THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 487

RECORD NO. 2013/966 J.R.

DONAL MCMONAGAIL AGUS A MHIC TEORANTA TRADING AS MCMONAGLE STONE

APPLICANT

-AND-

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

RESPONDENTS

THE HIGH COURT

JUDICIAL REVIEW

RECORD NO. 2020/497 J.R.

IN THE MATTER OF SECTION 50 OF THE PLANNING & DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

DONAL MCMONAGAIL AGUS A MHIC TEORANTA TRADING AS MCMONAGLE STONE

APPLICANT

-AND-

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr Justice Cian Ferriter delivered this 31st day of July 2023

(Application for leave to appeal pursuant to s.50A(7) of the 2000 Act)

Introduction

1. This is my decision on the applicant's application for leave to appeal from my judgment of 28 April 2023 ([2023] IEHC 223) (the "judgment") in relation to two sets of judicial review proceedings commenced by the applicant in respect of its quarry at Largybrack, Co. Donegal.

2. The first set of proceedings ("the 2013 proceedings") concerned a challenge by the applicant to a decision of Donegal County Council (the "Council"), in 2012 under s.261A of the Planning and Development Act 2000 as amended (the "2000 Act") that the quarry required a mandatory Environmental Impact Statement ("EIS") and an Appropriate Assessment ("AA"). This decision was upheld by An Bord Pleanála (the "Board") by decision of 25 October 2013 and the 2013 proceedings challenged that decision also. Following the Board's decision, the Council subsequently served an enforcement notice on the applicant.

3. On 10 October 2018, the applicant made an application seeking leave to apply for substitute consent in respect of the quarry. This was an application made directly to the Board pursuant to s.177C of the 2000 Act. Leave to apply for substitute consent to regularise the development was sought under the "exceptional circumstances" criteria set out in s.177D of the 2000 Act. On 16 April 2020, the Board gave its decision refusing leave to apply for substitute consent under s.177D. The second set of proceedings ("the 2020 proceedings") concerned a challenge to the Board's substitute consent decision.

4. I gave a single judgment on both sets of proceedings. The judgment upheld the Board's decision and the enforcement notices the subject of the 2013 proceedings and the decision of the Board to refuse the applicant leave to apply for substitute consent which was the subject of the 2020 proceedings.

5. Following the dismissal of the applicant's challenges in both cases it now seeks a certificate of leave to appeal from the High Court pursuant to section 50A(7) of the

2000 Act on the basis that the Judgment involves points of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

Proposed points of law of exceptional public importance

6. The applicant says the following points of law arise from the judgment and meet the statutory criteria for certification of leave to appeal:

The 2013 Proceedings

1. *Having regard to the consequences that flow from the determinations made pursuant to section 261A of the PDA 2000, what obligation is there on An Bord Pleanála to seek information from the owner or operator of a quarry?*

2. *In circumstances where the Board in making a determination under section 261A is considering material not submitted by the owner/operator, what is the obligation on the Board to seek information on such material from such owner/operator?*

3. *In circumstances where an owner/operator does not anticipate that the Board may have regard to information other than that furnished by such owner/operator (whether culpably or not), are the consequences under the section (service of enforcement notice, closure of business) a proportionate consequence?*

4. *Given the severity of the consequences of the determination of An Bord Pleanála, and the lack of appeal therefrom, is it sufficient for the Court to be satisfied simply that the decision of the Board was reasonable and/or there was material before it that supported its determination?*

The 2020 Proceedings

5. *What are the consequences for lands the subject of a refusal of an application*

for leave to seek substitute consent on the basis of a lack of exceptional circumstances?

6. *Is there another application that can be made, if so what does this comprise? If not, are the lands permanently sterilised? Does this affect the standard of fair procedures and decision making by the Board or the Court in reviewing same?*

7. *Having regard to the consequences that flow from a refusal of an application for leave to seek substitute consent made pursuant to section 177C/D of the PDA 2000, what obligation is there on An Bord Pleanála to seek information from the owner or operator of a quarry?*

8. *In circumstances where the Board in making a determination on an application under section 177C/D is considering material not furnished by the owner/operator, what is the obligation on the Board to seek information on such material from such owner/operator?*

9. *In circumstances where an owner/operator does not anticipate that the Board may have regard to information other than that submitted by such owner/operator (whether culpably or not), are the consequences under the section (closure of business/sterilisation of lands) a proportionate consequence?*

10. *Given the severity of the consequences of the determination of An Bord Pleanála, and the lack of appeal therefrom, is it sufficient for the Court to be satisfied simply that the decision of the Board was reasonable and/or there was material before it that supported its determination?*

Applicable legal principles

7. Section 50A(7) of the 2000 Act provides as follows:

"(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 [Court of Appeal] *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* [Court of Appeal].*"*

8. Section 50A(7) originally referred to the Supreme Court rather than the Court of Appeal. The reference to the Supreme Court was replaced by the reference to the Court of Appeal by section 75 of the Court of Appeal Act 2014.

9. In *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231 at para 32 (*"CHASE"*), Barniville J. (as he then was) set out the principles applicable to an application for a certificate under section 50A(7), analysing much of the earlier case-law including the seminal case of *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250:

   "32. While not intended to be exhaustive of the legal principles applicable to applications for leave to appeal in planning cases, the following appear to me to be the most potentially relevant for the purposes of this application:

   (1) The clear intention of the Oireachtas in enacting s.50A(7) (and its statutory predecessors) was that, in most cases, the decision of the High Court on an application for leave to seek judicial review in respect of a planning decision, or on an application for judicial review of such a decision, should be final and should not be the subject of an appeal.

   (2) In order for a party to appeal from the High Court to the Court of Appeal, the intended appellant must obtain leave of the High Court under s.50A(7) and must satisfy the requirements of that section.

   (3) S.50A(7) requires an intended appellant, in order to obtain leave to appeal, to persuade the Court that (a) its decision involves a point of law of exceptional public importance and (b) it is desirable in the public interest that an appeal should be taken to the Court of Appeal. While there may be some overlap

between the factors relevant to these two requirements, they are cumulative requirements and require separate consideration.

(4) *The jurisdiction of the Court to grant leave to appeal under s.50A(7) must be exercised sparingly.*

(5) *When asked to grant leave to appeal under s.50A(7) and to certify a point or points of law under that section, the Court must have regard to the effect of the 33rd Amendment to the Constitution and the enactment of the Court of Appeal Act 2014 and, in particular, the new "constitutional architecture" created under those provisions. While an appeal from a decision of the High Court in a planning case might potentially be brought directly to the Supreme Court, the High Court, in considering whether to grant a certificate giving leave to appeal, must have regard to the fact that an appeal to the Court of Appeal remains the more normal route for such appeals.*

(6) *It is not sufficient for an intended appellant to merely show that the decision of the High Court involves a point of law. The point of law must be one of exceptional public importance. This is a clear and significant additional requirement which must be satisfied in respect of the proposed point of law.*

(7) *The point of law proposed by the intended appellant must arise out of the decision of the High Court itself and not from the discussion, argumentation or consideration of the point during the course of the hearing. A point the court did not decide in its judgment could not amount to a point of law of exceptional public importance.*

(8) *In most circumstances, in order to establish that the point of law is one of exceptional public importance, the intended appellant must demonstrate that there is some uncertainty or lack of clarity in the law or that the law in the area is still evolving.*

(9) *Merely raising an argument on a proposed point of law which the Court has rejected does not mean that the law is uncertain. The uncertainty must arise*

over and above the mere fact that an argument can be made on the point. An example given in the cases is where there is uncertainty in the daily operation of the law in question which is required to be clarified.

(10) The fact that the point of law raises a novel issue does not necessarily mean that the law is uncertain or evolving. It is not, however, necessary to point to other decisions which conflict with the decision of the High Court on the point from which it is sought to appeal. However, where the point is a novel one and the law is in a state of evolution, it is likely that the Court will find that the point of law raised is one of exceptional public importance.

(11) In considering an application for leave to appeal under s.50A(7), the Court should not concern itself with the merits of the parties' arguments on the point or with the intended appellant's prospects of success on any appeal. The Court should take the intended appellant's case on the point at its height and should recognise the fact that the Court may be wrong in its decision on the point. Equally, the intended appellant must not use the application for leave to appeal as an opportunity merely to reargue the merits of the case which the Court has already decided against in its substantive decision. However, it may sometimes be difficult to avoid doing so (or at least giving the impression of doing so) in order to persuade the Court that the law is uncertain or evolving in the area and that the point raised is a point of law of exceptional public importance.

(12) The relevant point of law must transcend well beyond the individual facts of the case and the parties in the case since most points of law are of some importance.

(13) The point of law must be one which is actually determinative of the proceedings and not one which, if answered differently, would leave the result of the case unchanged.

(14) The question raising the point of law must be formulated with precision and in a manner which indicates how it is determinative of the proceedings. The

question should not invite a "discursive, roving, write- an-essay" type response (per Humphreys J. in Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 636 at para. 6(i)).

(15) Where a party has lost in the High Court on the particular point (or points) on the basis of the application of clear and well established principles to the facts of the case, it will be much more difficult for that party to satisfy the requirement that the point of law is one of exceptional public importance and that it is desirable in the public interest that there be an appeal on the point. As is clear from cases such as Halpin and Rushe, valuable guidance can be obtained from the approach adopted by the Supreme Court in determining applications for leave to appeal where one of the requirements is that the decision must involve a matter of "general public importance". As explained in the determinations of the Supreme Court in cases such as BS v. Director of Public Prosecutions [2017] IESC DET 134 ("BS"), Quinn Insurance Limited v. Price Waterhouse Coopers [2017] IESC 73, [2017] 3 IR 812 ("Quinn Insurance") and Fitzpatrick v. An Bord Pleanála [2018] IESCDET 61 ("Fitzpatrick"), the closer you come on the spectrum to the application of well-established legal principles to the facts of an individual case, the further you get away from there being a point of law of exceptional public importance. While the Court cannot rule out the possibility that the application of well-established principles to the particular facts of the case may potentially give rise to a point of law of exceptional public importance, that is only likely to be A(&) the case in exceptional circumstances and is not in any sense the normal or usual position. Generally, where a Court applies well established legal principles to the particular facts of the case before it, it will be very difficult for an intended appellant to satisfy the cumulative statutory requirements in s.50A(7). Conversely, the failure by the Court to apply well-established legal principles to the particular facts of the case may well give rise to a point of law of exceptional public importance, subject to complying with the other principles referred to here.

(16) Generally, it will not be appropriate to grant leave to appeal under s.50A(7) in respect of a point of law which has not been properly pleaded: Ross

v. v. An Bord Pleanála (No. 2) [2015] IEHC 484; Hellfire Massy at para. 6(iv).

(17) In considering the second requirement which an intended appellant must satisfy, there may be some overlap in the factors relevant to the question as to whether it is desirable in the public interest that an appeal be brought to the Court of Appeal, such as where there is uncertainty in the relevant area of law or where that area of law is evolving as such that it is desirable to have that uncertainty clarified. The case law demonstrates that there is a broad range of different factors and considerations which may be taken into account by the Court in determining whether it is desirable in the public interest that an appeal be brought. Those factors include, but are not limited to, the existence of uncertainty in the law, the nature of the particular development and the potential consequences of a significant further delay in the final determination of the case before the courts."

Application of the relevant principles to this application

10. For the reasons set out below, I do not believe that the applicant satisfies the criteria for certification for leave to appeal pursuant to s.50A(7) in respect of any of its proposed questions of law.

Do all of the proposed questions legitimately derive from the judgment?

11. As is clear from the judgment, the applicant's case in judicial review was based on fair procedures grounds, principally to do with the contention that the Board had arrived at the s.261A review decision and the s.177C/D substitute consent determination by reference to aerial photography without having given the applicant opportunity to comment on that aerial photography before it made its decisions.

12. Objection was taken on behalf of the Board to a number of the proposed questions on the basis that the questions simply did not derive from the Judgment at all. In my view, this objection is well-founded in respect of proposed questions 4, 5, 6 and 10 for the following reasons.

13. Question 4 (in respect of the 2013 proceedings) and question 10 (in respect of the 2020 proceedings) purport to relate to the standard of review on a judicial review of the determinations in question. These questions simply do not arise from the judgment as the question of the standard of review was not an issue in the proceedings at all; the case was expressly confined at the hearing to a case in fair procedures and was dealt with on that basis.

14. Questions 5 and 6 also seek to address matters which were not determined in the judgment. The applicant's case in judicial review was confined to fair procedures arguments, albeit that the applicant contended for a high level of fair procedures given the asserted draconian consequences of the Board's determinations; as I shall come to further below, I proceeded on the basis that, as there were serious matters at stake for the applicant and its quarry business in the processes in issue, a high level of fair procedures were required (judgment para 74). The case did not require me to determine whether the effect of the determinations in issue was to sterilize the applicant's land, and, the judgment did not involve a decision on the question of whether a party such as the applicant who was refused an application for leave to apply for substitute consent under section 177C/177D was thereafter permanently inhibited from regularising the planning status of its quarry.

15. Accordingly, I proceed on that basis that only proposed questions 1 to 3 (in relation to the 2013 proceedings) and question 7 to 9 (in relation to the 2020 proceedings) (together, "the fair procedures questions") are properly before the Court on this application for certification.

Consideration of the proposed fair procedures questions

16. The fair procedures questions essentially resolve to a contention that there is a point of law of exceptional public importance to the effect that under the s.261A review process before the Board and under the s.177C/177D process for applying for leave to apply for substitute consent, the Board is under a proactive legal obligation, as a matter of fair procedures, in every case where the Board proposes to rely on information which has not been supplied by an applicant, to invite an applicant's submissions on such information before making any decision pursuant to those statutory provisions.

17. Counsel for the applicant submitted (without, it must be said, evidence before the Court of these matters) that it was a recurring feature of such applications in the quarrying sector that the Board did not revert to applicants inviting submissions on information identified by the Board as relevant on its own volition which left the unsatisfactory situation that the Board could unilaterally determine what information is relevant for these applications and then decide such applications based on information not supplied by applicants. It was said that this raised an issue of systemic unfairness which was heightened by the draconian consequences for an applicant in being refused leave to apply for substitute consent in that, it was contended, a quarry in such a situation was effectively sterilised with no mechanism to regularise the status of the quarry notwithstanding that the quarry owner had done nothing wrong. It was said that a quarry owner or operator in such circumstances was forced to anticipate what the Board might regard as relevant without any opportunity to address the Board on what it did ultimately regard as relevant and that this was clearly wrong given the irreversible and draconian consequences of an adverse Board determination. It was submitted that there was an absence of authority from the appellate courts on this fair procedures issue of principle of transcendent importance.

18. Counsel for the Board submitted that the applicant's case was put up on the basis of the well-established fair procedures principles set out in *Kiely v. Minister for Social Welfare* (cited in the judgment at para 61), that the applicant's case was made on a fact-specific basis (as reflected in paragraph 63 and 76 of the judgment) and that there was in truth no issue of novel or evolving legal principle as to the standard of fair procedures to be applied, let alone any issue of exceptional public importance.

19. Counsel for the Board placed reliance was placed on the fact that Hyland J. in *Fursey Maguire* [2023] IEHC 209 (which, as I found in the judgment, raised issues very similar to the case before me) refused to certify a fair procedures question under s.177D of the 2000 Act in that case. The relevant proposed question in that case related to what the Board is obliged to consider in reaching a determination that the applicants did not have a reasonable belief under section 177D(2)(b) that its development was not unauthorised: the question was: "*having regard to the consequences of such a determination, what is*

the Board obliged to consider in reaching that determination and is it obliged to invite submissions from an applicant for substitute consent?"

20. Hyland J. held (at para 29) that "*the question is effectively concerned with the fair procedures points raised by the applicant. I determined that argument on the basis that the applicant had an opportunity to put before the Board any material it wished and was aware of the statutory test. I held that there had been no breach of fair procedures where the Board did not invite submissions on a specific point as it had no obligation to do so. That is an unexceptional finding deriving from existing case law on fair procedures, including the decision of JJ Flood* [[2020] IEHC 95] *where a similar type point was raised in a different statutory context. The mere fact that the question arises in a statutory context not previously the subject of consideration by the courts cannot result in it amounting to a point of law of exceptional public importance… The threshold for leave is not met in respect of this question*."

21. In my view, a similar conclusion is inevitable in respect of the fair procedures questions here. The case was brought by the applicant on the basis that a heightened level of fair procedures was required in the application of the relevant statutory provisions because of the draconian consequences of, in particular, a refusal for leave to apply for substitute consent and that the application of such a heightened level of fair procedures led to the conclusion that fair procedures were breached on the facts. I effectively approached the applicant's case on the basis that a heightened level of fair procedures was appropriate. This is clear from the terms of paragraph 74 of the judgment where I explained that I proceeded from the premise that the applicant was entitled to fair procedures in a way that reflected that "*serious matters are at stake in both the s.261A and s.177C/177D processes (in terms of a quarry owner's business operation and the extent to which quarry land use is lawfully authorised) and that it is important that quarry owners and operators such as the applicant here are afforded all appropriate opportunity to make their case as fully as reasonably possible and to have that case fairly considered by the relevant decision makers. This is recognised in principle by the statutory processes in issue which, in both s.261A and s.177C, provide express opportunity to an applicant to make submissions in support of its case."*

22. I rejected the applicant's judicial review case principally on the fact-specific basis that the applicant should be taken to have been on notice of the fact that the Board was likely to have regard to the aerial photography in issue when trying to assess the extent of historical user of the quarry and the applicant did nothing to seek to get the relevant photographs despite it being within its gift to do so (see, in relation to the 2013 proceedings, paras 109 and 110 of the judgment and, in relation to the 2020 proceedings, paras 124 and 125 of the judgment).

23. (For completeness, I should note that there was a second fair procedures issue in the 2020 proceedings based on fact-specific contentions as to how the Board's inspector dealt with material submitted by the applicant to substantiate a contention that quarrying activity had taken place on the site pre-1964; I rejected the applicant's case on this issue on the facts (judgment, paras 135 and 136). In fairness, it was not contended that my findings on this aspect of the case raised any points of law of exceptional public importance).

24. Accordingly, the case in judicial review was determined by the application of straightforward and established principles of fair procedures to the particular facts of the cases.

25. While Counsel for the applicant in support of his case for certification submitted that the Board was effectively being left at large to determine what information was not relevant, without the Board being obliged to go back to an applicant on information or issues deemed relevant by the Board and inviting submissions on that information or those issues before reaching determinations which had severe consequences, it seems to me that this is to significantly overstate the established legal position reflected in the judgment. As made clear by the judgment at paragraph 86, the Board is not left at large; it is obliged to afford fair procedures in accordance with well-established principles:

> *"As noted earlier, part of the relevant context in which the fair procedures questions fall to be assessed is that an applicant must be taken to know that the Council and Board are likely to have regard to publicly-available maps and photos when assessing issues of quarry use in a s.261A or ss.177C/177D process. At the level of principle, one could envisage situations where,*

notwithstanding that submissions had already been received, a planning authority or Board in arriving at a decision adverse to an applicant proposed to decisively rely on information or material which could not have been obtained or provided by an applicant or which could not otherwise have been reasonably envisaged as likely to be relied upon by the Council or Board in the decision-making process. In such circumstances, one could see a more compelling argument for notifying an applicant of same to allow the applicant comment on same before arriving at a final decision. However, we are very far removed from such a scenario on the facts of the cases before me. As I shall come to shortly, all of the material relied upon by the Council and the Board in the s.261A and s.177C processes was material which could have been obtained by the applicant and, further, was material which could reasonably be envisaged as potentially being relied upon by the Council or Board in those decision-making processes."

26. Ultimately, the question of whether fair procedures were afforded in the cases before me was a fact sensitive one. On the facts here, the applicant could not make out a breach of fair procedures. The applicant's failure to make out a breach of fair procedures on the application of the established principles of fair procedures to the facts of this case does not, in my view, give rise to any transcendent legal principle or legal issue of exceptional public importance.

27. In judgments addressing fair procedures contentions under the applicable statutory regimes, whether section 261 or the substitute consent regime in section 177C/177D, such as *McGrath Limestone* [2014] IEHC 382, *JJ Flood* [2020] IEHC 95 and *Fursey Maguire* [2022] IEHC 707, the courts have consistently held that the relevant statutory regimes afford sufficient fair procedures. There is no uncertainty in the law in this respect. The fact that these judgments have been delivered in the High Court does not detract from the lack of uncertainty. The law on fair procedures in this context cannot be said to be uncertain or evolving or to raise any novel issue of law. While it might be the case that issues remain, in general terms, as to the proper application of the substitute consent regime to quarries and the consequences for quarries of decisions under that regime (and I express no view on the correctness of that proposition), this

was not a case that truly engaged any such issues and certainly not any issues of exceptional public importance in a fair procedures context.

Conclusion

28. For the reasons set out above, in my view, the onerous threshold on this application is not passed by the applicant. Insofar as the questions the subject of the certification application arise from the judgment at all, no issues of exceptional public importance arise.

29. Accordingly, I refuse the application pursuant to s.50A(7) for certification of leave to appeal to the Court of Appeal.