THE HIGH COURT
JUDICIAL REVIEW

[2017 336 J.R.]

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

BETWEEN

CLAIRE O'BRIEN AND PATRICK O'BRIEN

APPLICANTS

AND
AN BORD PLEANALA

RESPONDENTS

AND
LEONARD DRAPER

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 27th day of June 2018

1. The applicants have requested a certificate for leave to appeal the decision in this case of the 18th December, 2017 to the Court of Appeal pursuant to s. 50A (7) of the Planning and Development Act, 2000 as amended. The section provides:

> *"(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."*

By virtue of s. 75 of the Court of Appeal Act, 2014 references to the Supreme Court in s. 50A (7) of the Act of 2000 are to be construed as a reference to the Court of Appeal.

2. In this case the court has been asked to certify that its decision involves one point of law which the applicants say is of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal. The point of law is:

> *"Does the requirement to carry out an environmental impact assessment include an obligation to examine, analyse and evaluate the substance of the information submitted by the public concerned."*

3. The parties are agreed that the law applicable to the grant of a certificate is as set out in the decision of McMenamin J. in *Glancre Teoranta v. Mayo County Council* [2006] IEHC 250. This provides:

> *"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. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).*
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> *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."*

4. Clarke J. distilled the ten principles down to four main principles in *Arklow Holidays Ltd v. An Bord Pleanala* [2006] IEHC 102 as follows:

> *"(a) The decision must involve a point of law of exceptional public importance.*
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> *(c) It must be desirable in the public interest that an appeal should be taken to the Supreme Court.*
>
> *(d) There must be uncertainty as to the law and*
>
> *(e) The importance of the point must be public in nature and, transcend the individual facts and parties of a given*

case."

5. The point of law must not only be of public importance, it must be of exceptional public importance. This point must be emphasised because, in planning terms, all points of law regarding the operation of the Planning and Development Act affect the public and therefore could be said to be of public importance. Separately, it must be in the public interest that an appeal should be brought. This should be assessed in the context of the clear legislative intention that planning cases should generally be confined to the High Court. The jurisdiction is to be exercised "sparingly" (*Glancre* and *Harding v. Cork County Council* [2006] IEHC 450). An applicant does not establish uncertainty in the law simply by raising a question as to the point of law. The fact that the position is arguable is therefore not sufficient to satisfy the requirement that there be uncertainty in the law. Finally, of course, the point of law concerned must arise out of the decision of the High Court.

The applicant's case for a certificate for leave to appeal
6. The applicants start from the requirements of Directive 85/337 and the requirement to conduct an Environmental Impact Assessment ("EIA") in appropriate cases. In the decision of case C-50/09 *Commission v. Ireland* [2011] I-00873 the CJEU held:

> *"37. In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.*
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> *38. That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.*
>
> *39 Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.*
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> *40 However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 Commission v United Kingdom [2006] ECR I 3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors."*

7. The applicants argue that the obligation to assess the information gathered includes an obligation to assess the information furnished by the public concerned. The assessment is not limited to the information provided by the applicant for planning permission. The applicants submit that the assessment means that all of the information must be subjected to examination analysis and evaluation by the competent environmental authority. The consideration of the information gathered is part of the EIA process and therefore attracts the requirement to examine analyse and evaluate all of the information.

8. The applicants accept that it is not necessary to deal with the detail of every point made in every individual submission and the Board is not required to record an evaluation of every argument made point by point. They say that the exercise of considering the information must be capable of review by a court and accordingly there must be a record of the evaluation of the substance of the information gathered by the Board. The applicants submit that the assessment could be carried out on an issue by issue basis once the competent environmental authority identified the relevant issues in the submissions of the public concerned.

9. The applicants submit that this arguable interpretation of *Commission v. Ireland* is the basis of the point of law they ask the court to certify. They say the judgment in this case concluded that there was no obligation on the Board in carrying out its EIA to examine, analyse and evaluate the information gathered from the public concerned or to record the Board's evaluation of that information. They submitted that the court "in effect held that the examination analysis and evaluation does not extend to environmental information submitted to the Board by the applicants, in particular, the Bowdler report". It is implicit in their submissions that the assessment of the Board was limited to the information furnished by the developer to the exclusion of information supplied by the public concerned and that the judgment indorsed this exclusion.

Relevant findings in the judgment
10. Following the analysis in *Commission v. Ireland* at para. 31 the judgment identifies two distinct obligations of the Board:

> (1) The obligation to assess the direct, indirect, secondary and cumulative effects of the proposed development on the environment in relation to certain factors specified in the Planning and Development Act, 2000 as amended (PDA), where an assessment involves an examination analysis and evaluation of the potential effects of the proposed development upon the environment, and
>
> (2) The Board is required to consider any submissions or observations validly made in relation to the environmental effects of the proposed development. Consideration of the submissions or observations is part of the process whereby the Board examines, analyses and evaluates the potential effects of the proposed development upon the environment.

11. I held that the applicants had not established that the Board did not consider their submission as required both by s. 172 (1G) (c) of the PDA and by Directive 85/337. (paras. 32 and 33). At paras. 44 and 45 I held as follows:

> *"44. The implications of the submissions of the applicants in this case are that the Inspector and the Board must examine, analyse and evaluate each of the submissions or observations validly made to the Board. This is not what is required by either the EIA Directive or the Act of 2000, which simply requires that the direct and indirect effects of a proposed development be so assessed, not the submissions or observations. The arguments advanced by the applicants leads to a result which would render the provision of s. 172(1J)(c) effectively otiose. Why would the Oireachtas stipulate that the planning authority or the Board had an obligation to consider the submissions and observations submitted by third parties before the planning authority or the Board informed the public of the main reasons and considerations for their decision, if they were already obliged to examine, analyse and evaluate the individual submissions and observations and make that assessment available to the public under the provisions of s. 172(1J)(b)?*

45. In my judgment it was not necessary for the Board (or the Inspector) to examine, analyse or evaluate the Bowdler Report or the points made in the report or the experience of the applicants (or their neighbours) in relation to noise in order to carry out a lawful EIA. It is sufficient that there is an examination, analysis and evaluation of the direct and indirect effects (including the noise implications) of the proposed development on the environment as set out in pages 22 to 23 of the Inspector's report."

12. I earlier noted that the Inspector referred to the noise modelling set out in the rEIS without specifically referring to the criticisms set out in Mr. Bowdler's report. The applicants said that this amounted to a failure to examine, analyse and evaluate all the evidence before the board. At paras. 39 I said:

"39. In this case Mr. Bowdler criticised the noise impact assessment included in the rEIS. He criticised the methodology adopted in the noise impact assessment and complained of a lack of salient information. Both the Inspector and the Board concluded that they had sufficient information to carry out an EIA of the Kilvinane wind farm. Not only is there no challenge to the adequacy of the information before the Board, the applicants' counsel expressly stated that there was no challenge to the adequacy of the information. It follows that the substance of the complaint (that there was no examination, analysis or evaluation of Mr. Bowdler's report) amounts to a complaint that there was no explanation why the Inspector and the Board concluded that there was sufficient information before them in order to carry out an EIA, notwithstanding Mr. Bowdler's complaints to the contrary."

Discussion

13. The error of law identified by the applicants in the judgment is the finding that it was not necessary to examine, analyse and evaluate the Bowdler report or the points made in the report or the experience of the applicants (or their neighbours) in relation to noise in order to carry out a lawful EIA, and the failure to record the examination, analysis and evaluation of the report.

14. Obviously, any appeal must arise from the judgment delivered. At the original hearing one of the issues was whether the Board had complied with its obligations to give its reasons for its decision and I concluded that this ground for judicial review failed. At para. 82 of the judgment I held:

"The first obligation is to consider any submission or observation validly made and the second requirement is to inform the public of the main reasons and considerations on which its decision is based or for the attachment of any conditions. There is no obligation to engage in a point by point refutation of the submissions and observations validly made."

The single point of law in respect of which the applicants seek a certificate from the court is not based upon the reasons for the decision or the recording of the reasons. Counsel expressly disavowed this and accepted that it would not be necessary to deal with the detail of every point made in every submission. However, in written submissions the applicants argued that it was necessary that there be a record of the evaluation results in order that an individual who is affected by the decision may have access to a review procedure which allows the decision to be properly reviewed by the court. It was said that if there is no record of the evaluation of the substance of the information gathered by the Board, this cannot be achieved.

15. This point is a separate point from that identified as the point of law upon which the applicants seek a certificate granting them leave to appeal. That being so, it is not a matter which I propose to consider in this judgment as it is not a ground of appeal upon which the applicants sought a certificate granting them leave to appeal.

16. It is clear from the judgment that the Inspector's report deals with all the submissions and observations validly made on an individual basis and on an issue by issue basis. The Bowdler report was accurately summarised and considered, but was not referred to in the section of the report where the Inspector discussed the issue of noise effects on the receiving environment. As a fact, the report was considered by the Inspector and the Board.

17. Counsel accepts that there is a distinction between the obligation to consider the information submitted by the public concerned and the obligation to assess the direct and indirect effects of the proposed development on the environment (the Article 3 obligation). He says the obligation includes an obligation to examine the substance of the information submitted by the public concerned.

18. In order to advance his proposed ground of appeal, the point must arise out of the judgment. The argument is based on an allegation that as a matter of fact there was an unlawful distinction in the assessment conducted by the Board of the information submitted by the applicants, on the one hand, and the developer on the other and a failure to examine the substance of the information gathered. The judgment does not hold that the Board is not required to assess the substance of the information submitted by the public concerned. Therefore, this point does not arise from the judgment. Nor does it suggest that the Board should- or may - make a distinction in its assessment of the information provided by the applicant for planning permission and that submitted by the public concerned. In the judgment, I found that the Inspector and the Board considered the information validly provided, as they were required, and then went on to outline how the Inspector and the Board assessed the direct and indirect noise impact of the development on the environment, the Article 3 obligation. It seems to me that there was no finding of fact that there was any distinction between the assessment of the information provided by the developer and the applicants by either the Inspector or the Board, but merely an inference by the applicants that this was so because there was no express reference to the submissions and criticisms of Mr Bowdler of the information provided by the developer. From this inference, it was then inferred that the court in effect endorsed a difference in treatment of information provided by the developer and the public concerned which was not authorised by law. But this was not so. Simply put, the point does not arise from the judgment as a matter of fact or of legal conclusion.

19. In debating the Article 3 assessment obligation, counsel for the applicants was asked to identify which information received from the public concerned he said required to be subjected to examination, analysis and evaluation, in circumstances where he accepted that the Board was not required to set out a point by point refutation of every point raised. He was unable to give a clear exposition of what was required, other than to rely upon the requirement that the substance of the information gathered be examined. He suggested that the submissions could be dealt with by issues raised rather than by individual submissions.

20. In response to this submission counsel for the Board said that, in effect, the argument of the applicants was that an EIA must contain a rebuttal of any submission that was not accepted and this was not what is required by EU law. She submitted that it was not necessary to subject the Bowdler report to an examination, analysis and evaluation in circumstances where, as a matter of fact, the report was accurately summarised and considered. She said that the argument involved conflating the two separate steps: consideration of the evidence and assessment of the impacts of the project on the environment, which involved an examination, analysis and evaluation of the information gathered.

21. In assessing an application for a certificate for leave to appeal the High Court judge must approach the application on the basis that he or she may have been wrong in their decision and may be overturned on appeal. But they also do so on the basis that the jurisdiction is to be applied sparingly and the point raised must be of exceptional public importance and, separately, that it must be in the public interest that there be an appeal and that the law on the point is uncertain.

22. The difficulty the applicants had in identifying the information which they said must be subjected to an examination, analysis and evaluation, while accepting that there is no obligation to deal with each point individually, underscores that this is very much a facts specific appeal. As a matter of fact, all of the information validly submitted was considered by the Inspector and the Board. It was not necessary to rebut each individual point. In *Commission v Ireland*, the CJEU said the obligation is to assess the direct and indirect effects of the project on the environment "*in an appropriate manner, in light of each individual case*" and this requires that the substance of the information be examined. This is not a prescriptive test but a qualitative one. It recognises that the assessment of the substance of the information is not to be equated to the assessment of individual submissions or observations. I conclude that the issue raised is not a point which transcends the individual facts and parties. It is not therefore a point of exceptional public importance.

23. Furthermore, no separate case was advanced with any force that an appeal was desirable in the public interest. This is significant, given the fact that this is a separate distinct statutory requirement an intending appellant must satisfy. I am not satisfied that the applicants have met this statutory requirement.

24. The appellants say that they have raised an arguable point that there is an alternative view of the law than that taken in the judgment of the 18th December, 2017. I accept that this is so, but, as was pointed out in *Dunnes Stores v. An Bord Pleanala* [2015] IEHC 387 by McGovern J.:

> *"Merely raising a question as a point of law does not point to its uncertainty. The decision of this court on the judicial review applies the legislative scheme in an unexceptional fashion and was stated to be clear and unambiguous…"*

The law in relation to the assessment obligations of a competent environmental authority is not uncertain. There are no conflicting decisions or ambiguous statutory provisions requiring clarification highlighted by the applicants, merely an argument they advanced at trial and which did not succeed.

25. In all the circumstances, for the reasons I have given and in view of the fact that the jurisdiction is to be exercised sparingly I refuse the applicants a certificate to appeal on the point of law identified in paragraph 2 above.