THE HIGH COURT

[2021] IEHC 258

[Record No. 2013/941 JR]

BETWEEN

LISCANNOR STONE LIMITED

APPLICANT

AND

CLARE COUNTY COUNCIL, AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 14th day of April, 2021.

Introduction

1. This judgment is dealing with an application on behalf of the applicant for leave to appeal to the Court of Appeal pursuant to s.50A(7) of the Planning and Development Act 2000 (as amended) (the PDA) following a judgment delivered on 4 December 2020.

2. Section 50A(7) aforesaid provides:

> "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. Section 75 of the Court of Appeal Act 2014 provides that references to the Supreme Court are to be construed as references to the Court of Appeal unless the context otherwise requires.

Applicable principles

4. The principles guiding the test to be applied to the within application have been set out and subsequently followed extensively by McMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 as follows:

> "(1) The requirement goes substantially further than 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) [Not relevant as it deals with leave].
>
> (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."

5. Clarke J. in *Arklow Holidays Limited v. An Bord Pleanála* [2008] IEHC 2 clarified as follows:

(1) There must be 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.

(3) The requirement that the court be satisfied 'that it is desirable in the public interest that an appeal should be taken…' is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance.

(4) The court must assess the grant or refusal of a certificate on the basis that the court may have been wrong unless the law is so clear that there would be no legitimate basis for an appeal (see paras. 3.1 and 4.5).

(6) The strength or weakness of the argument is not relevant (see paras. 4.3).

6. The above principles are not in dispute between the parties.

Proposed questions

7. In the application for leave to appeal nine questions are raised comprising three groups of three questions. The first three questions are as follows:

(1) Is an EIA required in respect of a development that is being carried out under a pre-1964 established user?

(2) In this regard, is there a difference in law between a development that is operating under a pre-EIA pre-1964 user and a development that is operating under a pre-EIA planning permission?

(3) In the context of the determination pursuant to s.261A, was it incumbent on An Bord Pleanála to make a determination as to whether or not the site had a *bona fide* pre-1964 user?

8. In *Ashbourne Holdings Limited v. An Bord Pleanála (No. 3)* [2001] IEHC 98 Kearns J. confirmed that there is no place for a moot in an application for leave to appeal.

9. Such an approach was also taken by Simons J. in Heat*her Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820, where at para. 55 the Court was satisfied that the second limb of the statutory test would not be met in circumstances where *inter alia*, a successful appeal on one of the points of law in the subject matter of leave to appeal would not affect the outcome of the judicial review proceedings.

10. McDonald J. in his judgment in *O'Neill v. An Bord Pleanála* [2021] IEHC 58, at para. 30 confirmed that a question of law raised should be one which is actually determinative of the proceedings.

11. In respect of question number one, at para. 46 of the judgment I indicated:

` "By reason of the foregoing there is insufficient documentation before the Court to suggest that the within quarry is within its pre-1964 envelope."

12. In the circumstances therefore, I am satisfied that the first question is based on a factual set of circumstances which do not exist in the instant matter, and therefore it is not an appropriate question to certify for appeal.

13. In respect of the second question, this question was answered in the judgment, having considered prior jurisprudence where no contradictory jurisprudence was identified. There is therefore no uncertainty in the law. The applicant argues that the uncertainty is by reason of an asserted contrary view, at least on occasion, by An Bord Pleanála. However, I am satisfied that the uncertainty in the law identified in the various jurisprudence relates to uncertainty in court jurisprudence, as opposed to uncertainty as between An Bord Pleanála and the courts. Therefore, the possibility of a difference in view as between An Bord Pleanála (on occasion), and the body of jurisprudence within the High Court, does not give rise to a satisfaction of the test in identifying uncertainty.

14. Insofar as query number three is concerned, it simply does not arise on foot of the judgment.

15. The applicant argued that in some manner the rules governing a certificate for leave to appeal might be relaxed somewhat in the instant matter, given that it is asserted that the judgment is wrong, and because of the manner in which the judgment was arrived at. The applicant argues that the judgment amounted to "judgment by ambush". It is

asserted that there was a finding in the judgment to the effect that the applicant was not entitled to maintain judicial review proceedings as against the An Bord Pleanála decision because (as the applicant's argument goes), there was a finding in the judgment that the applicant's quarry was unauthorised without raising this point before the parties, or affording the applicant an opportunity address the point. The applicant therefore contends that the judgment was arrived at in breach of fair procedures.

16. In the events, there was no finding within the judgment that the quarry was unauthorised. Insofar as there was a finding at para. 46 that there was insufficient documentation before the Court to suggest that the quarry was within its pre-1964 envelope, this finding was arrived at in a consideration of the possibility of a reference to the CJEU, and following para. 43 of the judgment to the effect that it was not appropriate for this Court under the heading of judicial comity to find otherwise than in accordance with prior jurisprudence, which said finding was arrived at following a consideration of the applicant's argument against the decision of An Bord Pleanála. Accordingly, there is no question of a refusal of this Court to hear and determine the issues raised by the applicant against An Bord Pleanála based on the applicant's asserted finding that the applicant did not have *locus standi*. The words *locus standi* do not appear in the judgment.

17. The second set of questions for which certification is sought is as follows:

    (4) Is it necessary in the context of a judicial review of a decision by An Bord Pleanála under s.261A (wherein the Board decided not to consider whether or not a development was or was not pre-1964) for an applicant to establish that the development was pre-1964 in order to have *locus standi* to challenge the decision?

    (5) In circumstances where the lack of *locus standi* on this point is not pleaded by the respondent, and the matter is not raised in submissions before the Court, (having regard to *inter alia* to Article 11 of the EIA Directive and the requirements for fairness) can the Court hold against such an applicant?

    (6) Can a Court identify an uncertainty in terms of EU law, worthy of a reference to the CJEU but decline to make such a reference in the manner that it did herein?

18. In respect of queries four and five, no *locus standi* issue was raised in the judgment.

19. In so far as query number six is concerned, Article 267 of the Treaty on the Functioning of the European Union provides that where a question is raised before any court or tribunal of a Member State, that court or tribunal may if it considers that the decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Furthermore, if the question is raised before a court or tribunal where there is no official remedy under national law, that court or tribunal shall bring the matter before the Court.

20. The applicant relies on *CILFIT*, Case C-283/81 and the subsequent *Ferreira da Silva e Brito and Others,* Case C-160/14 to the effect that it is incumbent upon this Court to refer a question to the CJEU. The applicant highlights para. 16 of *CILFIT* to the effect that, only if the correct application of community law is acte clair the national court or tribunal might refrain from submitting the question to the CJEU.

21. An Bord Pleanála refers to para. 6 of the same judgment quoting from Article 177 (now Article 267) where it is only before a court where there is no judicial remedy under national law that an obligation to pose a question of the CJEU arises, otherwise there is a discretion available to the Court. Several CJEU cases support the proposition that a reference for a preliminary ruling is not to enable advisory opinions on general or hypothetical questions, but rather that the question is necessary for the effective resolution of a dispute. (See for example *Gourmet Classic*, Case C-458/06 at para. 26).

22. In *Sony Music Entertainment Ireland Limited v. UPC Communications Ireland Limited* [2016] IECA 231 at para. 99 it is recognised that the Court of Appeal is not a court of last resort with an obligation to refer a question under the TFEU and relied upon CJEU jurisprudence in this regard – Case C-99/00 *Lyckeskog* [2002].

23. In the events therefore, there is no uncertainty on the law, namely, a reference to the CJEU on a point of law from the High Court is not mandated, and in any event, the query would be more of an advisory opinion as opposed to necessary to determine the proceedings.

24. The third set of questions is as follows:

    (7) In a judicial review of a decision of an appeal or review body, can a court refuse *certiorari* on the basis that if such an order was made it would result in the resurrection of the original order under review or appeal?

    (8) In circumstances where a decision of an authority has been reviewed or appealed to an appellant or review body, is it necessary for the applicant to separately challenge the substantive or procedural legality of the decision under appeal on its own merits?

    (9) If a legal infirmity is identified in the decision of the appellate or review body, does the order of the authority under appeal revive if the decision of the appellate body is quashed?

25. At para. 66 of the judgment I concluded that the decision of An Bord Pleanála was rational and reasoned, and arrived at within jurisdiction. At para. 67 I indicated that if I was incorrect in that regard as the Council's decision was valid there would be no benefit to the applicant by quashing the ABP decision.

26. In the circumstances there was no refusal to grant *certiorari* on the basis of a resurrection of the original County Council decision. Rather An Bord Pleanála's decision was considered

valid. Thereafter I did consider the position if I was wrong in relation to the validity of as An Bord Pleanála's decision.

27. In the circumstances, assuming I was wrong in relation to para. 67 of the judgment, nevertheless, para. 66 would stand to the effect that the securing of an alternate answer to question number seven would not alter the outcome of the matter.

28. Neither queries eight or nine arise on foot of the judgment herein as An Bord Pleanála's decision wasn't quashed and indeed the decision was upheld.

Conclusion

29. For the reasons set out above, the application for leave to appeal the decision of 4 December 2020, pursuant to s.50A(7) of the PDA is refused.