THE HIGH COURT
JUDICIAL REVIEW

[2023] IEHC 19
2022/48JR

BETWEEN:

ECO ADVOCACY CLG

APPLICANT

-AND-

AN BORD PLEANÁLA

RESPONDENT

-AND-

KEEGAN QUARRIES LIMITED
MEATH COUNTY COUNCIL

NOTICE PARTIES

Judgment of Mr Justice Cian Ferriter this 19th day of January 2023

Introduction

1. This is my judgment on a contested application for leave to apply for judicial review pursuant to s. 50 of the Planning and Development Act 2000 ("*s.50*" and "*the 2000 Act*") in respect of a decision of the respondent ("*the Board*") of 17 November 2021 pursuant to which the Board granted permission for a proposed development consisting of various steps to restore a now disused quarry in Co. Meath to agricultural use. One area of the site adjoins the Blackwater River.

2. The specific development for which permission was granted is as follows: *"(a) use of existing stockpiles for site restoration at a quarry, (b) importation to the quarry of inert excavation spoil comprising natural materials of clay, silt, sand, gravel or stone for the purposes of restoration of a previously extracted area to restore the site to a beneficial agricultural and ecological after use (5.85 hectares), (c) temporary portacabin offices and staff facilities 100 square metres, (d) wheel wash and weighbridge 134 square metres, (e) site entrance and access road, (f) lockable access gate at the pit entrance, (g) all other ancillary buildings, plant and facilities for the restoration, and all ancillary site works at a closed quarry site occupied by the Notice Party at Newcastle, Enfield, County Meath*."

3. The applicant company is an environmental non-governmental organisation (NGO) established in 2015 to advocate, *inter alia*, on issues of planning and environmental law. The moving force behind the applicant is Kieran Cummins of Rathmolyon, County Meath. Mr. Cummins swore an affidavit verifying the statement of grounds and supporting the application for leave. While the Board is the respondent, it did not participate in the hearing of the application for leave. The application for leave was contested by the first notice party, Keegan Quarries Limited ("*Keegan Quarries*" or "*the notice party*", for ease). Replying affidavits were sworn on behalf of Keegan Quarries by John Keegan, a director of Keegan Quarries.

4. Part of the relevant background is that the Board granted substitute consent for an unauthorised quarry at the location in October 2014 subject to a condition requiring the remediation of the quarry within 24 months of the agreement of a restoration plan ("the 2014 substitute consent"). The applicant contends that no restoration happened on foot of that consent. The applicant contends that Keegan Quarries continued extracting material from the quarry after the grant of the 2014 substitute consent in a manner that amounted to unauthorised development and that the expanded void/subsequently worked areas on the site were not the subject of a planning permission or an Environmental Impact Assessment (EIA) or Appropriate Assessment (AA).

5. Keegan Quarries accepts that it carried out some quarrying activity on the site after the grant of the 2014 substitute consent and up until 2019. It contends that this was a continuation of the natural and proportionate working out of the pre-1964 quarry which had been on the site and refutes the contention that this constituted unauthorised development. It appears that Meath County Council instituted enforcement proceedings against Keegan Quarries in 2015 relating to this continued extraction but Keegan Quarries maintains that these proceedings have long since been moot save as to the form of restoration to be implemented and that the Board's permission effectively addresses the restoration issue.

6. Apart from the applicant, the only other objector in the process before the Board was a Mr. Thomas Donegan from whom Keegan Quarries purchased the quarry site, that sale being completed in 2006. It appears that proceedings were taken by Keegan Quarries against Mr. Donegan arising out of alleged attempts by him to block access to the site following the grant of the impugned permission. Keegan Quarries contends that the applicant is motivated by *animus* in these proceedings and that the applicant has actively sought to object to a whole series of developments which Keegan Quarries have been party to. I regard those matters as immaterial to this leave application.

7. I should also note, by way of relevant background, that Meath County Council granted Keegan Quarries a waste permit licence on 26 August 2022 which Keegan Quarries had sought in furtherance of implementation of the impugned decision, given that part of the process of restoring the quarry to agricultural use involves the importation of inert material onto the site. I was told that the applicant has issued proceedings seeking leave to quash the waste permit licence by way of judicial review, but that the relevant leave application (which will also be contested) has not yet been heard.

8. It appears that, at the time that I heard the contested leave application, phase one of the permitted works the subject of the impugned decision (being the infill of the void on the site from stockpiles of excavated material on site) has been completed, such that the large pool that had been in the excavation pit on the site has now been filled in, and that various infrastructural works the subject of phase two of the impugned permission (such as the construction of a wheel wash and a weighbridge) have also been completed.

Summary of applicant's case and Keegan Quarries' response

9. The applicant has pleaded some fourteen grounds in its statement of grounds, which were presented in accordance with the prevailing practice for presentation of statements of grounds in the Strategic Infrastructure List. Those fourteen grounds were helpfully grouped into three essential sets of grounds at the leave hearing, being, firstly, a set of grounds to the effect that alleged unauthorised development subsequent to the 2014 substitute consent decision tainted the impugned decision; secondly, a set of grounds alleging legal error in the application of the Appropriate Assessment (AA) requirements of the Habitats Directive as implemented into Irish law (namely, that an AA was required where the development gave rise to a likely significant effect on the environment and no stage 2 AA had been done here); and, thirdly, a set of grounds relating to alleged breaches of specified Irish and EU law public notification obligations, including in relation to matters said to relate to waste handling on the site.

10. The first set of grounds relate to the contention, already noted, that Keegan Quarries continued extracting material from the quarry after the grant of the 2014 substitute consent in a manner that amounted to unauthorised development and that such development was not the subject of a planning permission or an Environmental Impact Assessment (EIA) or Appropriate Assessment (AA). It is said that the focus of these grounds is on what happened since 2014 and does not involve any collateral challenge to the 2014 substitute consent.

11. In relation to the second set of grounds, the applicant contends that Keegan Quarries accepts that otters using the development site are likely to travel there from the River Boyne and River Blackwater SAC which was designated for their protection. It says that the Board erred in adopting the Inspector's conclusion that the disturbance of the otters 'would not be excessive' which, it says, does not meet the test of 'not likely to have a significant effect' for AA screening within Article 6(3) of the Habitats Directive; it also says that the Board erred in relying on a mitigation measure of a 65-metre setback from the works to the waterbody as part of the AA screening.

12. In the third set of grounds, the applicant contends in summary that the permission granted relates to development which comprises, or is for the purposes of, an activity requiring a waste licence and no indication of that fact was given on the site notice and no consultation occurred between the Board and the Environmental Protection Agency which is the licensing authority for waste licences. It further contends that no drawings or details were before the Board to describe the nature of the landfill structure, its lining and other design attributes for the control of emissions from the waste.

13. In broad terms, Keegan Quarries' position can be summarised as follows. Firstly, it says that many of the applicant's grounds are not legitimately raised as they were not raised before the Board during the appeal process despite the applicant's full participation at that point and that no attempt has been made on affidavit now to explain why those grounds were not raised previously, relying in this regard on *dicta* of MacGrath J. in *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 ("*M28 Steering Group*"), at para. 118, and the decision of McDonald J. in the *Highland Residence Association v. An Bord Pleanála* [2020] IEHC 622 ("*Highland Residence*") which emphasise the impermissibility, in broad terms, of such an approach. Further, it says that many of the grounds the subject of the leave application impermissibly go to the merits of the Board's decision and not the lawfulness of how the decision was arrived at citing, on this argument, *dicta* of McDonald J. in *O'Neill v. An Bord Pleanála* [2020] IEHC 356 at paras. 64 and 65. Keegan Quarries next says that other grounds are simply not arguable as they seek to challenge factual findings where no irrationality is alleged and where those findings were grounded in the material before the Board and are, accordingly, unimpeachable in judicial review. Finally, it contends that the first group of grounds related to alleged unauthorised development on the site constitute an impermissible collateral attack on the 2014 substitute consent decision, a decision which was not challenged by the applicant at the time and cannot be challenged through the back door now.

The Legal test

14. Section 50A(3) of the 2000 Act provides that the court shall not grant leave under s.50 unless it is satisfied that there are "*substantial grounds*" for contending that the decision concerned ought to be quashed and that the applicant has a "*sufficient interest*" in the matter which is the subject of the application. Section 50A(3) also gives standing to environmental NGOs to seek leave to apply for judicial review where the development in question may have significant effects on the environment.

15. There is no dispute as to the legal test applicable to the "*substantial grounds*" requirement. As set out by Carroll J. in *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 at 130, if a ground is to be substantial "*it must be a reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous*."

16. In relation to the requirement of "*sufficient interest*", it is common case that prior participation in the process before the decision-maker leading to the impugned decision is generally regarded as sufficient to give an applicant standing under s.50A(3) (see *Grace and Sweetman v. An Bord Pleanála* [2020] 3 IR 286 at para. 54). It is not disputed that the applicant has sufficient interest here given that it participated in the appeal to the Board which led to the impugned decision. However, Keegan Quarries does strongly press the point that the applicant now seeks to raise grounds of challenge which were not raised by it before the Board during the appeal process and submits that the applicant should not be granted leave in respect of such grounds particularly where the applicant has not sought to explain on affidavit why those grounds were not advanced before the Board. Keegan Quarries relies in this regard on the *dicta* of McDonald J. in *Highland Residence* at para. 14.

17. The applicant does not accept that any of the grounds sought to be advanced by it fall into the category of grounds which cannot be advanced now because they were not raised before the Board. It submits that all of the grounds were either raised in substance during the course of the appeal to the Board or flow from legal errors manifest in the terms of the impugned decision which can be perfectly legitimately challenged now.

18. As a fall-back, the applicant submitted that, in any event, it has full standing to raise all grounds it raises as an environmental NGO. It relies in this regard on the judgment of the CJEU in the case of *LB & ors v. College van burgemeester en wethouders van de gemeente Echt-Susteren* (Case C-826/18, 14 January 2021) (commonly known as "the distressed pigs case") where the CJEU held that the terms of the Aarhus Convention were

such that an environmental NGO was entitled to bring legal action against a planning decision relating to environmental matters notwithstanding that it had not participated in the process leading to the decision sought to be impugned. However, on the face of it, the CJEU in that case (at para. 68 of its judgment) expressly held that it did not appear to be necessary to determine whether the relevant provisions of the Aarhus Convention only permitted in such legal action complaints directed against the same aspect of the contested decision as those which were the subject of observations by the applicants during that procedure. In any event, for the reasons that I will come to, I am satisfied that the applicant here has a sufficient interest in respect of all of the grounds which it seeks leave to advance in these proceedings such that I do not need to consider any wider EU law question as to the question of the extent of restrictions on the grounds that may be advanced by an environmental NGO in a challenge to a decision arising from a process in which it did not participate.

Analysis of leave application

19. I propose now to analyse the leave application by reference to each of the three groups of grounds in turn. Given that this is a leave application, I propose to say as little as necessary in relation to the merits of the grounds advanced given that the focus of the court at this point is simply on whether those grounds disclose substantial grounds within the meaning of the applicable case law.

First group of grounds: decision is in effect an impermissible retention permission for unauthorised post-2014 development that required an EIA when no such EIA conducted

20. The applicant's core point in respect of this group of grounds is that Keegan Quarries engaged in unauthorised development subsequent to the 2014 substitute content decision by engaging in impermissible levels of excavation at the quarry site. It contends that such development would have required an Environmental Impact Assessment Review (EIAR) under the EIA Directive as implemented in Irish law, an AA under the Habitats Directive as implemented in Irish law and a further grant of substitute consent, and that in the absence of those steps, the Board had no jurisdiction to grant the impugned permission which effectively amounted to an impermissible retention permission for unauthorised post-2014 development. The pleaded grounds relevant to this contention were ground E2, which contends that there has been a breach of the provisions of the 2000 Act (ss. 34(12), s. 177C(1), s. 177D(1) and s. 177E(1)) relevant to a substitute consent where an EIA was required; ground E10, which relates to the corresponding EU law requirements contained in Article 2(1) of the EIA Directive as made clear from the CJEU decision in the *Derrybrien* case (Case C-215/06); and ground E11, which relates to an alleged failure to

remediate the failure to conduct a (backward looking) EIA in relation to the alleged post-2014 unauthorised development.

21. Keegan Quarries contends that no substantial grounds are raised by the applicant in respect of this set of grounds in circumstances where the set of grounds are said to amount to a collateral attack on the 2014 substitute consent decision which the applicant did not challenge at the time. Keegan Quarries also complained that the applicant sought to rely on facts at the leave application hearing (based on maps showing the extent of excavation at different points in the quarry's existence) which were not explained in such terms to the Board at the time of the appeal.

22. In my view, the applicant has raised substantial grounds in respect of this set of grounds and has established a sufficient interest in raising those grounds. The applicant in its appeal submissions to the Board clearly contended that, *inter alia*, unauthorised development (involving the creation of lakes on site) was done after the 2014 substitute consent process and that the application before the Board was essentially one for the retention of pre-existing unauthorised development. It was pointed out that, despite an enforcement notice from the planning authority in 2015, Keegan Quarries allegedly continued to "*operate and eventually created a very dangerous enormous lake without any planning consent whatever*". The Inspector expressly engaged with and rejected these contentions in his report. The applicant seeks leave to contend, in essence, that the Board erred in law adopting that conclusion. As the focus of these grounds is on what allegedly occurred subsequent to the 2014 substitute consent decision, and the legal consequences of same, I do not believe it can be said that this is so obviously a collateral attack on the 2014 substitute consent decision that the applicant should be shut out from advancing these grounds. I believe it would be more appropriate for the court at a full hearing of the judicial review to assess all relevant facts and legal argument in arriving at a just decision on these grounds and, accordingly, I propose to grant leave to the applicant to advance each of grounds E2, E10 and E11.

Second group of grounds: Allegedly invalid AA as no stage 2 AA conducted when one was legally required

23. This group of grounds comprises ground E3 (which alleges a breach of s. 177S(1) and s. 177U(1) to (4) of the 2000 Act which implement in Irish law the requirements of appropriate assessment of a European site pursuant to the Habitats Directive); ground E9 (which pleads Article 2(1) EIA Directive), and grounds E12, E13, E14 and E15 (which plead an alleged failure under EU law to conduct a stage 2 AA as required by the Habitats Directive, relying on the low trigger for same in the authorities, and also plead that the

Board improperly took mitigation measures into account at the screening stage contrary to EU law).

24. The applicant constructs its case on this issue on the basis that Keegan Quarries accepted in its AA screening report that there were otters on site (otters being a relevant protected species in the nearby European site for the purposes of the Habitats Directive) and that Keegan Quarries' consultants said in their EIAR that otters would be undisturbed by the proposed development because the work will in fact be stepped some 65 metres back from the Blackwater River. The applicant contends that the Inspector and Board in substance relied on the fact that the works would be some 65 metres back from the river as a mitigation measure, when it is inappropriate to rely on a mitigation measure in arriving at a conclusion that there is no likely significant effect on the environment, at AA screening stage, such as to conclude that a stage 2 AA was not required.

25. Keegan Quarries pushes the case, in opposition to the grant of leave on these grounds, that the applicant did not make any case before the Board in relation to otters and AA requirements. It says that the applicant is impermissibly conflating "*apples and oranges*" by taking a proposed EIAR mitigation planning measure and seeking to insert it into the AA screening process to contrive an alleged breach of AA requirements. Keegan Quarries says that the Inspector made unimpeachable factual findings within his jurisdiction to the effect that the evidence before him was "*that potential disturbance to otters arising from the proposed activity would not be excessive during infilling and would cease thereafter*" leading him to be satisfied that "*the ex situ impact on otters would be negligible and would not be likely to have significant effects on the River Boyne and Blackwater SAC and its objective to protect the conservation position of the otter population therein*" (addendum to Inspector's report, para. 2.3.18). It submits that this finding is unimpeachable in judicial review terms as no case in irrationality is pleaded. It says that the applicant did not put in any expert or other evidence to disturb that finding.

26. The applicant, for its part, says that this set of grounds is a perfectly legitimate set of grounds based on the legal proposition that if a stage 2 AA was required, it was required irrespective of whether or not it was sought by an objector in the process (citing in this regard the decision of Finlay Geoghegan J. in the *Ted Kelly* case). The applicant's central contention on these set of grounds was that the 65-metre setback was, in truth, a mitigation measure such as to require a stage 2 AA, and its argument in this regard was based on an application of the objective test set out by McDonald J. in *Sweetman v. An Bord Pleanála (IAGP Solar case)* [2020] IEHC 39 at paras. 89 and 90.

27. In my view, this set of grounds constitute substantial grounds within the applicable test. I cannot conclude at this point that the grounds are tenuous or are not, on the face of them, reasonable, arguable or weighty. I also believe that the applicant has established a sufficient interest in raising these grounds in circumstances where the grounds focus on alleged legal error in EU law obligations (flowing from the Habitats Directive) which the Board is obliged to comply with in arriving at its decision and where the applicant participated in the process leading to that decision. I believe it would be more appropriate for the court at a full hearing of the judicial review to assess all relevant facts and legal argument in arriving at a just decision on these grounds (including whether the applicant is entitled to rely on these grounds at all in the overall circumstances of the case) and, accordingly, I propose to grant leave to the applicant to advance each of grounds E3, E9, E12, E13, E14 and E15.

Third group of grounds - Public notification points: Waste licence, not waste permit, required and waste licence not notified and also breach of art 22(4)(a) 2001 Regs re absence of proper plans and drawings (i.e. such plans as are necessary to describe the works)

28. The third group of grounds include ground E4 (which alleges a breach of s.172(IJ) of the 2000 Act in relation to conditions 2(d) and 3 of the impugned decision which contain a requirement that no development shall commence "*prior to the issuance of the necessary waste authorisation*"); ground E5 (which alleges a breach of Article 22(4)(a) of the Planning and Development Regulations, 2001 which requires a planning application to set out such plans and particulars "*as are necessary to describe the works to which the application relates*"); ground E6 (which relates to an obligation to send to the Board plans and particulars of the proposed development, which is said to have been breached in light of the terms of condition 7 of the impugned decision); ground E7 (which relates to the obligation in Regulation 19(1)(a) of the 2001 Regulations to the effect that a site notice must reference any need for a waste licence, it being alleged that there was such a requirement here which the site notice failed to identify); and ground E8 (which relates to s.173B(5) of the 2000 Act, imposing an obligation on the Board to consult with the EPA where a waste licence is required).

29. This set of grounds effectively raises two issues. The first is a contention by the applicant that the nature of the waste which is sought to be brought on site to close out the backfilling includes commercial waste on development sites such that a waste licence and not just a waste permit was required. Secondly, it is contended that condition 7(a) of the permission the subject of the impugned decision (which states that "*prior to the commencement of the development, drawings shall be submitted to, and agreed in writing with, the planning authority which shall detail existing and proposed ground levels, water table levels, the provision of the 65-metre buffer zone between the works area and the edge of the River Blackwater, longitudinal and cross-section drawings and*

proposed locations of infilling operations which shall remain above the water table") is such as to make clear that core elements of the development now the subject of the permission were simply not notified in a way that an objector could meaningfully engage with during the appeal process.

30. Keegan Quarries submits in relation to these various grounds that, while the applicant raised waste licence issues during the appeal process in the context of the level of tonnage that may be involved, it did not raise any issues in respect of the type of material involved and that these grounds involve an illegitimate attempt to raise matters which were not before the Board. Keegan Quarries says that topographical drawings and information as to what was proposed in the development were before the Board and that condition 7(a) was simply sensibly conditioning the implementation of the permission of the development which was otherwise clearly notified. It also makes the point that the waste permit it has been issued with is confined to clean waste and there cannot be any substantial ground disclosed based on a contention that, in essence, Keegan Quarries will act in breach of its permit by bringing in non-clean waste. Keegan Quarries also expressed the concern that separate proceedings have been lodged in respect of the waste licence issue and it would be inappropriate to have those matters also ventilated in these proceedings.

31. On balance, I am persuaded that this set of grounds discloses substantial grounds in that they identify legal issues stemming from the impugned decision in respect of which there are, on the face of it, reasonable, arguable and weighty grounds of challenge and that the applicant has established a sufficient interest in raising those grounds, given that waste-related matters were raised by it (at least in broad terms) at the appeal stage and the terms of condition 7(a) raise a substantial ground as to whether more detailed plans were required at the outset of a process in which the applicant participated. As with the second set of grounds, I believe it would be more appropriate for the court at a full hearing of the judicial review to assess all relevant facts and legal argument in arriving at a just decision on these grounds (including whether the applicant is entitled to rely on these grounds at all in the overall circumstances of the case). I will accordingly grant leave to the applicant to advance each of grounds E4, E5, E6, E7 and E8.

Concluding observations

32. It follows from the terms of this ruling that I am granting leave to the applicant to advance each of grounds E2 to E15 by way of judicial review in these proceedings.

33. In so concluding, I wish to make clear my view that it is of course fully open to Keegan Quarries (and, indeed, the Board) to raise all such defences to these grounds that they believe appropriate including any defences to the effect that a point cannot succeed following the full hearing of the judicial review because it was not raised, or not raised sufficiently, by the applicant at appeal stage before the Board and that any such failure to raise at appeal stage has not been sufficiently justified within the meaning of the authorities.

34. In my assessment, this is a situation where the just determination of the question as to whether grounds were raised before the Board or legitimately arose out of points made to the Board cannot be made in the absence of a full hearing. It will be for the judge dealing with the full hearing to determine whether the grounds on which leave has now been granted are grounds which can legitimately sound in final relief and to consider the application of the applicable tests to those grounds as set out in case law such as *M28 Steering Group and Highland Residence* (insofar as these issues are pursued by Keegan Quarries and/or the Board at the full hearing).

35. Equally, neither Keegan Quarries nor the Board can be shut out from raising points of defence in these proceedings arising from any overlap (permissible or otherwise) between the grounds advanced in these proceedings and those sought to be advanced in the intended separate proceedings in relation to the waste permit licence.

36. I should also emphasise that this grant of leave does not mean that the applicant is entitled to a stay on any further work at the site pending determination of this judicial review. If the applicant seeks such a stay, an appropriate application will have to be brought grounded on affidavit with an opportunity to Keegan Quarries and the Board to reply and the Court will have to consider at that point whether the circumstances are such as to warrant a stay.

37. In the circumstances, I propose to put the matter back for mention at 2pm on Monday 30th January next to allow the parties to consider their positions in light of this ruling. I can give any further directions at that point in relation to any stay application, if one is sought.