THE HIGH COURT

[2015 No. 454 JR]

BETWEEN

CLEARY COMPOST AND SHREDDING LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

(NO. 2)

JUDGMENT of Ms. Justice Baker delivered on the 13th day of June, 2018

1. This judgment is given in the application by the applicant pursuant to s. 50A(7) of the Planning and Development Act 2000 (as amended) ("the PDA"), for a certificate for leave to appeal my decision delivered on 10 July 2017, *Cleary Compost and Shredding Ltd. v. An Bord Pleanála* [2017] IEHC 458 ("the substantive judgment"). The statutory test is set out in s. 50A(7) of the PDA and requires the applicant for leave to demonstrate that the court's 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.

2. Section 50A(7) provides as follows:

> "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."

3. The leading judgment is that of MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 where he set out the ten principles applicable in the consideration of the issues 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.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
>
> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
>
> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).
>
> 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
>
> 6. The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).
>
> 7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.
>
> 8. Normal statutory rules of construction apply which mean inter alia that 'exceptional' must be given its normal meaning.
>
> 9. 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.
>
> 10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

4. It is clear, as noted by Hedigan J. in *Shillelagh Quarries Ltd. v. An Bord Pleanála* [2013] IEHC 92 at para. 6.2, that the tests are cumulative.

5. In *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 IR 112, Clarke J. further clarified the principles, which I would summarise as follows:

> 1. there must be an uncertainty as to the law in respect of a point which has to be of exceptional importance;
>
> 2. the importance of the point must be public in nature and transcend the individual facts and the parties;
>
> 3. the court must be satisfied as a "separate and independent requirement" that it is "desirable in the public interest that an appeal should be taken", so that even if law in a particular area is uncertain, the court may not always consider it appropriate to grant leave to appeal.

6. As Barrett J. said in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 263, at para. 57:

"'a point of law of exceptional public importance', is a point of law that is of unusual or untypical importance. That is a very high

hurdle to cross: the point of law must not just be important, but of unusual or untypical importance."

7. He took the view that, having regard to the high threshold, most applications for a certificate to appeal will fail, and this echoes the observation of MacMenamin J. in *Glancré*, that the "jurisdiction to certify such a case must be exercised sparingly".

8. Thus, it would appear that the legislative intent is that the High Court decision be final, save in exceptional cases and where the public interest is served by an appeal.

The substantive judgment
9. The substantive judgment was an application for judicial review of the decision of An Bord Pleanála ("An Bord") in an appeal by the applicant of a decision of Kildare County Council of 23 December 2014 to refuse permission to extend or expand waste activity on a site at Larchill, Monasterevin, Co. Kildare. On 8 June 2015, An Bord had dismissed the appeal in the exercise of its statutory jurisdiction under s. 138(1)(b)(i) of the PDA for the stated reasons that the existing waste facility did not have the benefit of planning permission and did not or could not benefit from any of the exemptions in the PDA, as it required an Environmental Impact Assessment ("EIA") and an Appropriate Assessment ("AA").

10. The application for judicial review was brought in regard to the correctness of the approach of An Bord to the appeal and the reasons therefor.

The first point of law
11. The substantive judgment involved a number of legal principles and in particular the interaction between three declarations made under s. 5 of the PDA by the planning authority, and three declarations by An Bord, and what hierarchical preference, if any, should be given to the older declarations.

12. The conclusion in the substantive judgment regarding that argument is contained primarily at paras. 46 and 47:

> "46. An Bord Pleanála therefore had considered the activity and works on a number of occasions, and gave three determinations under s. 5 of the PDA, a decision with regard to the exemption under s. 172(3), and had refused the application for retention permission on appeal on 31st December, 2014. Therefore, in the period between 2012 and the end of 2014 the Board engaged a number of extensive analyses of the facility, and issued five determinations or decisions which remain unchallenged, and are now not capable of being challenged. Each of these, and taken together, amount to the conclusion that the activity and works on site are development which do not have the benefit of planning permission, and are not exempt.
>
> 47. In each case the applicant had engaged fully with the evidence and made substantial submissions and replying submissions. In each the relevant planning history and the s. 5 declarations made by Kildare County Council were actively engaged."

13. What is relevant for the purpose of the present application, is the manner of the engagement by An Bord with the prior planning history and the s. 5 declarations, and the fact that the factual circumstances of the activity on the site had changed between 2012 and the end of 2014. The determination in the substantive judgment was that An Bord had "actively engaged" with the relevant planning history, or to put it another way, had fully considered the evidence before coming to a decision to reject the appeal in pursuance of its statutory power under s. 138 of the PDA.

14. At para. 79 of the substantive judgment, the argument of the applicant regarding a perceived conflict between the various declarations made under s. 5 was held to have failed as An Bord expressly determined on the evidence that the activity had changed in nature and extent:

> "78. The s. 5 declarations made by Kildare County Council and the later ones made by An Bord Pleanála in each case are now not capable of being challenged. Insofar as a conflict arises, the applicant argues that the Board was not competent to make a determination which favored one decision over another.
>
> 79. That analysis fails to have regard to the fact that An Bord Pleanála expressly determined the applications before it in the light of the evidence before it that the nature and extent of the activity had changed."

15. Therefore, while theoretically a question of exceptional public importance might arise in another case regarding how a planning authority or An Bord is to treat a series of declarations under s. 5 of the PDA, the determination in the present case does not raise that abstract general or exceptional point of law, as the decision of An Bord was determined in light of the facts, and because it had evidence of a change in the nature of the activity over the course of the relevant years.

16. Thus, insofar as it is argued that the question regarding the correct treatment of a series of declarations under s. 5 of the PDA might raise a point of law of exceptional public importance, I consider that it did not do so in the present case and that the determination in the substantive action was so rooted in the facts of the case and the manner by which An Bord treated the evidence before it, that the point does not arise from the judgment. Having regard to the conclusion that I took regarding the correctness of the approach by An Bord to the facts before it, that question would be hypothetical.

17. The point is one that would fail the fifth principles identified by MacMenamin J. in *Glancré*.

The second point of law
18. The other point argued to be of exceptional public importance is said to arise from para. 117 of the substantive judgment, under the part headed "Statutory character of s.5 as part of history: s. 5(5)":

> "Further, the decision under challenge in the present case is not a declaration made under s. 5 but rather a substantive planning appeal, and there is no jurisdictional limit on the power of the Board to make a determination in that context that works or activity are unauthorised. The planning history is part of the nexus of fact that could lead to that conclusion. The s. 5 declarations are evidence of a finding by the Board and by Kildare County Council regarding the planning status of the works and activity, and there being no argument or evidence of pre-1964 use which might have precluded such a consideration or determination, and there being separately a finding that an exemption did not exist, the Board was entitled to conclude that the activity was unauthorised in planning terms. No other possible means by which it could be authorised was argued before the Board in any of the applications before it or in the appeal now under challenge."

19. The point of law of exceptional public importance concerns the "slender line" referred to by Hogan J. giving the judgment of the Court of Appeal in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 2017, [2016] 1 IR 541, at para. 21, where he noted the difficulty in distinguishing between a power to determine that a development is not exempted development and the power to determine that a development is unauthorised.

20. It is likely that further jurisprudence may evolve regarding that "slender line" and in that regard, I note the argument of the applicant that certain questions may arise as to the power of An Bord to make a determination which either by implication or expressly, amounts to a decision that a development is unauthorised and in particular how the demands of natural or constitutional justice might require to be observed.

21. However, counsel for the applicant argues that the proposition stated at para. 117 of the substantive judgment is, as he puts it, "a departure from existing authorities and that the matter of jurisdiction is one which is to be resolved in the public interest."

22. Were the first sentence of para. 117 to be taken in isolation, the argument of the applicant that that might be a novel point of law of exceptional pubic importance might be attractive, but that sentence is to be read in the context of the part of the judgment commencing with para. 114 and ending with para. 118, where I identified the basis on which An Bord came to the determination to dismiss the appeal.

23. An Bord had determined that it was "inappropriate" for it to give any further consideration to the grant of planning permission for two stated reasons: that the existing facility did not have the benefit of planning permission, or the benefit of any exemptions from planning, and that the facility required an EIA and an AA. It then stated that it would not give any further consideration to the application "unless and until its planning status is regularised".

24. I would make a number of observations as regards the argument of the applicant.

25. The language of s. 34(12) of the PDA, which formed part of the basis of the decision of An Bord, expressly permits a planning authority to refuse to consider an application to retain an "unauthorised development of land" if an EIA or an AA is required. The clear terms of that section do not mean that An Bord or a planning authority may not engage the provisions of s. 34(12) unless a court has first determined that the development is "unauthorised".

26. Second, in *Westwood Club Limited v. An Bord Pleanála* [2010] IEHC 16, Hedigan J. upheld the decision of An Bord that retention be refused as it "would facilitate the consolidation and intensification of this unauthorised use", yet there had been no finding of a court that the use was "unauthorised".

27. A similar approach is found in *Frank Harington Ltd. v. An Bord Pleanála* [2010] IEHC 428, where Hedigan J. agreed with An Bord that it would be inappropriate to grant retention permission as to do so would facilitate the continuation of an "unauthorised development" on the site, and the decision of An Bord was upheld.

28. No prior judicial determination had been made in either of these cases and the court nonetheless came to a conclusion that the decision taken by An Bord was one it was entitled to take.

29. On a reading of the first sentence in para. 117 of the substantive judgment in its full context, the question considered was whether An Bord was entitled in the light of the evidence before it to come to a determination that the activity was "unauthorised", because as I stated in the substantive judgment, "[n]o other possible means by which it could be authorised was argued before the Board in any of the applications before it or in the appeal now under challenge".

30. The grounds on which judicial review was sought are summarised in para. 9 of the substantive judgment, *i.e.* that the decision was unreasonable or irrational, not supported by the evidence, and was made "unilaterally" and without giving the applicant an opportunity to be heard. On the facts, the judicial review was refused on my finding that An Bord had ample evidence before it on which it could come to the decision, and that it had not erred in the process engaged.

31. No public interest would be achieved in asking the appellate court to further review the decision of An Bord in the light of the clear conclusions which were specific to and rooted in the actual evidence before An Bord. In other words, the substance of the challenge and the reasons for the dismissal were clear and obvious, are specific to the appeal, and are not of general or public application.

32. The use of the term "unauthorised" may be one that still gives rise to difficulty in the understanding of the respective jurisdictions of An Bord Pleanála, a planning authority, and the court. The first sentence of para. 117 of the substantive judgment may in that context be found to have expressed a proposition which is not correct, or which failed to have regard to the statutory limitations. However, I consider that an appeal of the substantive decision is not likely to give any further clarity to that question having regard to the clear and obvious reasons that An Bord gave for dismissing the appeal, and because An Bord was exercising a statutory jurisdiction under s.34(12) in respect to which no uncertainty exists. An Bord did not on the facts of the present case rely on any untrammelled jurisdiction and its decision was made in reliance on the planning history and the statutory powers under s.34(12).

Conclusion

33. For these reasons I refuse to grant the certificate sought.