[2020] IEHC 4

THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 1029 J.R.]

IN THE MATTER OF
THE PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED

BETWEEN

JOHN CONWAY

APPLICANT

AND

AN BORD PLEANALA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DUBLIN CITY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 14th day of January, 2020

Introduction

1. On 16th July 2019, I gave judgment on the applicant's application for leave to seek judicial review of a decision of the first respondent, An Bord Pleanala (the "Board"), to refuse to grant approval for a development proposed by the notice party, Dublin City Council (the "Council") consisting of a civic plaza and other ancillary works at College Green in Dublin City Centre (the "principal judgment"). The principal judgment bears the neutral citation [2019] IEHC 525.

2. In the principal judgment, I decided that the applicant did not have a "*sufficient interest*" in the matter the subject of the application under the applicable national law (s. 50 A(3)(b) of the Planning and Development Act, 2000 (as amended) (the "2000 Act (as amended)"), or a "*sufficient interest*" to bring the proceedings under the relevant provisions of EU law (Article 11(3) of Directive 2011/92). I concluded, therefore, that the applicant did not have the required standing to bring the proceedings. As a consequence, I decided that I had to refuse to grant leave to the applicant to bring the proceedings.

3. The applicant has now sought the leave of the court to appeal from that decision to the Court of Appeal under s. 50A(7) of the 2000 Act (as amended). The applicant has also sought to have the principal judgment amended so as expressly to provide that the court was not refusing to grant leave to the applicant to bring the proceedings, but rather that the court "*would not deal with the issue of leave on account of the applicant's lack of standing as so found*". This is my judgment on those applications.

4. For the reasons set out in this judgment, I have concluded that: -

   (i) There is no basis for the applicant's application to amend the principal judgment in the terms requested by the applicant and I refuse that application;

   and,

   (ii) 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 and, therefore, I refuse the application for leave to appeal.

5. I will deal first with the applicant's application to amend the principal judgment. I will then deal with the applicant's application for leave to appeal.

Application to amend principal judgment
The positions adopted by the parties

6. The applicant takes issue with the conclusion stated at para. 91 of the principal judgment that, since the applicant does not have the requisite standing to bring the proceedings (under national law or under EU law), I must refuse to grant leave to the applicant to bring the proceedings. The applicant submits that para. 91 should be amended so as to replace the reference to the court refusing to grant leave to the applicant to bring the proceedings and instead to state that the court "*would not deal with the issue of leave on account of the applicant's lack of standing as so found*" (para. 2 of the applicant's written submissions).

7. The basis for the applicant's application to amend seems to be that the court's refusal to grant leave to the applicant implies that the court considered all of the grounds upon which the applicant sought leave to challenge the impugned decision of the Board whereas, in its principal judgment, the court only dealt with and determined the issue of standing and concluded that the applicant did not have standing to bring the proceedings. The applicant submits that in the event that the court were to grant leave to the applicant to appeal from the decision of the court to the Court of Appeal, it would be "*artificial that the applicant should have to appeal anything beyond the High Court's findings of standing*" and that it would be "*wrong to require the applicant to appeal a refusal of leave where no argument at first instance was had in relation to that issue*" (para 2. of the applicant's written submissions).

8. The applicant's concern appears to be that in the event that the court were to grant leave to appeal to the applicant, the applicant would be faced with the task of having to deal not only with the court's determination on the standing issue, but also all of the grounds of challenge to the Board's decision sought to be raised by the applicant, which would not have been the subject of a decision of the court at first instance. The applicant's argument is predicated on there being a distinction between the court deciding not to grant leave and the court refusing to grant leave.

9. Both the Board and the State respondents oppose the applicant's application to amend the principal judgment. They support the court's conclusion, that as the applicant does not have standing, it was appropriate to refuse to grant leave to the applicant to bring the proceedings. In support of that position, the Board and the State respondents refer to the provisions of s. 50 A(3)(b) and s. 50 A(7). Both the Board and the State respondents made clear, at the hearing of the application to amend, that if the applicant were to obtain leave to appeal to the Court of Appeal, and if the applicant were to succeed on the standing issue, the applicant's application would be remitted to the High Court so that the

court could consider the substantive issues raised in the case and that there was no question of the Board and the State respondents making the case that the court had decided and, considered any of the substantive issues against the applicant in its principal judgment.

Decision on application to amend

10. I can deal with the application to amend the principal judgment in very short order. In my view, there is no basis whatsoever for the applicant's application. While I do not disagree that, in an appropriate case, the court may have jurisdiction to amend a judgment prior to the perfection of the order giving effect to that judgment, the basis on which the applicant seeks to have the principal judgment amended is simply wrong and he appears to have proceeded on the basis of a misreading or misunderstanding of the principal judgment.

11. It is the case, as the applicant contends, that, as a matter of effective case management, I decided that it was appropriate to deal with the issue of the applicant's standing in advance of dealing with any of the substantive issues sought to be raised by the applicant in his application for leave to seek judicial review in respect of the Board's decision. I did deal with the question of standing in isolation and without embarking upon any consideration whatsoever of the merits of the grounds of challenge sought to be raised by the applicant in respect of the Board's decision in his application for leave to challenge that decision. That course of action was taken with the agreement of the applicant and of the Board and the State respondents.

12. Having received written submissions and having heard oral submissions, I gave my decision in the form of the principal judgment, dealing only with the standing issue. I concluded that the applicant did not have standing to bring the proceedings either under national law or under EU law. In light of my conclusion that the applicant did not have the requisite standing, I decided that I was required to refuse to grant leave to the applicant to bring the proceedings and expressed that conclusion at para. 91 of the principal judgment. I reached that decision, and decided to refuse to grant leave to the applicant to bring the proceedings, on the basis of my conclusions on the applicant's standing and not on the basis of any assessment of the substantive grounds of challenge which the applicant sought to advance in respect of the Board's decision. There is no ambiguity in the principal judgment in that regard. I do not accept that my judgment, and, in particular, the conclusion expressed by me at para. 91 could be read as indicating or inferring that I had considered, still less, decided, any of the substantive grounds of challenge sought to be advanced by the applicant, in reaching my decision to refuse to grant leave to the applicant.

13. In my view, the decision to refuse to grant leave to the applicant rather than merely to state that the court was not prepared to deal with the issue of leave by reason of the applicant's lack of standing is supported by the relevant statutory provisions.

14. 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. Section 50A(3) provides that the court: -

> "*shall not grant section 50 leave unless it is satisfied that –*
>
> *(a) …, and*
>
> *(b)(i) The applicant has a sufficient interest in the matter which is the subject of the application . . ."*

15. I was not satisfied that the applicant had a "*sufficient interest in the matter which is the subject of the application"* and, therefore, I was required under s. 50A(3) not to grant leave to the applicant. I do not accept that there is any material difference between the court deciding not to grant leave to the applicant and the court refusing to grant such leave. In this particular context, a decision not to grant leave is synonymous with a decision refusing to grant such leave.

16. It is the determination of the court of an application for section 50 leave which engages the provisions of s. 50A(7) and requires the applicant to obtain leave of the court before being in a position to appeal from the decision of the High Court to the Court of Appeal. The determination of the court of an application for section 50 leave can be a determination to grant leave or a determination to refuse to grant or not to grant such leave.

17. Even if there were a distinction, in the context of the statutory provisions at issue, between a decision or determination to refuse to grant leave and one not to grant such leave (and I do not accept that there is), it would in any event be completely pointless to amend the principal judgment as requested by the applicant since the Board and the State respondents do not contend that the court considered any of the substantive grounds of challenge sought to be advanced by the applicant on his application for leave to seek judicial review in respect of the Board's decision. On no reading of the principal judgment could it be inferred or understood that the court did consider or determine any grounds or issues other than the issue of standing.

18. Therefore, I refuse the applicant's application to amend the principal judgment on the terms requested.

Application for leave to appeal
General

19. The applicant also seeks leave to appeal to the Court of Appeal pursuant to s. 50A(7) of the 2000 Act (as amended). The applicant has put forward four points of law which he asks the court to certify for the purposes of his intended appeal. The applicant contends that the four points are points of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal on those points,

thereby satisfying the requirements contained in s. 50A(7) as discussed and applied in the judgments which have considered that statutory provision.

20. The Board and the State respondents disagree. They contend that none of the points put forward by the applicant satisfies the first statutory requirement of being a point of law of exceptional public importance and that, in any event, it is not desirable in the public interest that an appeal should be permitted in respect of any of those points. They address each of the points in turn and submit that in respect of each of them the applicant has failed to comply with the cumulative requirements contained in s. 50A(7), as discussed in the relevant judgments considered below.

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

21. 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]."

22. 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.

Relevant legal principles

23. 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.

24. First, in considering the points 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 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)).

25. Second, as pointed out by the Supreme Court in *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10 ("*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)

26. 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) that 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.

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

The Glancré principles

28. 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. of 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 and to demonstrate that I have considered and applied all of the principles in considering the applicant's application for leave to appeal in this case, I set them out below.

29. MacMenamin J. summarized the applicable principle 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 that such no 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)

30. In *Ógalas Limited (trading as Homestore and More Limited) v. An Bord Pleanala* [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)

31. In *Dunnes Stores v. An Bord Pleanala* [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)

32. 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 Pleanala & 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)

33. 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 four points put forward by the applicant in light of the Glancré principles and the further discussion of those principles in the judgments just referred to.

The points of law put forward for certification by the applicant

The positions adopted by the parties

34. The applicant has advanced various general submissions in support of the four points put forward by him. He contends that each of the points raised is a point of law of exceptional public importance arising from the principal judgment. He asserts that the points raised (or at least three of the four points) involve issues of EU law and that there is uncertainty in the application of EU law when it comes to standing in environmental cases. He contends that such uncertainty is illustrated by the judgment of the Supreme Court in *Grace and Sweetman*. In particular, he refers to the determination of the Supreme Court in that case ([2016] IESCDET 29) in which the Supreme Court granted the applicants/appellants leave to appeal directly from the High Court to the Supreme Court under Article 34.5.4 of the Constitution on a number of points. The first of the points in respect of which leave to appeal was granted by the Supreme Court was: -

> *"Whether the jurisprudence of this Court on the question of standing in environmental matters requires to be revised in the light of recent judgments of the Court of Justice and, if so, the application of any such revised jurisprudence to the facts of this case;"*

35. The applicant relies on the fact that that question remained unanswered following the judgment of the Supreme Court, as it was unnecessary for that court to determine the point in light of its decision that Ms. Grace had standing under national law. The applicant contends that the fact that the point was not determined by the Supreme Court in that case demonstrates that there is uncertainty in the law and that the existence of such uncertainty means that the points put forward by the applicant are points of law of exceptional public importance. The applicant further contends that the existence of such uncertainty further means that it is desirable in the public interest that the applicant be permitted to appeal to the Court of Appeal in the respect of the points advanced by him. In that regard he further relies on the judgment of Cooke J. in the High Court in *Lofinmackin (an infant) v. Minister for Justice* [2011] IEHC 16. However, the applicant accepts that that judgment is not directly applicable to the present case, having regard to the establishment of the Court of Appeal since the judgment and the possibility that the applicant might be entitled to appeal directly to the Supreme Court. For those reasons, I do not believe that the judgment is of any great assistance in the present case. The applicant contends that it is in any event desirable in the public interest that he should be permitted to appeal in respect of the points raised on the grounds that the issues raised in those points transcend the facts of the present case and are likely to arise in other cases.

36. The Board and the State respondents do not accept any of this. They maintain that there is no uncertainty in the law in relation to standing and, in particular, in relation to the points raised by the applicant, whether as a matter of national law or EU law. They contend that in respect of the court's decision that the applicant does not have the necessary standing under national law, the court was merely applying the relevant legal

principles set out by the Supreme Court in *Grace and Sweetman*. Insofar as the points raised by the applicant concern standing under EU law, they contend that in the principal judgment, the court identified the relevant judgments of the CJEU and the principles to be derived from those judgments and applied them to the very particular facts of this case. They maintain that the court's decision on standing very much turned on the specific facts of the case. They highlight the particular findings of fact made in the principal judgment and note the fact that the impugned decision was to refuse rather than to grant permission in respect of the development proposed by the Council. They contend, therefore, that the points put forward by the applicant do not transcend the facts of the particular case and that a resolution of those points is not likely to resolve other cases likely to arise.

General consideration of the points raised

37. While I will deal with these respective contentions when considering each of the points put forward by the applicant, I should state at this point that I accept the submissions advanced by the Board and the State respondents and reject those advanced by the applicant. I do not accept that the points raised by the applicant transcend the very particular and specific facts of this case or that a resolution of those points on appeal is likely to resolve or determine other cases. I noted at the very outset of the principal judgment that this is one of the most unusual planning cases to have come before the Irish courts, where the applicant, an environmental activist, seeks to challenge a decision to refuse to grant approval in respect of a development, as opposed to challenging a decision granting such permission.

38. Nor do I accept that the relevant national law on standing in cases such as this is in a state of uncertainty. The Supreme Court identified and discussed the relevant national rules on standing in *Grace and Sweetman*. I applied those principles to the very unusual facts of the present case. Nor has the applicant persuaded me that there is any uncertainty in the rules on standing under EU law, in general, or under EU environmental law, in particular. I identified the relevant decisions of the CJEU in the principal judgment and applied the principles derived from those judgments to the very particular facts of the present case. The fact that the Supreme Court did not ultimately have to consider one of the questions certified by it for the purposes of the appeal in *Grace and Sweetman*, as the court was in a position to decide the standing issue under national rules, does not mean that uncertainty exists in the law. I considered the relevant CJEU judgments, including a case C – 664/15 *Protect Natur,* (*"Protect Natur")* which post–dated the judgment in Grace and Sweetman, in the principal judgment. The applicant did not advance any reasons as to how or why it was to be suggested that the court had incorrectly identified or applied the principles derived from those judgments. While it is, of course, not the task of the court to consider the merits of the arguments raised or indeed the strength of any appeal which might be permitted, the court is entitled to expect that some arguments are advanced on the basis of which it might be considered that another view of the law is reasonably or potentially open. The court was not provided with any such arguments in the present case on the basis of which it might form that view.

39. I have concluded that the applicant has not established that any of the points raised by him are points of law of exceptional public importance. I have further concluded that it is not desirable in the public interest that an appeal should be taken to the Court of Appeal in respect of any of those points. I will explain why, both in the context of each of the points raised by the applicant and in further observations at the conclusion of the judgment.

First point of law put forward by applicant for certification

40. The first point advanced by the applicant which he contends is a point of law of exceptional public importance which should be certified is as follows: -

> *"Does the applicant's non–participation in the planning process before the first respondent and his explanation for such non–participation together with the other factors identified in the judgment of the court mean that the applicant does not have a 'sufficient interest' in the matter the subject of the proceedings and therefore lead to the conclusion that the applicant has no standing to bring a challenge to the first respondent's decision?"*

41. While it is unclear from the manner in which the point or question is drafted as to whether this point is specifically directed to that part of the principal judgment in which I found that the applicant did not have standing under national law to challenge the Board's decision. On the face of it, the point appears to be directed to those parts of the principal judgment which found that the applicant did not have standing under national law and under EU law. The applicant has not persuaded me that there is any uncertainty in the law in either area.

42. As regards national law, in reaching my conclusion that the applicant did not have standing under national law, I have reached my conclusion based on the principles of law set out and discussed by the Supreme Court in *Grace and Sweetman*. This is clear, for example, from paras. 31 – 52 of the principal judgment. It is not necessary for me to repeat here what I said in those paragraphs, but a cursory reading of them should demonstrate to the reader that what I was doing was identifying and then discussing the principles set out by the Supreme Court in *Grace and Sweetman*. Having done so, I then set out (at paras. 53 – 62 of the principal judgment) my conclusion on the applicant's standing under national law, applying the principles set out and discussed in *Grace and Sweetman*. I did so in light of the very particular findings of fact made by me at para. 29 of the principal judgment.

43. It was clear from para. 8.5 of the judgment of the Supreme Court in *Grace and Sweetman* that, as a matter of national law, a failure to participate in the planning process would not of itself lead to a conclusion that person did not have standing to challenge the decision but that it might be a factor which could, in an appropriate case, be taken into account in determining the question of standing. It is clear from several other paragraphs in the judgment in *Grace and Sweetman* (such as, for example, paras. 8.2, 8.3, 8.6, 8.7 and 8.8) that many factors may be taken into account in determining the question of standing

as a matter of national law, including a failure to participate in the planning process. That is precisely the approach which was taken in the principal judgment (see, for example, paras. 53 – 62). I made clear at para. 61 of the principal judgment that the applicant's non–participation in the planning process was only one of several factors which I had taken into account in coming to the conclusion that the applicant did not have a "sufficient interest" in challenging the Board's decision. A myriad of other factors were taken into account, as is clear from paras. 53 – 62 of the principal judgment. I am satisfied that it was open to me to take all of those factors into account, having regard to the principles set out and discussed by the Supreme Court in *Grace and Sweetman* and that I was doing no more than applying these principles to the facts of this case. I do not, therefore, accept that there is any uncertainty in the law in relation to the applicant's standing under national law.

44. As regards the applicant's standing under EU law, I considered the relevant legal principles at paras. 63 – 68 of the principal judgment. I referred to the relevant terms of Article 11(3) of Directive 2011/92 and to the observations of the Supreme Court in *Grace and Sweetman* in relation to that provision. At para. 35, and again at para. 65, of the principal judgment, I referred to what the Supreme Court stated at para. 4.4 of *Grace and Sweetman*, where the Court had stated that Member States have a "*material margin of appreciation*" in determining the standing rules to be applied in respect of challenges covered by Article 11, subject to the requirement to ensure that they confer "*wide access to justice*". Further, at para. 65 I also referred to para. 8.4 of the judgment in *Grace and Sweetman* where the Supreme Court stated that the fact that Article 11 of Directive 2011/91 (and Article 9 of the Aarhus Convention) gives status to national standing rules "*necessarily implies that it is open to subscribing or Member States to impose some limitations on those who may have standing*". I then referred to the two judgments of the CJEU on which the applicant relied (Case C – 263/08 *Djurgarden* and Case C – 137/14 *Commission v. Germany*) and to the more recent judgment of the CJEU in *Protect Natur* (on which the Board and the State respondents relied). I proceeded to consider those judgments in some detail, at paras. 71 – 84 of the principal judgment. I concluded that there was nothing in any of those judgments which prevented a national court, as a matter of EU law, from considering, among the factors to be taken into account in determining standing, the non–participation by the applicant in the planning process and any explanation for that non–participation (see. para. 84 of the principal judgment).

45. While contending that EU law on standing in environmental cases is uncertain, the applicant did not put forward any arguments as to why that was so or as to how it might be suggested that the court had incorrectly identified and applied the principles derived from the CJEU judgments to the facts of the case. In order to determine whether there is any basis for the position advanced by the applicant that the law is uncertain in this area, it was incumbent upon the applicant to advance arguments as to why that was so, so that the court could satisfy itself that contrary arguments were reasonably open and that the law was therefore in a state of some uncertainty. However, the court was not provided with such arguments or indeed any basis from which it could conclude that the law is and continues to be uncertain. I have not, therefore, been persuaded by the applicant that

there is any such uncertainty in the law which would support his contention that the point which he seeks to raise is one of exceptional public importance.

46. Nor am I satisfied that the first point raised by the applicant transcends the facts of this case. As observed earlier, I made a series of findings of fact in the principal judgment which were highly relevant to my conclusion that the applicant had no standing under national law or under EU law. The applicant's non–participation in the planning process was merely one of the facts or factors which were taken into account in reaching that conclusion. It was not the main or determining factor as is perhaps implicit in the first point raised by the applicant (see, for example, para. 70 of the principal judgment). The applicant has not sought to challenge the court's reliance on any of the other factors taken into account in reaching its conclusions on the question of standing under national law or under EU law.

47. In summary, therefore, I am not satisfied that there is any uncertainty in the law, or that the first point raised by the applicant transcends the particular facts of this case. In those circumstances, the applicant has not persuaded me that the first point put forward by him is a point of law of exceptional public importance. Even if the applicant had persuaded me of this, I would not have been satisfied that it is desirable in the public interest that the applicant should be permitted to appeal in respect of this first point to the Court of Appeal. The absence of uncertainty in the law is one reason for this conclusion. My further reasons for this are set out separately at the end of this judgment.

The second, third and fourth points of law put forward by the applicant for certification

48. The second point which the applicant wishes to have certified is:

> *"Are Irish national rules on standing in conformity with the EU law requirement in Article 11 of Directive 2011/92 that there be 'wide access to justice'?"*

49. The third point is:

> *"Must Irish national rules on standing, be interpreted in such a way as to confer standing on the applicant to bring these proceedings by virtue of Article 11 of Directive 2011/92 or otherwise in EU law?"*

50. The fourth point is:

> *"Does EU law require the court to uphold the applicant's standing to bring these proceedings?"*

51. The basis upon which the applicant contends that leave to appeal should be granted on the basis of these questions for the purposes of s.50(A)(7) is that some uncertainty exists in relation to standing under EU law as the Supreme Court in Grace and Sweetman ultimately did not have to decide the question of standing in that case on the basis of EU law since the Court found that Ms. Grace had standing under national law and once she

had standing, the Court could proceed to address the further issues in the case without reaching a final determination on the question of Mr. Sweetman's standing.

52. It is appropriate to deal with these three questions together, as in essence they raise one central question, namely, whether EU law requires that the applicant be found to have standing to bring the proceedings. In my view, the points raised by the applicant do not satisfy the *Glancré* principles.

53. The second point raised by the applicant is a hypothetical point and does not directly arise from the decision contained in the principal judgment. The decision was very fact dependent as is clear from the nature of the decision being challenged and from the detailed findings of fact set out in para. 29 of the principal judgment as well as from the conclusions on the applicant's standing under national law and his standing under EU law. In effect, the point raised by the applicant for certification seeks an advisory opinion for the Court of Appeal, completely isolated from the very specific and unusual facts of the case, which is not compatible with s. 50A(70) and the *Glancré* principles.

54. The third and fourth points are also directed to the very particular facts of this case in that they address the question as to whether EU law requires standing to be given to the applicant to bring the proceedings. The particular factual circumstances of the applicant are highly relevant to the determination of that question. Having regard to the very fact sensitive nature of the case and the particular circumstances of the applicant, I do not accept that a resolution of any of these three points is such as would transcend the particular facts of the case and would enable or assist the resolution of other cases. The case is a highly unusual one and several factors were taken into account in the principal judgment for concluding that the applicant did not have standing under Irish law or under EU law. Some of those factors can be seen at paras. 54-61 of the principal judgment. While those factors included the applicant's non-participation in the planning process, this was only one of several factors taken into account. As explained at para. 70 of the principal judgment, the applicant's non-participation in the planning process (and the explanation given by him for that non-participation) were relevant factors but were by no means the only such factors or the decisive factors taken into account. My conclusions on the applicant's standing under national and under EU law were very fact dependent and, in my view, the application of the principles identified in the existing case law (of the Supreme Court and of the CJEU) to the particular facts of this case do not have the required transcendent effect which the *Glancré* principles, and the cases which discuss and apply those principles demand.

55. Apart from that, while professing that the law is uncertain in light of the fact that the Supreme Court in *Grace and Sweetman* did not need to determine the question of standing under EU law, the applicant has not identified any real basis for suggesting that the analysis contained in the principal judgment on his standing under EU law is wrong whether in terms of the principles identified or in the application of those principles. As observed earlier, the task of the court at this stage is not to assess the merits of the arguments or the strength of any appeal which might be permitted and I do not do so.

However, having considered the case law from the CJEU relied upon by the applicant and by the Board and the State respondents, having considered the principles derived from that case law and applied those principles to the particular facts in the principal judgment, it was incumbent upon the applicant to identify some arguments from which it might be considered that a different view might be formed by another. However, the applicant did not undertake that exercise and did not put any such arguments before the court. Nor did the applicant advance any submissions identifying any particular environmental concerns with respect to the impugned decision of the Board which refused permission for the development proposed by the Council.

56. While the Supreme Court in *Grace and Sweetman* did not ultimately have to determine the question of standing under EU law, the judgment of the Court in that case did make important observations in relation to the question of standing under EU environmental law, as I observed at paras. 65 and 70 of the principal judgment. Those paragraphs made reference to Article 11(3) of Directive 2011/92 and to the "*material margin of appreciation*" given to member states in determining the standing rules to be applied to challenges covered by Article 11, subject, of course, to the requirement to ensure "wide access to justice". Having regard to the very particular facts of this case, it is impossible to see a court concluding that "*wide access to justice*" requires that a person such as the applicant be permitted, in the very particular circumstances of the case, to challenge the Board's decision refusing to grant permission for the development proposed by the Council.

57. For these reasons, I am not satisfied that the applicant has established that there is any uncertainty in the law which might require clarification or resolution by a higher court on appeal. As I am not satisfied that there is uncertainty or lack of clarity in the law which should be resolved, I do not believe that it is desirable in the public interest that an appeal be brought to remedy that perceived uncertainty.

58. Even if it could be said that the court was not entitled to take into account the non-participation by the applicant in the planning process (or his explanation for such non-participation) (and I do not accept that that is the case), as noted earlier, many factors were taken into account in leading to the conclusion that the applicant did not have standing under national law or under EU law. The applicant's non-participation was expressly stated in the principal judgment (at para. 70) not to be the only factor or the decisive factor. The other factors considered were set out in the list of factors at paragraphs 54-62 of the principal judgment which it is unnecessary to reproduce again here. The applicant has not challenged the relevance of any of those other factors or the court's entitlement to take them into account.

59. For these reasons, I am not satisfied that the applicant has demonstrated that the 2nd, 3rd and 4th points put forward by him for certification involve points of law of exceptional public importance. I do not believe that any of the requirements set out in the *Glancré* principles have been satisfied in relation to these questions. There is no relevant

uncertainty in the law which would make it desirable in the public interest to grant leave to appeal.

Appeal not desirable in public interest

60. Before concluding this judgment, I wish to make some additional observations in relation to the second of the two requirements contained in s.50A(7) of the 2000 Act (as amended), namely, the requirement to establish that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

61. Having regard to the nature of the decision which the applicant sought to challenge, namely, the Board's decision to refuse to grant permission for the development proposed by the Council at College Green, and having regard to the applicant's description of himself as an "environmental activist" with a particular interest in the coastal areas of Ireland as well as his significant geographical distance from College Green, it would, in my view, be hard to think of a case in which it was less desirable in the public interest for there to be an appeal to the Court of Appeal or to any other court in this case. Such a course of action would amount to a monumental waste of court time and resources and would, having regard to the costs provisions contained in s.50B of the 2000 Act (as amended), expose the Board and the State respondents to very significant further costs which they may not be awarded (by reason of s. 50B) or may not be able to recover from the applicant, who has not put forward any real environmental concerns in relation to the impugned decision to refuse permission for the development.

62. I have to ask myself what conceivable public interest could be served by permitting an appeal in the present case in light of all of these considerations? I can see none. Having regard to the nature of the decision challenged and the particular circumstances of the applicant, as well as the ongoing exposure of the Board and the State respondents to further costs in the context of the costs regime contained in s. 50B, as well as the relative scarcity of court resources and the need to ensure that resources are allocated to cases involving real, concrete and genuine environmental concerns, I have no doubt whatsoever that it would not be in the public interest to grant leave to appeal from my decision contained in the principal judgment to the Court of Appeal.

Conclusions

63. In conclusion, I am not satisfied that any of the points or questions put forward by the applicant involve points or questions 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, having regard to the nature of the decision challenged and the particular factual circumstances of the case. In those circumstances, the cumulative requirements of s.50A(7) of the 2000 Act (as amended) have not been satisfied by the applicant. Accordingly, I refuse to grant leave to appeal to the applicant.

64. For reasons set out earlier in this judgment, I also refuse the applicant's application to amend the principal judgment.