THE HIGH COURT

[2017 586 JR]

[2024] IEHC 476

BETWEEN:

PATRICK McCAFFREY AND SONS LTD

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

Ex Tempore JUDGMENT of Ms. Justice Gearty delivered on the 26th of July, 2024

1. Introduction

1.1 This Applicant Company, the owner of a limestone quarry in Donegal, lost its application to quash two decisions of the Planning Appeals Board: a decision to dismiss an application for substitute consent to continue its quarrying operations and a decision to refuse conventional planning permission for further development at the same site. That judgment is dated 14th June and can be found at [2024] IEHC 315.

1.2 The Applicant now seeks leave to appeal the decision of the Court, which must be refused. The application is, in many respects, made without reference to findings of fact of this Court, in particular, that the direction to apply for substitute consent referred to the entire quarry and not just to one part of it. This finding means that arguments about the quarry being a pre-1964 development are simply not relevant as

it is common case that the whole quarry encompasses areas which are still being developed and which extend far beyond any pre-1964 user.

1.3 The remaining arguments either repeat submissions in respect of which other Courts have refused leave to appeal, including the Supreme Court, or rely on a misleading summary of the state of the law in this regard. Finally, the Applicant also relies on assertions of confusion and an inability to apply the law on its own part and on the part of other quarries. This same argument was rejected *in Fursey Maguire and Ors. v. An Bord Pleanála* [2023] IEHC 209 and is rejected here for the same reasons.

1.4 The application for leave to appeal is refused.

2. Leave to Appeal: Provisions and Recent Cases

2.1 Leave to appeal is governed by s.50A(7) of the PDA 2000 which provides:

"*The determination of the Court of an application for [s.]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 …*"

2.2 The requirements under s.50A(7) are cumulative: the point must be of exceptional public importance and, in addition, it must be in the public interest that an appeal be brought. The statutory test and applicable legal principles relevant to an application under s.50A(7) are set out in *Monkstown Road Residents Association v. An Bord Pleanála* [2023] IEHC 9 and *Fursey Maguire*, both of which were relied upon in this application.

2.3 Before examining the relevant tests, a significant factor in this application was that it was based on a version of events which has been rejected, as a matter of fact, by this Court. In these circumstances, it is not possible for the Court to accept that a matter of law, as identified on misstated facts, can truly arise. Despite the fact that this dispenses with practically every argument made, I have considered each submission.

2.4 The starting point for me is identified by Barniville J in *Rushe v ABP* [2020] IEHC 429:

"*The clear intention of the Oireachtas in enacting s.50A(7) (and its statutory predecessors) was that, in most cases, the decision of the High Court on an application for leave to seek judicial*

review in respect of a planning decision or on an application for judicial review of such a decision should be final and should not be the subject of an appeal".

2.5 The principles to be applied in considering whether to certify that leave for an appeal should be granted are well established. The most relevant are recited in the next few paragraphs, followed by a recitation of the Applicant's six proposed questions.

2.6 The point of law identified as appropriate for an appeal must arise out of the decision of the High Court and not from consideration of a point of law during the hearing. A point the court did not decide, or that does not arise from the evidence or the pleadings in the case, cannot amount to a point of law of exceptional public importance.

2.7 The application for a certificate for leave to appeal must not be used to "*recalibrate*" the case in response to the judgment: *Hellfire Massy (No.2)* [2021] IEHC 636, per Humphreys J. This Applicant attempts to do so, impugning *Westland and Bulrush* [2018] IEHC 58, and relying on Case C-268/06 *Impact* (ECLI:EU:C:2008:223), cases not raised at hearing.

2.8 The law in question must be in a state of uncertainty or evolution. If the law is clear and the Applicant has lost on the basis of an application of established legal principles to the facts of the case, then no uncertainty can arise. Uncertainty cannot be imputed to the law simply by raising a question as to the point of law. Here, it is submitted that the law is uncertain as the points raised have been not been determined by the Court of Appeal or the Supreme Court. This is not a basis on which a court could grant a certificate of appeal. There is no uncertainty in the law in this respect and the judgments of the High Court are *ad idem* as to how the Directives should be applied.

2.9 Contrary to the Applicant's submission, I have considered the proposition that Ní Raifeartaigh J. may be wrong. As set out in my judgment, with relevant quotations from her judgment and by analogy with this case, I consider her to be correct in her logic and am not just bound by the doctrine of comity to agree with her. Just as persuasively, other High Court Judges have done likewise; O'Regan, Ferriter and Hyland JJ. in turn. None of these would hesitate to distinguish or disagree with an earlier judgment if they considered it had been wrongly decided, nor would I. But none of us criticised the logic or reasoning applied in *Flood v. An Bord Pleanála* [2020] IEHC 195. This is not because we have not considered that she may be wrong, but

because we have considered each case on its own facts, agreed with the reasoning of Ní Raifeartaigh J. in *Flood* and applied it, seeing no *Worldport* basis on which to distinguish *Flood*. [*Worldport*: [2005] IEHC 189]. Each judgment involved applying logical principles to the facts. *Flood* has been followed so often that the principles set out therein are not only logical, they can now be described as well-established.

2.10 Finally, in terms of stating the principles applying to this application for leave to appeal, the jurisdiction to certify such a case must be exercised sparingly.

3. The Grounds of Appeal

3.1 The Applicant has posed the following questions as raising suitable points of law for a certificate of leave to appeal on the facts of this case:

i. *Does the EIA Directive apply retrospectively to a quarry operating prior to the 1st of February 1990?*

ii. *Does the Habitats Directive apply retrospectively to a quarry operating prior to the 26th of February 1997?*

iii. *If the answer to the above questions is in the affirmative, can the EIA / Habitats Directives lawfully apply retrospectively to activity which occurred prior to the operative date of the Directives such that the development carried out before those dates could be required to be subject to an assessment and / or restoration?*

iv. *Does the Irish presumption against the retrospective application of legislation preclude the retrospective application of the EIA/ Habitats Directives to established development (development commenced before 1st October 1964) or otherwise operating prior to the transposition dates of 1st February 90 / 26th February 97?*

v. *Is an Environmental Impact Assessment required in respect of a quarry operating under a pre-1964 established user?*

vi. *Is an Appropriate Assessment required in respect of a quarry operation under a pre-1964 established user?*

3.2 All six proposed points are hypothetical questions, posed in the abstract and bearing no relation to the factual findings of this Court. Firstly, the questions, in reality, seek advisory opinions from an appellate court in respect of areas which do not arise in this case. Secondly, this area of law is now well established and is not uncertain. Thirdly,

the main issues raised here (that the Directives cannot be applied retrospectively or cannot be applied to a pre-1964 quarry and that *Flood* was wrongly decided) were raised as potential appeal points in *Fursey Maguire* and in *McMonagle*, they were rejected by Hyland and Ferriter JJ: [2023] IEHC 209, [2023] IEHC 487. They were raised in *Liscannor Stone Limited* [2020] IEHC 651 and rejected there by O'Regan J. who also refused the applicant a certificate for leave to appeal: [2021] IEHC 258.

3.3 There is no evidence of uncertainty in the operation of the law in question insofar as the Directives clearly apply to a quarry such as this one, still in development and featuring large sites, the subject of intensive development for decades. Arguments about the effect of the law on areas of under 5 hectares are not relevant to this case.

3.4 The fact that quarry owners may be subject to regulatory law in respect of pre-1964 works is not a matter of concern, although it may be a matter of inconvenience and expense to the owners and operators. But this is a matter in respect of which the legislature is perfectly entitled to make new rules and impose sanctions. Not only is it entitled to do so, it is obliged to do so as a matter of EU law. This is not a question of imposing a criminal sanction on a retrospective basis but of directing current reports to assess and remediate ongoing and past works, and their effects, over decades.

3.5 There will be no question of criminal or, more accurately, regulatory sanction if the Applicant abides by the directions of the Respondent and the planning authority. Applying the relevant principles to these facts, however, and as already stated, this Applicant is operating a development which has been in use and intensifying over a period long after the date of commencement of the two Directives so any hypothetical question about the possible retrospectivity of the Directives insofar as a pre-1964 quarry is concerned, remains just that: entirely hypothetical.

3.6 The Applicant relies on *Impact*, a case about trades unions to put forward the argument that Irish courts are not required to apply laws retrospectively unless it is clear from the domestic provision that it has retrospective effect. Apart from this being an attempt to recalibrate the case, *Impact* cannot apply where, on the facts found, the requirements for an Environmental Impact Assessment and an Appropriate Assessment arise in respect of an entire ongoing development, only one part of which has been in operation for decades. Furthermore, these domestic provisions, by way of the

substitute consent procedure, clearly and expressly envisage an element of retrospective review – insofar as a current assessment of habitats or environments, with a view to identifying, assessing and remediating the current effects of any damage done over decades, can be said to be truly retrospective.

3.7 The Applicant's submissions contain hypothetical assertions to the effect that its owners, and other quarry owners and operators, are uncertain as to how to apply the law set out in *Flood* and in this Court's judgment. Significantly, this submission was unsupported by evidence. Leaving aside that the law set out in *Flood* has been applied consistently by the courts for years since that decision was handed down and poses no difficulty in interpretation for planning authorities, an evidence-free submission cannot be a basis for the certification of questions of law to an appeal court.

3.8 The Supreme Court refused leave to appeal to the applicant in *Phoenix Rock Enterprises v. An Bord Pleanála & Ors* [2023] IESCDET 97 on comparable grounds. There, the Supreme Court rejected assertions made by that applicant that the High Court judgment created difficulties for the quarrying industry, on the basis that there was "*no evidence before the High Court that the quarry industry was being seriously affected by the issues in the case*", and that *"[t]he decision in this case was fact-specific to this quarry and it must be recalled that the role of the Supreme Court on an Article 34 appeal is not to give advisory opinions but to deal with the controversy at issue between the parties once the constitutional thresholds have been met*." These comments apply here.

3.9 All of the last arguments made by the Applicant are expressly based on the submission that it disagrees with factual findings made by the Court. On this basis, it is a straightforward matter to reject these grounds as they do not arise on the facts of the case. They cannot, therefore, constitute points of law of importance arising from this case, nor can it be to the benefit of the public that they be argued afresh.

3.10 None of the questions posed can affect the outcome of this case. The Court has concluded that the entire quarry was to be considered in applying for substitute consent, in a direction that was not appealed, and that the directed application was not made by the Applicant such that the Respondent cannot be faulted for dismissing it. None of the questions bear on these issues and are not appropriate for certification.

3.11 The application for a certificate of leave to appeal is refused.