[2020] IEHC 22

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2017/542 J.R.]

BETWEEN

SHILLELAGH QUARRIES LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

RACHEL MCCOY
(AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL MCCOY), (DECEASED)

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 24th day of January, 2020

Introduction

1. This is my judgment on an application by 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 "2000 Act (as amended)") from a decision made by me in a judgment delivered on 12th June, 2019 in which I refused the applicant's application for judicial review in respect of a decision of the respondent, An Bord Pleanála (the "Board") dated 18th May, 2017. In its decision, the Board had refused to grant the applicant leave under s. 261A(24)(a) of the 2000 Act (as amended) to apply for substitute consent in respect of the applicant's quarry under s.177C of the Act.

2. The applicant contends that leave to appeal should be granted on the basis of two points or questions which it says involve points of law of exceptional public importance and in respect of which the applicant says it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

3. For the reasons set out in this judgment, I have concluded that the applicant has not established that my decision involves a point or points of law of exceptional public importance or that it is desirable in the public interest that an appeal should be taken from my decision to the Court of Appeal. Therefore, I refuse the applicant's application for leave to appeal.

Points of law raised by the applicant

4. The applicant has put forward two points or questions which it has asked the court to certify as being points of law of exceptional public importance, which it is desirable in the public interest should be taken by way of appeal to the Court of Appeal. Those questions are as follows:-

> *"(1) What is the true construction of the phrase 'the quarry commenced operation before 1 October 1964' contained in section 261A(24)(a)(i)(I) of the 2000 Act (as amended)?*

(2) What is the true scope and application of the court's jurisdiction to quash an administrative decision on grounds of an error on the face of the record?"

The principal judgment
General

5. Before considering the provisions of s. 50A(7) of the 2000 Act (as amended) and the legal principles applicable to the applicant's application for leave to appeal, I should make reference to some aspects of the judgment which I gave on 12th June, 2019, on the applicant's application for judicial review in respect of the Board's decision (the "principal judgment"). The principal judgment bears the neutral citation [2019] IEHC 479.

6. At para. 71 of the principal judgment, I identified the various issues which it was necessary for me to decide. Among those issues were:-

   (1) Whether the Board had correctly interpreted and applied the provisions of s. 261A(24)(a)(i)(I) of the 2000 Act (as amended) in reaching its conclusion that the applicant's quarry had not "*commenced operation*" before 1st October, 1964; and

   (2) Whether the errors contained in the decision of the Board, which is recorded in the Board Order of 18th May, 2017, were such as to require that decision to be quashed.

7. The points or questions advanced by the applicant in its application for leave to appeal are intended to address the conclusions which I reached in the principal judgment on these two issues.

Interpretation of relevant statutory provision

8. I dealt with the question of the correct interpretation (and application) of s. 261A(24)(a)(i)(I) of the 2000 Act (as amended) at paras. 73 to 154 of the principal judgment.

9. I approached the question of the interpretation of that provision from various perspectives. First, I considered the terms of the provision itself (paras. 74 to 80 and paras. 93 to 94 of the principal judgment). Second, I considered the statutory framework and scheme into which ss. 261A(21)-(24) were inserted, with effect from 22nd July, 2015 (as discussed and considered by the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] IESC 1 ("*Sweetman*") and *An Taisce v. McTigue Quarries Limited & ors* [2018] IESC 54 ("*McTigue"))* (paras. 81 to 92 of the principal judgment). In that context, I considered the various "*gateways*" under which leave to apply for substitute consent, or substitute consent itself, could be obtained and noted that a new "*gateway*" was provided for under ss. 261A(21)-(24), with effect from 22nd July, 2015. I considered the particular circumstances which that new "*gateway*" was intended to address. One of the requirements to be met in order to avail of that "*gateway*" was that the quarry had to have "*commenced operation*" before 1st October, 1964.

10. Third, I considered the European context in which the provisions of ss. 261A(21) – (24) must be seen (paras. 95 to 105). In that context, I considered the judgment of the CJEU in Case *C-215/06 Commission v. Ireland* [2008] ECR I-04911 ("*Case C-215/06*") and the subsequent judgment of the CJEU in *Joined Cases C-196/16 and C-197/16 Comune di Corridonia and Ors v. Provincia di Macerata* (judgment given on 26th July, 2017) *("Joined Cases C-196/16 and C-197/16"*) and the consideration given to those cases by the Supreme Court in *Sweetman* and *McTigue.*

11. I particularly noted the comments of Clarke C.J. at paras. 7.6 and 7.7 of his judgment for the Supreme Court in *Sweetman*. At para. 7.6, he noted that the jurisprudence of the CJEU "*makes clear that what is described as a system of regularisation in the environmental context is permissible but only where the system 'does not offer the persons concerned the opportunity to circumvent the Community rules... and that it should remain the exception'*. He further noted that the CJEU had held that the previous Irish system of retention permission, which the CJEU observed "*could be issued even where no exceptional circumstances are proved*", was found to be inconsistent with European law. At para. 7.7, Clarke C.J. observed that the validity of any scheme for obtaining retrospective consent, including the substitute consent procedure under the 2000 Act (as amended), in order to be compatible with European law, could *"not operate as a facilitation or encouragement to circumvention of Union rules and can only operate in exceptional circumstances".*

12. I noted that the Supreme Court in *McTigue* considered the overall framework and scheme of the 2000 Act (as amended) and observed that the words used in the section at issue in that case were "*consistent only with a legislative intention to comply with the EIA Directive" and were "not consistent with a literal interpretation which would permit the quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come*" (per MacMenamin J. at para. 72). The Supreme Court held that the literal interpretation of the section at issue in that case (s. 177O) would not reflect the plain intention of the Oireachtas as ascertained from the Act as a whole, which was to give effect to the EIA Directive. In that context, I noted that the judgment of the Supreme Court in *McTigue* was significant as it highlighted the importance of carefully considering not only the actual words of the section of the 2000 Act (as amended) which had to be construed, but also the critical importance of the framework and scheme of the legislation as well as the European context (paras. 104 and 105 of the principal judgment).

13. Fourth, I considered the meaning of the words "*commenced operation*" by reference to prior case law (paras. 107 to 122). I stated that I found the judgment of Charleton J. in the High Court in *An Taisce v. Ireland & ors* [2010] IEHC 415 ("*An Taisce (2010*)") to be of "*most assistance and relevance for present purposes*" (para. 112). In that case, Charleton J. had interpreted the very same words as are found in the statutory provision at issue in this case which are also contained in s. 261(7) of the 2000 Act (as amended), which was the statutory provision at issue in *An Taisce (2010),* under that provision, in order to be entitled to a grant of permission under the section, the quarry in question had

to have "*commenced operation*" before 1st October, 1964. I set out at some length the interpretation given to those words in that statutory provision by Charleton J. at paras. 3, 4, 6 and 12 of his judgment (see paras. 112 to 115 of the principal judgment). I then referred to the subsequent endorsement and application of that approach by Charleton J. in his subsequent judgment in the High Court in *McGrath Limestone Works Limited v. An Bord Pleanála & ors* [2014] IEHC 382 ("*McGrath Limestone*") and by Baker J. in the High Court in *Hehir v. An Bord Pleanála* [2016] IEHC 104 ("*Hehir*").

14. I concluded that those cases clearly demonstrated the approach which had to be taken by the Board in considering whether a quarry had "*commenced operation*" before 1st October, 1964. The correct interpretation of the statutory words in question required that there had to have been some quarry operation on the relevant site before 1st October, 1964 and that that operation had to have continued (and not have been abandoned) on a proportionate basis since then (see para. 121 of the principal judgment). I stated (at para. 122 of the principal judgment) that I had "*no doubt*" that that was the correct approach to the interpretation of the requirement in s. 261A(24)(a)(i)(I) that the quarry must have "*commenced operation*" before 1st October, 1964 before the Board could grant leave to apply for substitute consent in respect of the quarry (as well as having to comply with all the other requirements contained in ss. 261A(21)-(24)). I expressed the view that it would be "*most unsatisfactory*" if that phrase, as used in connection with a quarry, were to be interpreted differently in this case to the way in which it had been interpreted by Charleton J. in *An Taisce (2010*), and elsewhere.

15. Fifth, I was also satisfied that that interpretation of the words at issue better gave effect to the intention of the Oireachtas, as it could be inferred, not only from the subsection at issue, but also from the legislative framework and scheme into which s. 261A(24) was inserted in July, 2015 (paras. 123 to 125). My conclusion in that regard was also heavily influenced by the European dimension and context as discussed by the Supreme Court in *Sweetman* and *McTigue*.

16. Sixth, I considered that the *Barras* principle, as a presumption and a guide to interpretation, was of some (albeit not decisive) assistance to my consideration of the correct interpretation of the words "*commenced operation",* in the context of a quarry in s. 261A(24)(a) of the 2000 Act (as amended) (paras. 126 to 134).

17. Finally, I considered that the interpretation of the words in the subsection at issue advanced by the applicant would not be compatible with EU law. In that regard, I was heavily influenced by the judgments of the CJEU in *Case 215/06 and Joined Cases C-196/16 and C-197/16* (as discussed by the Supreme Court at paras. 7.6 and 7.7 of the judgment of Clarke C.J. in *Sweetman* and, for example, at paras. 44, 72, 73 and 76 of the judgment of MacMenamin J. in *McTigue*) (paras. 135 to 137 of the principal judgment).

18. I set out my conclusions on the correct interpretation of s. 261A(24)(a)(i)(I) at para. 138 of the principal judgment. I did so both by reference to national law and by reference to EU law. I concluded that an interpretation of the statutory provision in question which would allow the Board to find that a quarry had "*commenced operation*" before 1st

October, 1964, in circumstances where only limited quarry operations were carried on before that date and where those operations intensified and increased in the period up to the date of the application for substitute consent (and I would add here, up to the date of the application for leave to apply for substitute consent), would run completely counter to the intention of the Oireachtas as ascertained from the framework and scheme of the legislation and to the requirements of EU law, as interpreted by the CJEU in *Case C-215/06* and in the subsequent jurisprudence of that court. I concluded that the interpretation advanced by the applicant did not properly reflect the requirement for the existence of "*exceptional circumstances*" in order to enable an applicant to apply for substitute consent (or, for that matter, for leave to apply for substitute consent) under the statutory provision at issue and would also afford such an applicant the opportunity to circumvent Community rules, for the reasons set out at para. 138 of the principal judgment.

19. It was for those various reasons that I concluded that the interpretation of s. 261A(24)(a)(i)(I) which was advanced and applied by the Board in the impugned decision was correct and that the interpretation advanced by the applicant was not.

Errors in Board's decision

20. I dealt with the issue in relation to the errors in the Board Order, which recorded the decision of the Board, at paras. 162 to 173 of the principal judgment. Four errors in the Board Order were relied upon by the applicant in the statement of grounds. They were not, however, addressed in the written submissions served on behalf of the applicant in advance of the hearing or in the Board's replying written submissions. The errors in the Board Order were briefly referred to on behalf of the applicant in opening the application at the hearing and were dealt with in response on behalf of the Board. Counsel for the Board referred to some of the relevant cases. His submissions were then responded to on behalf of the applicant in reply. That is the context in which the question of the errors in the Board Order came to be considered in the principal judgment.

21. The four errors in the Board Order were referred to at para. 162 of the principal judgment. I should observe that there is a typographical error at para. 162(2), where the section referred to should be s. 261A(21)(c) of the 2000 Act (as amended) and not s. 261(21)(c). I considered the cases relied upon by the Board and the submissions made on behalf of the applicant in relation to those cases in its reply in the principal judgment. The judgments referred to and considered by me were the judgments of the High Court (O'Neill J.) in *KK v. Taaffe* [2009] IEHC 243 ("*KK*"), of Hogan J. in the High Court in *G(B) v. District Judge Murphy and Others* [2011] IEHC 359, of the High Court (Birmingham J.) and of the Court of Appeal in *Ahearn v. Judge Brady and the DPP and Joyce v. Judge McNamara and the DPP* [2014] IEHC 448 and [2015] IECA 240 ("*Ahearn*") and of the Court of Appeal in *O'Brien v. Judge Coughlan and the DPP* [2015] IECA 245 ("*O'Brien*").

22. I considered each of the errors in the Board Order relied upon by the applicant and concluded that, in respect of each of them, the error was minor, inconsequential and of no substance and did not in any way prejudice or mislead the applicant or its advisors

(paras. 170 to 173). In those circumstances, I was not satisfied that any of the errors in the Board Order relied upon by the applicant were of any substance and that they were all insubstantial and inconsequential and did not mislead or prejudice the applicant or its advisors in any way. In those circumstances, I concluded that the errors did not provide any basis on which the decision of the Board as recorded in the Board order could be quashed.

23. Those are the portions of the principal judgment which appear to me to be relevant to the two points or questions which the applicant has advanced as being points of law of exceptional public importance which the court should certify for the purposes of an appeal to the Court of Appeal. Before considering whether either of the two points satisfies the statutory requirements as considered in the case law, I should briefly refer to the applicable statutory provision and to the relevant legal principles.

Section 50A(7) of 2000 Act (as amended)

24. The relevant provision of the 2000 Act (as amended) under which leave to appeal from the decision of the High Court to the Court of Appeal is required is s. 50A(7). 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* [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]."

25. Section 50A(7) originally referred to the Supreme Court. That reference was replaced by the reference to the Court of Appeal by s. 75 of the Court of Appeal Act, 2014.

26. The term "*section 50 leave*" is defined in s. 50A(1) as meaning "*leave to apply for judicial review*" under O. 84, RSC in respect of a decision of (inter alia) the Board in the performance or purported performance of a function under the 2000 Act (as amended). It was agreed between the parties that, in order for the applicant to appeal the decision contained in the principal judgment, leave to appeal must be obtained under the provisions of s. 50A(7).

Relevant legal principles

General

27. Before referring to the leading summary of the principles to be applied by the court in considering an application for leave to appeal, which is to be found in the judgment of MacMenamin J. in the High Court in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 ("*Glancré*"), it is necessary for the court to bear a number of considerations in mind. I discussed these considerations and the relevant legal principles in a judgment recently delivered on 14th January, 2020 in *John Conway v. An Bord Pleanála and ors* [2020] IEHC 4.

28. First, in considering the points or questions put forward by the applicant as amounting to points of law of exceptional public importance, the task of the court is not to assess the merits of the arguments which may be made by the parties in respect of those points or the strength or prospects of any appeal based upon them. That is not part of the exercise required to be undertaken by the court. As can be seen from several of the judgments in this area, the main task of the court in considering whether a point of law is of exceptional public importance is to determine whether the law with respect to the particular point advanced is unclear or uncertain (see: *Lancefort Limited v. An Bord Pleanála* (unreported, High Court, Morris J., 23rd July, 1997), *Arklow Holidays Ltd v. An Bord Pleanála and others* [2008] IEHC 2 (per Clarke J. at para. 43) and *Callaghan v. An Bord Pleanála & Ors*. [2015] IEHC 493 ("*Callaghan*") (per Costello J. at para. 16)).

29. Second, as pointed out by the Supreme Court in *Grace and Sweetman* (at para. 3.9), and as noted recently by Simons J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820 (at para. 14), it is necessary for the court which is asked to grant leave to appeal under s. 50A(7), and to certify a point or points of law under that section, to have regard to the effect of the 33rd Amendment to the Constitution and the enactment of the Court of Appeal Act 2014 and to the new "*constitutional architecture"* created thereby, whereby an appeal from a decision of the High Court in respect of an application for leave or for judicial review of a planning decision might potentially be brought to the Court of Appeal or directly to the Supreme Court. In that regard, in Grace and Sweetman the Supreme Court stated:

> *"We would merely add that we consider that it would be appropriate for High Court judges, in considering whether to grant a certificate, to at least have regard to the new constitutional architecture, to the fact that an appeal to this Court under the leapfrog provisions of Article 34.5.4. is open but also to the fact an appeal to the Court of Appeal should remain the more normal route for appeals from the High Court."* (para. 3.9, p. 8)

30. Third, as has been pointed out in many of the judgments (including that of Costello J. in the High Court in *Callaghan*, at para. 10), the clear intention of the Oireachtas in enacting s. 50A was that, in most cases, the decision of the High Court on an application for leave to seek judicial review of a planning decision or on an application for judicial review of such a decision will be final and, in most cases, there will be no appeal. That is why s. 50A(7) was enacted. An appeal to the Court of Appeal is available where the statutory requirements of that subsection are complied with. To that it must be added that an appeal to the Supreme Court may also be available where the requirements of Article 34.5.4 of the Constitution are satisfied.

31. I must consider the applicant's application for leave to appeal having regard to and taking full account of those considerations.

The Glancré principles

32. The leading summary of the principles to be applied by the Court in considering an application for leave to appeal under s. 50A(7) is that provided by MacMenamin J. in the High Court in *Glancré*. The principles set out by MacMenamin J. in that summary (the "*Glancré* principles") have been adopted and applied in almost all, if not all, the available judgments on such applications. So well-known and so widely applied are those principles that it is scarcely necessary to repeat them here. However, for ease of reference, I set them out below.

33. MacMenamin J. summarised the applicable principles in *Glancré* as follows:

> *"I am satisfied that a consideration of [the] authorities demonstrates that the following principles are applicable in the consideration of the issues herein.*
>
> 1. *The requirement* [that there be a point of law of exceptional public importance] *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 the 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"* (Per MacMenamin J. at pp. 4- 5)

34. In *Ógalas Limited (trading as Homestore and More Limited) v. An Bord Pleanála* [2015] IEHC 205 ("*Ógalas*"), Baker J. in the High Court referred with approval to the *Glancré* principles and continued: -

> *" . . . . it is not sufficient for an applicant for a certificate to show that a point of law emerges in or from a case, but an applicant must show that the point is one of exceptional public importance and must be one in respect of which there is a degree of legal uncertainty, more than one referable to the individual facts in a case. There must be a public interest in requiring that the point of law be clarified for the common good, but to an extent, if there exists uncertainty in the law, and because clarity and certainty in the common law is a desirable end in itself, and important for the administration of justice, if it can be shown the law is uncertain the public interest suggests an appeal is warranted"*
>
> (Per Baker J. at para. 4)

35. In *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, McGovern J. in the High Court reduced the ten *Glancré* principles to four essential principles to be applied in an application such as this. They were: -

> *"(a) the decision must involve a point of exceptional public importance;*
>
> *(b) it must be desirable in the public interest that an appeal shall be taken to the Supreme Court;*
>
> *(c) there must be an uncertainty as to the law; and*
>
> (d) the importance of the point must be public in nature and transcend the individual facts and parties of any given case." *(per McGovern J. at para. 5)*

36. In a helpful discussion and consideration of the applicable principles, Costello J. in the High Court in *Callaghan*, discussed the two cumulative requirements under s. 50A(7) as follows: -

> *"6. The point raised must be important to cases other than the case in issue, it must transcend the facts of the particular case and help in the resolution of future cases. It must also be of exceptional importance. I consider this aspect below.*
>
> *7. It is a separate requirement that it is also desirable in the public interest that an appeal should be taken. As was pointed out by Baker J. [in Ógalas], clarity and certainty in the common law is a desirable end in itself and important for the*

administration of justice. So, if it can be shown that the law is uncertain, then the public interest suggests that an appeal is warranted. Obviously, this is not always the case. In Arklow Holidays Limited v. An Bord Pleanála & Ors [2008] IEHC 2 Clarke J. held that there was a point of exceptional public importance but the delay in bringing forward absolutely necessary public infrastructure (a wastewater treatment plant) meant that an appeal was not in the public interest. . .." (Per Costello J. at paras. 6 and 7)

37. I will proceed to consider the applicant's application for leave to appeal from the decision contained in the principal judgment on the basis of the two points or questions put forward by the applicant in light of the *Glancré* principles and the further discussion of those principles in the judgments just referred to, as well as the other considerations discussed earlier.

Consideration of points of law advanced by the applicant for certification

(A) The first point raised: construction of term that quarry must have "commenced operation" before 1st October, 1964

Applicant's position

38. The applicant contends that the first point advanced by him amounts to a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken in respect of it to the Court of Appeal. It contends that that the construction of the phrase at issue, namely, that the quarry must have "*commenced operation*" before 1st October, 1964, in order for the Board to be in a position to grant leave to seek substitute consent under s. 261A(24)(a) of the 2000 Act (as amended) is a net point of statutory interpretation. It argues that it is a matter of very significant public importance and notes that the same phrase, namely, *"the quarry commenced operation before 1 October 1964*" is contained in at least nine other subsections or subparagraphs of s. 261A, apart from the subparagraph at issue in this case. While the applicant accepts that the High Court has addressed the true construction of the phrase on two occasions, namely, in *An Taisce* (2010) and in the principal judgment, it maintains that the issue should be determined by an appellate court and that that is desirable in the public interest.

39. The applicant submits that, on the ordinary meaning of the words used in s. 261A(24)(a)(i)(I), all that the applicant was required to establish in order to obtain leave to seek substitute consent was that its quarry had commenced prior to 1st October, 1964 (in circumstances where there was no issue that the applicant operated a quarry). It contends that the provisions of this statutory provision must be contrasted with the words used in s. 2(1) of the 2000 Act (as amended) which contains definitions of the terms *"unauthorised use*" and "*unauthorised works",* as being a use or works, as the case may be, which "*commenced on or after 1 October 1964*". An intensification of use may amount to a change of use which, if it is "*material for planning purposes*", could amount to development within the 2000 Act (as amended), on the existing authorities. However, the applicant contends that the words used in the statutory provision at issue in this case are quite different. It argues that that provision does not require the Board to identify the

date of commencement of the use of the lands as a quarry or satisfy itself that such use did not materially intensify over time, such that it might amount to a new use of the lands. On the contrary, the applicant maintains that all that it had to establish was that it was the operator of a quarry and that the quarry had "*commenced operation*" prior to the relevant date. The applicant contends that, as the Oireachtas is presumed to know the law, it could have required the quarry operator to prove that the development in question had commenced prior to 1st October, 1964 but did not do so. It used different words in the statutory provision at issue which simply required an applicant for leave to apply for substitute consent to establish that its quarry "*commenced operation*" prior to 1st October, 1964. The applicant maintains that if the Oireachtas had intended that the statutory provision at issue had to be interpreted as requiring the applicant to prove that the development of a quarry had commenced before the relevant date and had not materially intensified after that date, it could have expressly so provided but did not.

40. While accepting that the decision contained in the principal judgment is consistent with the judgment of Charleton J. in the High Court in *An Taisce* (2010), where the court construed the same phrase in s. 261(7) of the 2000 Act (as amended), the applicant submits that the construction given to the section by Charleton J. in that case, and by me in the principal judgment, is contrary to the plain meaning of the words used in the statutory provision in question and that it is, therefore, desirable that the correct construction of the provision should be determined by an appellate court. The applicant also notes that the phrase construed by Charleton J. in *An Taisce* (2010) arose in a different statutory and factual context. Finally, the applicant maintains that EU law does not require the court to construe the provision at issue as it had done in the principal judgment. It contends that the provision was intended to remedy a problem for certain quarry operators who were unable to avail of other "*gateways*" and to enable them to obtain leave to apply for substitute consent.

41. For these reasons, the applicant contends that the first point of law advanced by it amounts to a point of law of exceptional public importance. It further contends that it is desirable in the public interest that an appeal should be permitted in respect of that point for a number of reasons. It argues that the point is one of great importance and arises in several other subsections and subparagraphs of s. 261A and also in s. 261(7) of the 200 Act (as amended). It maintains that the point of law raised transcends the particular facts of this case and applies to other cases. Finally, it argues that the provision in question is a remedial one which affords another "*gateway*" to quarry operators who were unable to avail of other "*gateways*" to apply for substitute consent, or leave to apply for substitute consent, and that there is, therefore, a public interest in the proper construction of the statutory phrase used being determined by an appellate court.

The Board's position

42. The Board disputes the contention that the first point raises a point of law of exceptional public importance. It contends that there is no uncertainty in the law and notes that the applicant accepts that the construction given by the court in the principal judgment to the phrase in the provision at issue is consistent with the existing jurisprudence of the High

Court and, in particular, is identical to that given by Charleton J. in the High Court in *An Taisce* (2010). The Board notes that the applicant did not contend in its written submissions or at the oral hearing that the interpretation given to the phrase by Charleton J. in *An Taisce* (2010) was wrong. The Board further argues that it could not be said that the law in this area is evolving (as was the case *in People Over Wind v. An Bord Pleanála & ors* [2015] IEHC 393 (Haughton J.) *("People Over Wind*") and in *Callaghan*). The Board also disputes the existence of any uncertainty in the law in light of the existing jurisprudence applied by the court in construing the phrase in question in the principal judgment.

43. The Board further contends that the applicant has not sought to address how the construction of the phrase which it has put forward is consistent with EU law and, in particular, with the judgment of the CJEU in *Case C-215/06.*

44. The Board also disputes the contention that the issues in this case and, in particular, the point of statutory interpretation at issue, transcend the facts of the case. It points to the relatively narrow window of time in which quarry operators could seek to avail of the new "*gateway*" introduced by s. 261A(24)(a) of the 2000 Act (as amended). For those reasons, but principally for the reason that it says there is no uncertainty in the law, the Board maintains that the first point advanced by the applicant is not a point of law of exceptional public importance.

45. The Board further contends that it is not desirable in the public interest that an appeal should be permitted to the Court of Appeal on this point. It takes that position for a number of reasons. First, it relies on the absence of any uncertainty in the law on the point or question at issue. Second, it relies on the fact that there has already been an extensive history of planning applications and appeals and litigation involving the quarry and its operators. The Board submits that the court is entitled to have to consider whether facilitating a further court challenge in light of the history of the quarry is in the public interest. The Board says that it is not. Finally, it argues that the statutory provision in question has a very narrow focus and that it is unlikely that the particular question which the court has to determine will arise again or in other cases and, therefore, there is little public benefit to be associated with an appeal.

Decision on first point

46. I am prepared to accept that the first point advanced by the applicant is an important point of law. The phrase in question appears in at least ten subsections and subparagraphs of s. 261A of the 2000 Act (as amended), as well as in s. 261(7), which was the provision at issue in *An Taisce* (2010). A decision on the correct construction of that phrase does, therefore, give rise to a point of law which, I accept, is an important one. I also accept that a decision on the correct construction of the phrase may be potentially relevant to other cases, although the issue may not necessarily arise in relation to the particular statutory provision at issue in this case in many other cases having regard to the various hurdles which must be overcome under ss. 261A(21)-(24) in order to avail of the final "*gateway*" created under those provisions, with effect from 22nd

July, 2015. While recognising that there may be relatively few, if any, other cases affected by the construction of the particular statutory provision in question, I cannot rule out the possibility that some other cases, or another case, may exist within the system to which the proper construction of the statutory provision may be relevant. I am prepared, therefore, to accept that the first point advanced by the applicant raises an important point of law and that it may transcend the facts of this case. However, that is not the end of the matter. The court must be satisfied that the point of law advanced is one of *"exceptional public importance*". I do not consider that the first point advanced by the applicant is a point of law of "*exceptional public importance*" for reasons which I will now explain.

47. In considering whether a point of law is of "*exceptional public importance*", an important task for the court is to determine whether the law in question, to which the point of law relates, is in a state of uncertainty or is evolving. That was one of the fundamental principles summarized by MacMenamin J. in *Glancré*. It was also stressed by Baker J. in the High Court in *Ógalas*, by McGovern J. in the High Court in *Dunne Stores*, by Haughton J. in the High Court in *People Over Wind* and by Costello J. in the High Court in *Callaghan*. If the law is not uncertain, then the court will generally conclude that the point of law raised is not of "*exceptional public importance".* Where the law is in a state of uncertainty and, in particular, where the law is evolving in the area, the court will generally be satisfied that the point of law in question is one of "*exceptional public importance*". In *Callaghan*, Costello J. in the High Court referred to the judgment of Haughton J. in the High Court in *People Over Wind* where he had rejected the submission that the law on the correct interpretation of the provision at issue was "*settled and certain*". He concluded that the law was "*still evolving*" in relation to the point in question and that it was a *"novel issue that has not previously been decided in the Irish courts or, I believe, in the CJEU"* (per Haughton J. in *People Over Wind* at para. 20) (quoted by Costello J. in Callaghan at para. 17). Costello J. then observed:-

> "*Haughton J.* [in People Over Wind*] referred to the fact that the law in relation to the Habitats Directive (with which he was concerned) was evolving. It seems to me that the combination of a novel point in an area of law which is evolving is likely to lead to the conclusion that the law is unclear and that it would be in the public interest that the law be clarified*."
>
> (per Costello J. at para. 18).

48. Costello J. concluded that, in respect of one of the points of law advanced, namely, the extent of the requirements of fair procedures in light of *Dellway Investments Limited v. NAMA* [2011] 4 I.R. 1, the law was "*evolving and* [was] *to that extent uncertain*" (para. 22). She continued:-

> *"This is not to say that in every case where a point of fair procedures is raised that it will follow that the law is uncertain and that a certificate of leave to appeal will usually be granted (all other factors in Glancré being satisfied). The strategic infrastructure designation legislation has not been the subject of judicial scrutiny.*

The interface between a novel point on this legislation with the evolving law of fair procedures and how it is to be applied to this legislation is open to debate. As Haughton J. said, another view of the law is possible. In my opinion this issue can be described as uncertain within point 3 of MacMenamin J's decision in Glancré." (per Costello J. at para. 22).

49. Unlike the position in *Callaghan* and in *People Over Wind*, the correct construction of the statutory phrase at issue in this case was previously decided in the Irish courts by Charleton J. in the High Court in An *Taisce (2010).* Therefore, when the court came to construe the same phrase in the statutory provision at issue in this case, in the principal judgment, it was not dealing with a novel point but rather a point which had already been decided by the High Court. Nor could it be said that the point arose in an area of law which was evolving or uncertain. On the contrary, the High Court had already construed the phrase in question, albeit in relation to a different section of the 2000 Act (as amended), in *An Taisce (2010).* The position is totally different to that which arose in *People Over Wind* and in *Callaghan*. In both those cases, the issues raised were novel, had not been the subject of any previous judgment of the Irish courts and arose in the context of an area of law which was evolving. That is not the case here. I stated at para. 112 of the principal judgment that "*of most assistance and relevance*" on the question of the correct construction of the phrase at issue was the judgment of Charleton J. in *An Taisce* (2010). Later, at para. 122 of the principal judgment, I stated that it would be *"most unsatisfactory if the phrase 'commenced operation' in connection with the quarry (which is used in various subsections of s. 261A) were to be interpreted differently to the way in which the phrase was interpreted by Charleton J. in An Taisce (2010)* …". In those circumstances, while accepting that Charleton J. in *An Taisce (2010)* was dealing with same words used in a different statutory provision (s. 261(7)), the interpretation which he gave to that phrase was one which I followed and applied in the principal judgment.

50. If I had reached a different conclusion on the correct construction of the phrase as used in s. 261A(24)(a) to that given by Charleton J. in *An Taisce (2010)* in relation to the same phrase used in s. 261(7), then it might reasonably be said that some uncertainty exists in the law and that, as a consequence, the correct construction of the phrase gives rise to a point of law of "*exceptional public importance*" for the purposes of s. 50A(7) of the 2000 Act (as amended). However, that is not what happened. I formed the same view as Charleton J. did and approved of and applied the same construction of the phrase used as Charleton J. had done. I do not accept that the fact that Charleton J. was dealing with the phrase in a different section is significant, as both sections are contained in Part XVIII of the 2000 Act (as amended) concerning quarries and both require consideration as to whether the quarry had "*commenced operation*" before the relevant date.

51. In those circumstances, I am not satisfied that any uncertainty exists in the law in relation to the correct construction of the relevant phrase used in s. 261A(24)(a) of the 2000 Act (as amended), which would enable the court to conclude that the first point advanced by the applicant gives rise to a point of law of "*exceptional public importance*".

52. I should add that I am not at all satisfied that the applicant has addressed the consequences and significance of EU law and the EU law context in which the statutory provision at issue must operate. The construction of the statutory phrase at issue advanced by the applicant does not, in my view, adequately accommodate the EU law requirements considered by the CJEU in Case C-215/06 and in subsequent cases, as discussed and considered by the Supreme Court in *Grace and Sweetman* and in *McTigue*. While submitting that EU law and the context in which the statutory provision at issue must operate did not require the court to construe the provision in the way in which it did in the principal judgment, the applicant has not attempted at all to address the EU law context and the issues raised by it, as they were considered in the principal judgment. In those circumstances, while accepting, of course, that it is not the task of the court at this stage to consider the merits of the arguments raised or indeed the strength or prospects of success of any appeal which might be permitted, the court is entitled to expect that some argument is advanced on the basis of which it might reasonably be considered that another view of the law is reasonably or potentially open. However, the court was not provided with any such arguments directed to the EU law issues in the present case on the basis of which it might reasonably form that view.

53. In conclusion, therefore, I am not satisfied that the first point advanced by the applicant amounts to a point of law of "*exceptional public importance*" as required by s. 50A(7) of the 2000 Act (as amended), as that provision has been considered in the case law discussed earlier. In light of that conclusion, it is, strictly speaking, unnecessary for me to consider whether the applicant has demonstrated that "*it is desirable in the public interest*" that an appeal should be permitted on this point since the requirements in s. 50A(7) are cumulative requirements. Nonetheless, I consider this issue separately towards the end of this judgment by reference to both points of law advanced by the applicant. I conclude there that the applicant has not demonstrated that it would be desirable in the public interest to permit the applicant to advance an appeal on this point or, indeed, on the second point raised it.

(B) The second point raised: errors of law in Board's decision

Applicant's position

54. The second point or question put forward by the applicant for certification as a point of law of "*exceptional public importance*" is:-

> *"What is the true scope and application of the court's jurisdiction to quash an administrative decision on grounds of an error on the face of the record?"*

55. The applicant relies on the errors contained in the Board Order which records the Board's decision. It says that the Board Order contains errors on the face of the record and argues that the scope of the court's jurisdiction to quash administrative decisions on the basis of errors of law on the face of the record remains unclear. It refers to the case of *Simple Imports Limited v. Revenue Commissioners* [2000] 2 I.R. 243 ("*Simple Imports")* and, in particular, to the judgment of Keane J. in that case, where it was held that a warrant which contained on its face a statement that it was issued on a basis which was

not authorised by the statute in question was not valid. The Supreme Court found that the warrants in question in that case were invalid and had to be quashed. The applicant also relies on other cases which deal with the jurisdiction to quash administrative decisions which contain errors of law on the face of the decisions and seeks to rely on some Irish case law in that regard (including *Bannon v. Employment Appeals Tribunal* [1993] I.R. 500). The applicant also notes that more recent authority suggests that an error on the face of the record may be excused when it is inconsequential, where the errors are harmless and insubstantial and where nobody was prejudiced or misled by the errors (referring to the cases considered in the principal judgment including *KK, Ahearn and O'Brien)*.

56. In relation to the errors in the Board Order, the applicant submits that at least one of the errors in the order is of clear importance to the validity of the decision as a whole, as it purports to recite a legislative basis for the decision where the provision referred to does not provide a basis for it. The applicant contends that that error shows that the decision was made on a basis not authorised by the 2000 Act (as amended). The error referred to here is the error recited at para. 162(2) of the principal judgment, which was addressed at para. 171 of that judgment. The applicant contends that the decision has a very significant effect on the applicant's constitutional right to earn a livelihood and that the errors should be seen in that context. The applicant further contends that the cases demonstrate that there is a genuine doubt as to whether the jurisdiction to quash administrative decisions on the basis of an error of law on the face of the record has any place in the modern law of judicial review. It suggests that if the court were correct in its principal judgment in describing the errors (including the error referred to at para. 162(2)) as being inconsequential, it follows that the jurisdiction to quash administrative decisions on this basis can only be exercised in the most exceptional circumstances. The applicant maintains that there is a tension between the authorities and, in particular, between the decision of the Supreme Court in *Simple Imports* and cases such *KK* and that it is a matter of public importance that the nature and extent of the court's jurisdiction to quash decisions on the basis of an error or errors on the face of the record is clarified.

The Board's position

57. The Board rejects the contention that the second point advanced by the applicant raises a point of law of "*exceptional public importance*". It notes that in its principal judgment, the court considered the various arguments on this issue and set out the applicable principles (at paras. 162-169). The Board asserts that, critically, the applicant does not dispute the principles set out in the principal judgment and appears to accept that the court correctly identified those principles. Rather, the applicant appears to contend that the court erred in the application of the principles to the particular facts of the case. It maintains that the decision of the court on this issue could not be said, therefore, to transcend the facts of the case so as to give rise to a point of law of "*exceptional public importance".* The Board further argues that the suggestion by the applicant that there is doubt as to the jurisdiction to quash decisions which contain an error or errors on the face of the record does not flow from the authorities relied on or from the decision of the court, as contained

in the principal judgment. The Board further maintains that the submissions advanced by the applicant on this point on the application for leave to appeal were not advanced at the hearing of the substantive application. The applicant did not advance the argument at the hearing of the substantive application that there are competing authorities in relation to the jurisdiction of the court to quash an administrative decision which contains an error on the face of the record.

Decision on second point

58. I do not accept that the second point advanced by the applicant is a point of law of "*exceptional public importance*" for the purposes of s. 50A(7) of the 2000 Act (as amended). I have reached that conclusion for a number of reasons.

59. First, this point of law or question put forward by the applicant was not raised by the applicant before its application for leave to appeal. As I indicated earlier, while the applicant did plead in the statement of grounds that the Board Order contained errors on its face such that the decision should be quashed, the applicant did not provide any written submissions on that point prior to the hearing of the substantive application and, as a consequence, the Board did not deal with the point by way of its responding written submissions. While the applicant did refer to the relevant paragraphs of the statement of grounds when opening the application at the hearing, no authorities were opened in support of that part of its application. In its response, the Board referred to the judgment in *KK*. The applicant then addressed that case by way of reply and sought to distinguish it. The applicant did not refer, either in opening the application or in reply, to the judgment of the Supreme Court in *Simple Imports*. The applicant did not at any stage argue during the course of the substantive application that the approach taken in *KK* was inconsistent with that taken in *Simple Imports* or that there was any tension between the relevant authorities or any doubt as to the jurisdiction of the court to quash decisions, where appropriate, as containing an error or errors on the face of the record.

60. The issue as to the "*true scope and application of the court's jurisdiction to quash an administrate decision on grounds of an error on the face of the record*" (being the second point of law put forward by the applicant for certification) was not raised in the proceedings and was not addressed in the principal judgment. The cases addressed in the principal judgment were *KK* and other cases such as *Ahearn* and *O'Brien*. It was not argued by the applicant that those cases did not correctly reflect the relevant law. Nor was it argued that the court should approach the assessment of the impact of the errors in the Board's order by reference to the decision of the Supreme Court in *Simple Imports.* In those circumstances, the second point put forward by the applicant for certification does not arise out of the decision of the High Court as contained in the principal judgment (as required by the fifth of the *Glencré* principles).

61. Second, in the principal judgment, the court referred to and applied the judgment brought to its attention (*KK*) and other relevant judgments (such as *Ahearn* and *O'Brien*). It was not argued during the course of the substantive application, and is not argued on the application for leave, that those cases were wrong. However, the applicant now seeks to

advance a fresh argument based on *Simple Imports*, which was not made at the substantive application and was not opened to the court at that stage. In my view, it is an abuse of the procedure under s. 50A(7) to seek to raise points or arguments at the leave stage which were not argued at the hearing in order to secure leave to appeal.

62. Third, I am not satisfied that there is any uncertainty in the law in this area. In its principal judgment, the court referred to the relevant case law and applied the principles derived from that case law in addressing the claim advanced by the applicant in relation to the errors contained on the face of the Board Order. The applicant now wishes to rely on *Simple Imports* in support of its contention that the court ought to have quashed the decision of the Board, as recorded in the Board Order, by reason of the errors on the face of the order. However, apart from the fact that no reference was made to *Simple Imports* during the substantive application, it appears to me that that case dealt with an entirely different situation and has no application in the context of the present case.

63. The decision of the Supreme Court in *Simple Imports* concerned a challenge to the validity of warrants issued by a number of District Court judges on foot of which officers of the Revenue Commissioners entered and searched premises and seized goods which were alleged to be prohibited and in contravention of customs and excise legislation. The applicants challenged the validity of the warrants on a number of grounds including on the ground that the warrants on their face showed a lack of jurisdiction. They failed in the High Court but succeeded in the Supreme Court. The Supreme Court held that, given the draconian nature of the powers conferred by the statute, a warrant could not be regarded as valid which contained on its face a statement that the warrant had been issued on a basis which was not authorised by statute. The Court held, therefore, that the warrants were invalid and had to be quashed (see, in particular, the judgment of Keane J. at p. 255). That is completely different to what occurred in the present case.

64. The particular error in the Board Order relied upon by the applicant was the statement in the Board Order that the Board was refusing leave to apply for substitute consent pursuant s. 261A(21)(c) of the 2000 Act (as amended) whereas the refusal of leave was not pursuant to that provision and the Board had expressly noted that the requirements of that provision were satisfied. The Board's decision was taken on foot of an application for leave to apply for substitute consent made by the applicant under the applicable statutory provisions, namely, ss. 261A(21)-(24) of the 2000 Act (as amended) which provided for the new "*gateway*" for obtaining leave to apply for judicial review. I was satisfied that the Board Order made clear that the applicant's application for such leave was considered by the Board in accordance with the provisions of ss. 261A(21)-(24) and that the Board had decided that such leave should not be granted having regard to the failure by the applicant to satisfy the requirements of s. 261A(24)(a)(i). I was further satisfied that the Board Order could have left the applicant in no doubt about that. On that basis, I concluded that error was minor, inconsequential and of no substance and did not prejudice or mislead the applicant or its advisors (see para. 171 of the principal judgment). That is a world apart from what had occurred in *Simple Imports*, where the warrants were not issued on foot of an application by the applicants themselves but

rather by the Revenue Commissioners. The applicants had had no involvement in the application for the warrants or in the process which led to the decision of the various District Court judges to issue the warrants. The applicant in the present case made the application for leave to seek substituted consent and was involved in the process under which the Board's decision was ultimately made. In my view, even if the applicant had referred to and relied upon *Simple Imports* in the course of the substantive application, it would not have been of any benefit to him. That case was fundamentally different, involving as it did a draconian power to enter and search a premises and to seize goods which were alleged to be prohibited and in contravention of customs and excise legislation. I do not believe that the *Simple Imports* would have assisted the applicant at all, leaving aside the fact that the case was not referred to in any way or relied upon by the applicant in support of its challenge to the Board's decision. The case was completely different for the reasons just outlined.

65. Fourth, I am not satisfied that there is any uncertainty in the law or that the law is evolving in this area (as it was in *People Over Wind* and in *Callaghan*). I applied settled legal principles derived from well-established case law such as *KK* and the other judgments referred to, in dealing with this issue. Since there is no uncertainty in the law, it cannot be said that an appeal is necessary to resolve any such alleged uncertainty.

66. Fifth, I am not satisfied that the second point advanced by the applicant transcends the facts of this case. On the contrary, the point was resolved by reference to the particular errors in the Board Order and the particular context in which they arose. The assessment was very much dependent on the facts of the particular case and it is, I believe, highly unlikely that the court's decision on the point will assist in the resolution of other cases.

67. For these reasons, I am not satisfied that the applicant has shown that the second point put forward by him is a point of law of "*exceptional public importance*" as that term is properly understood under s. 50A(7) of the 2000 Act (as amended) as considered and discussed in the cases referred to earlier.

68. As I have concluded that the applicant has not satisfied the first of the requirements in s. 50A(7), it is, strictly speaking, unnecessary for me to consider whether he has satisfied the second requirement, namely, that it is desirable in the public interest that an appeal should be permitted in respect of this point, as the requirements are cumulative. However, I have nonetheless proceeded to consider that question in the next section of this judgment. I have concluded that it would not be desirable in the public interest to permit an appeal to be taken on either of the points raised by the applicant.

Appeal not desirable in public interest

69. I have found that neither of the points or questions advanced by the applicant in support of is application for leave to appeal is a point of law of "*exceptional public importance",* as that term is properly understood under s. 50A(7). Even if I were of the view that one or both of the points advanced by the applicant satisfied that requirement (and I am not), the applicant would also have to establish that it is "*desirable in the public interest*" that an appeal should be taken to the Court of Appeal. I am not satisfied that it is *"desirable in*

the public interest" that an appeal be taken to the Court of Appeal in respect of either of the points advanced by the applicant for the reasons outlined below.

70. It is open to the court to consider a range of different factors and considerations in forming its view as to whether it is desirable in the public interest that an appeal be taken from its decision. Various examples of the sort of factors and considerations which can be taken into account by the court in deciding whether this requirement is satisfied can be seen in the cases. In *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112 *("Arklow Holidays (No.1)"),* Clarke J. in the High Court was satisfied that the particular point raised on behalf of the applicant was a point of law of exceptional public importance. However, he went on to consider whether it was desirable in the public interest to grant the certificate sought. He came to the view that it was not. In reaching that view, Clarke J. considered that the public interest had to take into the account the nature of the proposed development (in that case a wastewater plant) and "*the potential consequences of a significant further delay in the matter being finally disposed of before the courts"* (para. 24). Clarke J. continued:-

> "*While it is undoubtedly the case that issues and questions concerning the public nature of the project involved are not necessarily decisive (it would be wrong to say that the public importance of the project concerned must necessarily outweigh all other considerations in the case), such factors are, nonetheless, in my view, matters which have to be taken into account by the court in assessing whether it is in the public interest to grant the certificate."* (para. 24)

71. Clarke J. concluded that having regard to the importance of the issue raised by the applicant, on the one hand, and the importance of the project and the consequences of the likely delay (were an appeal permitted), it would not be in the public interest to grant the certificate sought. It should, however, be noted that in a subsequent judgment in *Arklow Holidays Limited v. An Bord Pleanála & ors* [2008] IEHC 2 *("Arklow Holidays (No.2*)"), Clarke J. did grant a certificate to enable the applicant to appeal from his decision that the applicant was precluded, by virtue of the rule in *Henderson v. Henderson* [1843] 3 Hare 100, from pursuing any of the issues in respect of which leave to challenge the planning permission at issue had been granted. He was satisfied that the first of the two requirements in s. 50A(7) was satisfied, namely, the point which the applicant sought to raise was one of "*exceptional public importance*". He was also satisfied that the second requirement was satisfied, namely, that it was desirable in the public interest that an appeal should be permitted on that point.

72. In *Glancré*, MacMenamin J. in the High Court held that the applicant had not satisfied either of the two requirements in s. 50A(7). Among the factors which he took into account in deciding that it was not desirable in the public interest to permit an appeal in that case was that the applicant had already had an adequate opportunity of ventilating its complaints and concerns. MacMenamin J. stated as follows:-

> *"The applicant has already ventilated his concerns in respect of the proximity principle once in its appeal before the Board, and once, in rather different fashion in*

these judicial review proceedings. On neither occasion has its arguments been accepted. I do not consider that the public interest will be served in permitting those arguments to be made on a third occasion, having regard to the findings herein. The respondents state that it is not apparent that there is any basis on which the applicant should be permitted to ask a fourth body (that is the Supreme Court) to adjudicate on its entitlement to construct a waste recovery plant at Muingmore following adjudication by Mayo County Council, the Board, and the High Court. I agree." (at p. 8)

73. A number of the judgments demonstrate that the existence of uncertainty in the law and the evolving nature of the law are factors which may be considered not only in relation to the question as to whether the point of law is one of "*exceptional public importance*", but also on the question as to whether it is "*desirable in the public interest*" that an appeal should be permitted. (See: *Ógalas* (per Baker J. at para. 4) and *Callaghan* (per Costello J. at paras. 7, 18 and 26)).

74. These cases illustrate the broad range of factors and considerations which may be taken into account by the court in determining whether the second of the two requirements in s. 50A(7) is complied with on an application for leave to appeal to the Court of Appeal under that provision.

75. I have concluded that it not desirable in the public interest that an appeal should be taken from the decision contained in the principal judgment to the Court of Appeal in respect of either of the points put forward by the applicant. I have reached that conclusion for a number of reasons.

76. First, as I have sought to demonstrate in respect of each of the points put forward for certification by the applicant, neither point or question arises in circumstances where the law in the particular area is uncertain or is evolving. In the absence of any such uncertainty or lack of clarity, it cannot be said that it is desirable in the public interest that an uncertainty or lack of clarity be resolved by an appellate court. If the law were uncertain or evolving in the particular areas concerned, such as in *People Over Wind* and *Callaghan*, the position might well be different. However, in light of my conclusions that the law is not uncertain or evolving and does not require clarification, it is not in the public interest that an appeal should be permitted from my decision.

77. Second, if the applicant in *Glancré* was found to have had an adequate opportunity to ventilate its concerns and complaints on the facts of that case (as MacMenamin J. so found), then that factor applies with even greater force to the applicant in the present case.

78. At paras. 43 to 70 of the principal judgment, I set out the extensive planning and legal history of the quarry at issue in these proceedings, starting with the judgment of Costello J. in *Patterson v. Murphy* [1978] ILRM 85 ("*Patterson*") and continuing up to the applicant's second application for leave to apply for substitute consent in November, 2015, which led to the decision of the Board which the applicant sought to challenge in

these proceedings. I summarised the relevant history in relation to the quarry, at para. 69 of the principal judgment. There, I noted the following:

(1) There is no existing planning permission for the quarry;

(2) Planning permission was refused for the quarry by the Board in December, 2010 following an application brought by the applicant after it was served with a notice by the planning authority under s. 261(7) of the 2000 Act (as amended). The Board decided that it was precluded from granting permission in respect of the proposed development for a number of reasons which were summarised at para. 51 of the principal judgment;

(3) A challenge to that decision of the Board was rejected by the High Court (Hedigan J.) in 2012 (*Shillelagh Quarries Limited v. An Bord Pleanála (no.1*) [2012] IEHC 257 ("*Shillelagh (2012)")* and a certificate to appeal was refused by the court in 2013. The various findings made, and conclusions drawn by Hedigan J. were summarised at paras. 52 to 54 of the principal judgment;

(4) The Board decided in its s. 5 determination in December, 2010 that the intensification of the use of the quarry, including the use of explosives, constituted the carrying out of operations which were materially different to the development carried out on the lands before 1st October, 1964 and that there had, therefore, been development which was not exempted development (see. paras. 57 to 62 of the principal judgment);

(5) The s. 5 determination made by the Board was not challenged by the applicant and the High Court held that it was bound by that determination (*McCoy v. Shillelagh Quarries Limited* [2015] IEHC 838 (*"McCoy*");

(6) The High Court held that it was bound by the Board's decision of December, 2010 refusing permission for the quarry (*McCoy*). The Court of Appeal dismissed the applicant's appeal in May, 2017;

(7) The Board refused a previous application by the applicant for leave to apply for substitute consent in respect of the quarry in a decision made in February, 2014 (as outlined at paras. 65 to 67 of the principal judgment). Among the findings made by the Board was that the applicant had not established "*exceptional circumstances*", that regularization of the development would circumvent the purpose and objectives of the EIA Directive, that the ability to carry out an EIA and for the public to participate in such an assessment had been impaired, that the development had and was having significant effects on the environment and that the adverse effects on the environment could not be remediated to any great extent;

(8) The applicant then made its second application for leave to apply for substitute consent in November, 2015 which led to the Board's decision of May, 2017 which was the subject of the proceedings.

79. I believe the court is entitled to take into account this history in considering whether it is desirable in the public interest that an appeal should be permitted. It is, in my view, relevant that the various proceedings taken, and applications to the Board made, by the applicant all took place in circumstances where the quarry was unauthorised. A number of judgments of the High Court have held the quarry to involve unauthorised development (*Patterson, Shillelagh (2012)* and *McCoy*). On two prior occasions (in 2010), the Board concluded that the use of the lands where the quarry is situated was unlawfully intensified. The Board's decision which the applicant sought to challenge in the proceedings was the second decision of the Board refusing to grant leave to the applicant to apply for substitute consent. The applicant has brought a number of unsuccessful applications for judicial review in respect of the quarry (*Shillelagh (2012*) and *McCoy*). The applicant failed to obtain a certificate from Hedigan J. to appeal to the Supreme Court from his decision in *Shillelagh (2012).* The judgment on the certificate application is reported as *Shillelagh Quarries Limited v. An Bord Pleanála* [2013] IEHC 92 ("*Shillelagh (2013*)"). The applicant did appeal from the decision of Baker J. in McCoy. However, the Court of Appeal dismissed its appeal in May, 2017 and allowed the applicant a period of time to enable it to wind down its operations. Quarry operations ceased on 23rd May, 2017 (see para. 64 of the principal judgment).

80. It seems to me that the applicant has had adequate opportunity to persuade the planning authority, the Board and the courts that it should obtain the various permissions and consents sought by it and has failed at almost every turn. The findings made and conclusions drawn in the various decisions of the Board and in the judgments of the courts to which I have referred in relation to the planning and environmental status of the quarry are very serious. I believe that I am entitled to take all of this into account in determining whether the public interest would be served in permitting the applicant to appeal from the decision contained in the principal judgment. Having done so, I have concluded that it would not be desirable in the public interest that the applicant should be permitted to appeal from my decision to the Court of Appeal.

81. Finally, while, I cannot rule out the possibility that some other cases may exist within the system to which the particular "*gateway*" provided for in s. 261A(24) may apply, it is likely that those cases will be very few and far between, in light of the particular requirements that have to be met in order for a quarry operator to avail of that "*gateway*". This is not a case, therefore, where there are likely to be many cases to which the court's decision on the correct construction of the statutory provision at issue will be relevant. That conclusion applies even more so in the case of the second point advanced by the applicant in relation to the errors in the Board's order. Those errors must be seen in the particular factual context in which they arose, and they are, to that extent, very fact specific. It seems to me that I am entitled to take into account, in considering the question of the public interest, that even if the points decided in the principal judgment may have an effect beyond the particular facts of this case, that effect is likely to be very limited.

82. For all of these reasons, in my view, even if the applicant had satisfied the first requirement in s. 50A(7) and had established that one or both of the points advanced by it amounted to a point of law of "*exceptional public importance*", the applicant has not satisfied the second requirement of demonstrating that it would be "*desirable in the public interest*" that an appeal should be permitted. In my view, for the various reasons mentioned, it would not be desirable in the public interest that an appeal should be permitted from my decision.

Conclusion

83. In conclusion, I am not satisfied that either of the points or questions put forward by the applicant involve points of law of exceptional public importance arising from the decision contained in the principal judgment. Nor am I satisfied that it is desirable in the public interest that an appeal should be taken to the Court of Appeal from that decision. On the contrary, I have concluded that it would not be desirable in the public interest that such an appeal should be brought. In those circumstances, the cumulative requirements contained in s. 50A(7) of the 2000 Act (as amended) have not been satisfied by the applicant.

84. Accordingly, I refuse to grant leave to appeal to the applicant.