Neutral Citation Number [2006] IEHC 280

**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2005 No. 291 JR]**

**BETWEEN**

**ARKLOW HOLIDAYS LIMITED**

**APPLICANT**

**AND**
**AN BORD PLEANALA, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**
**WICKLOW COUNTY COUNCIL, ARKLOW TOWN COUNCIL,**
**SEABANK AND DISTRICT RESIDENTS ASSOCIATION,**
**ARKLOW ACTION GROUP,**
**WICKLOW PLANNING ALLIANCE, AN TASICE,**
**ARKLOW CARAVAN PARK RESIDENTS ASSOCIATION,**
**COASTWATCH EUROPE, P.J. HYNES AND BRENDAN HYNES**

**NOTICE PARTIES**

**Judgment of Mr. Justice Clarke delivered 8th September, 2006.**

**1. Introduction**

1.1 I have already delivered two judgments in these proceedings. On the 18th January, 2006, I gave judgment in an application for leave to apply for judicial review ("the leave judgment"). That application was required, by virtue of the provisions of s. 50 of the Planning and Development Act, 2000, ("the 2000 Act") to be on notice. The respondent and a number of the notice parties were heard. The background to the dispute between the parties is fully set out in that judgment and it is unnecessary to refer to it again. I propose describing the parties in this judgment in the same manner as they were described in the leave judgment. In that judgment I gave leave to seek judicial review in respect of some, but not all, of the grounds advanced on behalf of Arklow.

1.2 As a result of the refusal to give leave to seek judicial review in respect of some of the grounds advanced, Arklow sought a certificate to enable it to appeal from certain aspects of that refusal to the Supreme Court. Under s. 50(4)(f) of the 2000 Act, the determination of this court is final and no appeal lies from such decision except with the leave of this court. The section provides that such leave can only be granted where this court certifies that the 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.

1.3 Arklow sought a certificate of appeal in relation to three matters. As appears from the judgment delivered in respect of the certification application on the 29th March, 2006, ("the certification judgment") I came to the view that two of those matters did not raise a point of law of exceptional public importance.

1.4 In respect of the third issue (to which I will refer in more detail in the course of this judgment) I came to the view that it did, indeed, raise a point of law of exceptional public importance. However, at paragraph 5.3 of the certification judgment I went on to consider the question of whether it was, nonetheless, in the public interest to grant the certificate sought. For the reasons set out in that paragraph I came to the view that it was not in the public interest so to do.

1.5 In those circumstances Arklow has raised the question of whether it is permissible in principle, and if it be, whether it is appropriate in this case, to issue a certificate to enable an appeal to be brought in respect of the refusal to grant a certificate of appeal. Arklow's argument is confined to the ground in respect of which I had come to the view that a point of law of exceptional public importance was raised but that it was not in the public interest to grant the certificate.

1.6 That is the issue which I now have to decide.

There are, in substance, two separate questions. They are:-

1. Whether there is a jurisdiction to grant a certificate in respect of a point of law that arises not from a substantive leave or judicial review application itself but from the decision of the court on the application for a certificate; and

2. If there be such a jurisdiction whether it is appropriate to grant a certificate on the facts of this case.

In that context it is necessary to turn to the underlying issue in respect of which this application arises.

**2. The underlying issue**

2.1 In the leave judgment, I took the view that there were not substantial grounds sufficient to justify granting leave to seek judicial review in respect of an argument which concerned the delineation of the site of the proposed development on the maps attached to the relevant planning application. As pointed out at para. 5.1 of the leave judgment, it was contended at the leave application that the delineation (being confined to the site of the waste water treatment plant itself) was inaccurate and in breach of the relevant regulations by virtue of not including on the map as so delineated other aspects of the project. As I further pointed out in that paragraph I had taken the view that Arklow did not have standing to raise such an issue because Arklow had not, in any respect, been misled by the map and had fully participated in the hearing and addressed each of the issues which arose at the hearing, including those which related to those aspects of the project which were outside the site, as delineated. On that basis I took the view that Arklow did not having standing to raise the delineation point by virtue of the fact that they had not, in any respect, been misled by it and had, therefore, suffered no prejudice.

2.2 For the reasons set out at para. 5.2 of the certification judgment I came to the view that that issue raised a point of law of exceptional public importance. However, for the reasons set out at para. 5.3 of the same judgment I came to the view that it was not in the public interest to issue the certificate. It is unnecessary to set out those reasons in full again. In this application Arklow invites me to certify for appeal to the Supreme Court an issue as to the criteria by reference to which this court should exercise its role in the grant or refusal of a certificate.

2.3 In particular it is said that, having granted leave in respect of certain aspects of Arklow's challenge, it was inconsistent of the court to take into account any further delay that might be caused by allowing an appeal to the Supreme Court. Secondly, it is said

that the public interest, as referred to in s. 50 of the 2000 Act, cannot and should not encompass the merits of the project which is the subject matter of the proceedings.

2.4 Before going on to deal with the specific issues which arise in this application I think it is important to make some reference to the basis upon which I came to the view that it was not in the public interest to grant the certificate sought notwithstanding that a point of law of exceptional public importance arose.

2.5 It is part of Arklow's submission on this application that the "merits" of the project was a factor taken into account in the refusal. That was not the case. It has often been said that part of the purpose of the restrictions which recent planning legislation (including, and in particular, the 2000 Act) have introduced in respect of challenges to planning permissions, derives from a policy concern on the part of the Oireachtas that finality should be brought to planning matters in the shortest possible period consistent with allowing proper access to the court to challenge decisions of the statutory bodies involved in the planning process. There can be little doubt that a particular aspect of that concern, which has given rise to significant public concern in recent years, has been the significant delay which has occurred in respect of the implementation of major public infrastructural projects by virtue of court challenges. That is not, of course, to say that there is anything improper about such challenges and, indeed, it should be noted that some such challenges have indeed been successful thus establishing that there was a legal infirmity in the manner in which approval for the relevant project had, apparently, been given. Nonetheless it is of particular public importance that decisions as to the legal validity or otherwise of permissions granted in relation to major public infrastructural projects are determined one way or the other in the earliest possible time. If the permission is legally sound then the project should not be delayed in its implementation. If the permission is legally unsound then that fact should be determined as quickly as possible so that the authorities promoting the project can consider what, if any, alternative action is appropriate.

2.6 I would wish to make clear that it is not, in my view, any function of this court to form a view as to the merits or otherwise of such major public projects. That is the function of the authorities charged with promoting same and those who have a role in granting any necessary permissions required for the implementation of the project concerned. Indeed the merits of the project are, very frequently, the subject of the dispute with which the court will be concerned in any challenge. Parties may wish to argue before the relevant statutory bodies that the project is unnecessary. Alternatively, while accepting the necessity for major infrastructural improvement, parties may argue that there are different ways in which any perceived deficit may be met. Those are all issues for the relevant authorities and not for the court.

2.7 Nothing in the certification judgment should be taken as indicating a view as to the merits or otherwise of the project in dispute or that such merits were or could be a factor in the exercise of the court's discretion. However what the judgment does say is 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. In those circumstances, without taking any view as to the merits or otherwise of the project itself, I took into account the undoubted major public infrastructural nature of the project involved in this case and the importance of bringing finality to the questions concerning the validity of it, as a factor to be properly taken into account and weighed against, on the facts of this case, the position of Arklow which sought to rely on what I described as a technical argument and one in respect of which Arklow had suffered no prejudice.

2.8 It is therefore the fact that there is a particular public interest in the early resolution of questions which have the capacity to delay major public projects that was taken into account, not any view that the project as proposed was, necessarily, meritorious.

2.9 Having, for the avoidance of doubt, clarified what was involved in my considerations as set out in the certification judgment I now turn to the jurisdictional question.

**3. The jurisdictional issue**

3.1 This application raises a net, important, and difficult question. The relevant statutory provision is, as I noted, s. 50 of the 2000 Act. That section provides as follows at sub-s. (4)(f):-

> "(i) The determination of the High Court of an application for leave to apply for judicial review, or of an application for judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case, except with the leave of the High Court, which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.
>
> (ii) This paragraph shall not apply to a determination of the High Court, in so far as it involves a question as to the validity of any law, having regard to the provisions of the Constitution."

3.2 In an admirably concise argument counsel for Arklow suggests that the starting point of any consideration has to be to ask whether a decision by this court on an application for a certificate is or is not encompassed within the phrase "the determination of the High Court on an application for leave to apply for judicial review".

If it comes within that definition, it is argued, then the jurisdiction to certify clearly arises, as the decision on the certification application formed part of the application for leave and is, in principle, capable of being certified as involving a point of law of exceptional public importance where it is in the public interest that an appeal to the Supreme Court should be allowed.

3.3 In the alternative, it is said, if the decision on the certification application can not be said to be encompassed within "the determination of the High Court on an application for leave to apply for judicial review" then there is no express prohibition on an appeal being brought to the Supreme Court without any leave in relation to such a refusal.

3.4 In relation to the latter proposition it is necessary to have regard to the decision of the Supreme Court in *Irish Asphalt Limited v. An Bord Pleanala* [1996] 2 I.R. 179 where Barrington J. stated, at p. 185 as follows:-

> "Counsel for the applicant submitted that the High Court when it is dealing with an application for judicial review in a planning matter may be confronted by two different kinds of decision. The first is whether to grant or refuse the application. If, however, it refuses the application it will be confronted with the second decision to wit whether the application to review raises a point of exceptional public importance. But he submitted there is nothing in the provision which clearly excludes an appeal to the Supreme Court against the decision refusing to certify that the application raises a point of law of exceptional public importance. Therefore he submitted that Article 34, s. 4, sub-s. 3 of the Constitution mandates that an appeal should lie to the Supreme Court against the second decision. This appears to me to be an incorrect interpretation of the relevant provision. The correct interpretation appears to me to be that the first portion of

the provision under discussion is a statutory provision and does exclude all appeals from the High Court to the Supreme Court in questions of judicial review. This is achieved by the words:-

> 'The determination of the High Court of an application for leave to apply for judicial review as aforesaid or for an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case . . .'.

The sub-section, having accepted these cases from the appellate jurisdiction of the Supreme Court then goes on to create what counsel for the respondent called "an exception to the exception". As Counsel for the respondent puts it, it is the sub-section which excludes the appeals but at the same time there is a provision whereby the High Court may, as an exception to this exception, allow an appeal if the case involves a point of law of exceptional public importance and it is in the public interest that an appeal should be taken to the Supreme Court.

Moreover it is quite clear to me from a reading of the sub-section that the High Court alone may issue the certificate that the case involves a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken to the Supreme Court."

Later in the course of the same judgment Barrington J. went on to express the following view:-

> "Finally, it appears to me that the interpretation of the sub-section of the Act of 1992 given above accords best with what appears to have been the policy of the Act of 1992. Clearly the purpose of this Act was to speed up the planning process by shortening litigation and by eliminating applications for judicial review which were devoid of substance."

3.5 In support of this latter proposition reliance was placed on the judgment of Finlay C.J. in *K.S.K. Enterprises Limited v. An Bord Pleanala* [1994] 2 I.R. 128 (at p. 135).

*Irish Asphalt* was endorsed by the Supreme Court *in Irish Hardware Association v. South Dublin County Council* [2001] 2 I.L.R.M. 219.

3.6 It is clear, therefore, that the proper interpretation of this section is that it, in principle, precludes any appeal to the Supreme Court in respect of planning judicial review matters. That exclusion is subject to the limited exception which derives from the certification process. However, it is clear from those determinations of the Supreme Court that the decision as to whether to grant a certificate is a matter for the High Court and for the High Court alone. I am therefore satisfied that it is not open to the High Court to certify a question as to whether there should have been a certificate in the first place as a matter for appeal to the Supreme Court. Irish Asphalt is direct authority for the proposition that the section cannot be interpreted as allowing an appeal from a refusal to certify. However it does not follow that the decision to refuse to certify can itself be the subject of a certificate.

3.7 It is clear that amongst the matters taken into account by Barrington J. in *Irish Asphalt* was the policy of the Act. While the court was then dealing with the 1992 Act, the same provision is to be found in the 2000 Act with which I am concerned. The necessity, in the case of any ambiguity, to have regard, in the resolution of such an ambiguity, to the policy of the Act is now even stronger by virtue of s.5 of the Interpretation Act, 2005. To permit an appeal of the type sought would create the possibility of a huge multiplicity of hearings which would defeat the purpose of expedition which, it has been clearly held on many occasions, formed the policy behind the relevant provisions.

3.8 A party who is refused leave (or refused judicial review at a substantive hearing) might then seek a certificate. This court might refuse the certificate. If it were possible to obtain a certificate to appeal against the refusal, there would need to be a further hearing in this court in respect of that application. If that application were to be successful it would then be followed by the hearing of the appeal which would, in those circumstances, be confined to the question of whether the certificate had been wrongly refused. If that appeal, in turn, were successful then a certificate would have to be granted followed by the substantive appeal. It hardly needs to be emphasised that such a process would have the capability of introducing extreme delay rather than expedition into the determination of challenges to planning permission. Such an interpretation would clearly run contrary to the policy of the relevant provisions which has been identified in the authorities to which I have referred. Such an interpretation should, therefore, only be placed upon the legislation in circumstances where the clear wording necessitated such a view being taken.

3.9 It is clear from the authorities to which I have referred that, even as a matter of statutory construction, a different view on an analogous question was taken by the Supreme Court of the interpretation of the relevant statutory provisions. In those circumstances, at a minimum, the wording of the statute does not clearly require such a construction and for the reasons which I have indicated it does not seem to me to be appropriate to give the section such a construction unless it were clearly required.

**4. Conclusion**

For those reasons I am not satisfied that this court has any jurisdiction to grant a certificate in respect of a point of law that arises on a certification hearing. The final jurisdiction to decide to grant a certificate is vested, under the Act, and in accordance with authority, in this court. Where such a certificate is refused that is, in my view, the end of the matter. In those circumstances it is unnecessary to go on to consider whether it would, should such a jurisdiction have existed, have been appropriate, on the facts of this case, to grant the certificate sought.