THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED).

[2023] IEHC 209

Record No. 2013/567JR

Between

FURSEY MAGUIRE, IVAN PRATT AND FRANK PRATT T/A FRANK PRATT & SONS LIMITED

Applicant

and

AN BORD PLEANÁLA

-and-

MEATH COUNTY COUNCIL AND IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2020/438JR

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED).

Between

PHOENIX ROCK ENTERPRISES LIMITED T/A FRANK PRATT & SONS LIMITED

Applicant

and

AN BORD PLEANÁLA

-and-

IRELAND AND THE ATTORNEY GENERAL

Respondents

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 13 March 2023

Introduction

1. On 12 December 2022 I delivered two judgments in two separate cases that were not formally linked but nonetheless were factually intertwined. In the case of *Fursey Maguire* (Record No. 2013 No. 567JR), I refused the application for an Order quashing the Board's decision of 29 May 2013 under s.261A(4)(a) of the Planning and Development Act 2000 as amended, whereby the Board had upheld a decision of the Council that the Moyfin quarry, owned by the applicants, required a mandatory EIS and Appropriate Assessment under the Habitats Directive.

2. In the case of *Phoenix Rock Enterprises* (Record No. 2020/438JR), I refused an application for an Order quashing the Board's decision of 11 May 2020 under s.177D of the 2000 Act refusing leave to bring an application for substituted consent in respect of the quarry at Moyfin.
3. The applicants in both cases seek to appeal those decisions. The appeal sought to be brought is subject to the special statutory judicial review procedure provided for under s.50A(7) of the 2000 Act. As noted by Simons J. in *Halpin v An Bord Pleanala* [2019] IEHC 352, one of the features of the procedure is that there is no automatic right of appeal to the Court of Appeal: rather a person seeking to appeal must obtain leave from the High Court.

Application for leave to appeal

4. An application for leave to appeal has been made in both cases. The applicants have by way of legal submissions of 22 February 2023 identified 12 different questions, all of which they say raise a point of law. Four of those questions are in the context of the *Fursey Maguire* proceedings and eight are in the context of the *Phoenix Rock* proceedings. The Board provided written submissions on 7 March 2023 and the application for leave to appeal was heard before me on 9 March 2023. The notice party, Meath County Council, indicated that they would not participate in the leave to appeal process.
5. The questions are as follows:

   Fursey Maguire Proceedings

   1) *In circumstances where pursuant to s.261 of the PDA 2000, a planning authority makes a determination that a quarry is pre-1964 and decides to impose conditions on same pursuant to s.261(7) what is the legal status of such a quarry in planning terms?*

2) *Is a planning authority (or the Board) when carrying out a review under s.261A completely at large in respect of the status of the quarry, and in particular an earlier determination that a quarry is pre-1964?*

3) *If not, in what circumstances can such authority make a contrary determination, and, what may it have regard to in such a determination?*

4) *In the context of the determination that an EIA is required can such authority have regard to development carried out after the registration of the quarry pursuant to s.261 and in accordance with conditions imposed under s.267(7)?*

Phoenix Rock Proceedings

5) *Are the matters to which the Board must have regard in determining whether or not exceptional circumstances exist as set out at s.177D(2)(a)-(g) individually determinative of the issue?*

6) *Is a determination by the Board that an applicant did not have a 'reasonable belief' under s.177D(2)(b) that its development was unauthorised determinative of a lack of exceptionality?*

7) *If so, having regard to the consequences of such a determination, what is the Board obliged to consider in reaching that determination and is it obliged to invite submissions from an applicant for substitute consent?*

8) *What is the appropriate point in time for the consideration of the 'reasonable belief' of an applicant under s.177D(2)(b)?*

9) *What is the status of conditions imposed under s.261(7) in circumstances where the basis for the imposition of same (namely pre-1964 commencement) is not followed in a s.261A determination. Can a developer rely on same or must they continue to comply with same?*

10) *Is the Board entitled to have consideration for a failure to comply with such a*

condition in the context of a determination under s.177D(2)(b)?

11) *If so, is the Board entitled to have consideration for a failure to comply with a limitation period imposed under s.261(7) in circumstances where the developer had already been informed that its entire development is unauthorised by the Board under s.261A and had received an enforcement from the Council on foot of same?*

12) *Does s.177D(2)(f) relate to the development the subject of the application for leave, or does it relate to other developments?*

Legal Test

6. The legal test governing leave to appeal is identified at s.50A(7) of the 2000 Act as follows:-

> *"(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]."*

7. As per s.50A(11) of the 2000 Act, the form of the certified point of law operates to define the Court of Appeal's jurisdiction on the appeal. I am conscious that an appeal to the Supreme Court under the leapfrog provisions of Article 34.5.4 of the Constitution is also open to the applicant but since I have no role in being a gatekeeper in respect of such appeals, I do not need to consider that jurisdiction any further.

8. In relation to the applicable principles governing leave to appeal under s.50, they are well established. I have derived considerable assistance in this respect from the

decisions in *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250, *Halpin* and *Cork Harbour Alliance for a Safe Environment v An Bord Pleanála* [2022] IEHC 231 at §32 (*"CHASE"*). I do not think it is necessary to restate the principles again in any detail given their ubiquity. It is clear from the case law that I must keep the following considerations in mind when reviewing the questions:

- The point of law must be one of exceptional importance;
- Concepts of exceptional public importance and desirability in the public interest are cumulative;
- The law should stand in a state of uncertainty or be evolving and/or novel;
- Uncertainty cannot be generated by the mere raising of the question;
- The point of law must arise out of the decision of the High Court and not discussions or submissions during the course of the case;
- In most situations, it will not be enough to complain that the High Court did not properly apply established legal principles – rather it will be necessary to show that the principles relied upon were incorrect;
- The closer one comes to the application of detailed matters of principle to the facts of an individual case, the further one gets away from there being an issue of general public importance;
- Some affirmative public benefit from an appeal must be identified such that it would be likely to resolve other cases.

Findings of this Court

9. To assist in putting the questions in context before turning to the detail of them, I will summarise the core aspects of both decisions. In *Fursey*, I rejected a claim that the imposition of conditions under s.261 meant that no decision could be made under

s.261A requiring a mandatory Environmental Impact Assessment ("EIA") and Appropriate Assessment ("AA"), and upheld the s.261A decision of the Board, and the enforcement notices issued by the Council on 24 June 2013. I concluded that although the quarry had been treated as a pre-1964 quarry for the purposes of the imposition of conditions under s.261, that did not bind the Council (or the Board in the context of review) such that it was precluded from treating the quarry as a post-1964 quarry in the context of the s.261A procedure.

10. In relation to fair procedures, I rejected the applicant's claim, holding that the applicant had been given an opportunity to make any submissions it wished in relation to the pre-1964 status of the quarry and was aware of the issues arising since the Council had decided that the quarry operated post-1964 in the s.216A decision. Despite this, and the decision to appeal the Council's Order, the applicant failed to submit evidence in support of its position.

11. In *Phoenix*, I upheld the legality of the Board's decision to refuse leave to apply for substituted consent under s.177D of the 2000 Act. I held that the Board was entitled to consider compliance with the conditions imposed under s.261 in circumstances where the applicant had identified in its letter seeking leave that it believes there was a recognition of the site under s.261 and operates in accordance with the s.261 decision. I upheld the Board's decision that there had been a lack of compliance with the conditions and found that the Board was entitled to take into account that lack of compliance when deciding whether two criteria relevant to the existence of exceptional circumstances had been established, being those identified under s.177D(2)(d) and (f).

12. In relation to fair procedures, I rejected a claim similar to that made in *Fursey*, holding that the applicant had been given an opportunity to make any submissions it wished in relation the seven criteria identified at s.177D for the purposes of considering whether

exceptional circumstances existed justifying leave for substituted consent. I held that the Board had no obligation to raise specific concerns with the applicant in advance of its decision, given that the applicant must be taken to be aware of the provisions of s.177D.

Decision on Fursey Questions – Point of Law of Exceptional Public Importance

13. By way of overall introduction to the questions, the applicant states that the first three questions deal with the legal status of the determination under s.261 and s.261A, the interaction between these determinations, and the effects of the determination that the development is a pre-1964 development under s.261, in the context of a s.261A determination. It is asserted there is no case law at appellate court level on the issue of whether a s.261 determination can be revisited and dispensed with in the context of a determination on s.261A.
14. It is argued that it is a point of law of exceptional public importance as to whether the registration of the quarry as a pre-1964 development amounted to a representation such that it was not open to a planning authority after that point to determine otherwise. It is said that an authoritative judgment from an appellate Court would address an issue which the Court itself has regarded as having been unsatisfactorily dealt with in the present case law.
15. I do not understand that last reference since, far from identifying that I consider the law to be unsatisfactory, I relied on existing case law to determine the majority of the points raised on this interaction issue, relying in particular on the decisions of *McGrath Limestone Works Limited v. An Bord Pleanala* [2014] IEHC 382 and *JJ Flood & Sons v An Bord Pleanála & Ors* [2020] IEHC 195. *JJ Flood* makes it eminently clear that the registration of a quarry and the imposition of conditions on it pursuant to s.261 do not preclude a later decision to direct the same quarry pursuant to s.261A to make an

application for substitute consent. The second element agitated by the applicant i.e. whether a local authority can revisit its view that the quarry was a pre-1964 quarry in the context of s.261 registration, was largely answered in *McGrath*, as indeed I note in my judgment. In that case, Charleton J. noted that the lawful use of the land cannot be treated as having been established or implied by registration. The clear import of that judgment is that a decision by a planning authority in the context of conditions that the quarry had operated pre-1964 could not amount to a definitive decision that the quarry was outside the planning code and that its pre-1964 status could not be revisited.

16. Turning now to the four questions, I agree with the submission of the Board that none of the four questions raise a point of law arising out of my decision, but rather are in the nature of a request for an opinion of the appellate Court on the interaction between s.261 and 261A. The core point made by the applicant appears to be that no appellate Court has looked at this issue (although I note it has been extensively addressed by the High Court). That is not a basis for characterising a point of law as being of exceptional public importance.

17. **Question 1** asks about the legal status of a quarry where a planning authority determines that a quarry is pre-1964 under s.261 and decides to impose conditions on same pursuant to s.261(7). The Board observes that the law is clear in that registration and/or imposition of conditions under s.261 of the 2000 Act does not predetermine the determinations made under s.261A and the registration of a quarry under s.261 does not alter its status. It refers to a long line of case law prior to this Court's judgment [See e.g., *O'Reilly v Galway County Council* [2010] IEHC 97 (Charleton J.), *An Taisce v Ireland* [2010] IEHC 415 (Charleton J.), *Pierson and Others v Keegan Quarries Limited* [2009] IEHC 550 (Irvine J.), *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210 (Finlay Geoghegan J.). *McGrath Limestone Works Limited v An Bord*

Pleanála & Ors. [2014] IEHC 382 and *J.J. Flood & Sons Ltd. v An Bord Pleanála* [2020] IEHC 195 and identifies that a challenge to the legal correctness of *JJ Flood* was rejected by O'Regan J. in *Liscannor Stone Limited v. Clare County Council & ors* [2020] IEHC 651 at §66. Given the number of cases on this point, I tend to agree with An Bord Pleanála's observation that this is one of the clearest and most consistent lines of authority in domestic planning law.

18. Similar considerations apply to **Question 2** i.e. whether a planning authority (or the Board) when carrying out a review under s.261A is completely at large in respect of the status of the quarry, notwithstanding an earlier determination that a quarry is pre-1964. As identified above, both *JJ Flood* and *McGrath* have addressed that question comprehensively. It is by now well established in law that registration and imposition of conditions under s.261 do not preclude a local authority or the Board from subsequently reaching a conclusion under s.261A that an EIA/AA is required, and that further steps require to be taken given the absence of same. A specific point was raised by the applicant in the proceedings in respect of legitimate expectation, which was dealt with in my judgment by applying the well-established principles of legitimate expectation and finding that no representation had been made. It is difficult to see how any point of law arises from this factual finding.

19. In short, the law applicable to the resolution of questions 1 and 2 is not uncertain, or in a state of flux or novelty. Rather it is well established. The fact that no appellate Court has considered it does not mean that it must be treated as a point of law of exceptional public importance. In the circumstances, I do not think the applicant has even approached the high threshold it is required to meet insofar as these questions are concerned.

20. **Question 3** asks whether, if a planning authority is not at large in carrying out a review under s.261A, in what circumstances can such authority make a contrary determination, and what may it have regard to in such a determination. This question entirely fails to identify a point of law arising from my judgment. Again, this question appears to be an effort to seek general advice from the appellate Court. Given that I held that the planning authority, when carrying out a review under s.261A, is entitled to consider the matter unconstrained by the imposition of conditions under s.261, I made no finding as to the type of constraints that might apply to an authority in that situation. Therefore, this question does not arise from my decision and is entirely hypothetical. I refuse to grant leave on it.
21. Finally, **Question 4** asks whether an authority who has determined that an EIA is required can have regard to development carried out after the registration of the quarry pursuant to s.261 in accordance with conditions imposed. This raises an issue that was not part of the grounds raised by the applicant and therefore was not the subject of consideration or decision. The applicant cannot seek to introduce new grounds into the case by way of the leave to appeal process. In the circumstances, the applicant cannot point to any finding in my decision which gives rise to a point of law in this respect. A desire to have a legal question answered that was not posed in the proceedings cannot justify that question being treated as a point of law arising from the decision.
22. Accordingly, I refuse to certify any of the questions posed in relation to *Fursey* on the basis that they do not raise any questions of exceptional public importance.

Decision on Phoenix Questions - Point of Law of Exceptional Public Importance

23. The decision in *Phoenix* is concerned with the legality of the Board's decision to refuse leave to apply for substituted consent under s.177D of the 2000 Act.

24. The applicant argues that there is considerable uncertainty in the application of s.177D including the reliance by the Board on the breach of the s.216 conditions, the temporal application of the section, including when a person's state of mind should be analysed, and the interaction of the seven criteria identified in s.177D(2). In relation to the temporal effect, it is submitted that there is no indication in the judgment as to the point in time in which the Court claims the applicant could not have had a reasonable belief that the development was not authorised. It is argued that this is a novel point and the law is in a state of evolution.

25. The applicant points out that there is no case law on the application of s.177D(2)(d) and (f) i.e. whether the applicant had or could reasonably have had a belief that the development was not authorised.

26. The Board argue that the questions posed amount to an attempt to re-run unsuccessful arguments and that they impermissibly impute uncertainty in the law where none exists. The Board argue that the questions concerning the alleged inappropriate application of s.177D criteria are simply arguments that were determined against the applicant and that the applicant fails to engage with the judgment in that respect. The Board argues that the conclusions in the judgment were made by reference to existing case law and well settled legal principles and do not raise questions of law of exceptional public importance.

27. Clearly the mere fact that an applicant for leave disagrees with a conclusion in the judgment cannot be relied upon to characterise the state of the law as being uncertain. In my view some of the questions fall into that category.

28. Taking each question in turn, **Question 5** asks whether the matters to which the Board must have regard in determining whether exceptional circumstances exist are individually determinative of the issue. This is a simple issue of statutory interpretation

as to how statutory factors interact with each other and does not in my view raise a point of law of exceptional importance. The fact that it has not been determined before in the context of this particular statute cannot alone elevate it to one of public importance. It falls far short of meeting the threshold. As accepted by the applicant's counsel, **Question 6** is simply a different form of question 5 and for the same reasons I refuse leave on both questions.

29. **Question 7** refers to the consequences of a decision that an applicant did not have a reasonable belief under s.177D(2)(b) and asks whether the Board is obliged to invite submissions from an applicant for substitute consent in advance of reaching its decision. Although the question refers to an application for substitute consent, counsel confirmed in oral submission that it should refer to an application for leave to apply for substituted consent, as it was only the latter that this Court was concerned with. The question is effectively concerned with the fair procedure points raised by the applicant. I determined that argument on the basis that the applicant had an opportunity to put before the Board any material it wished and was aware of the statutory test. I held that there had been no breach of fair procedures where the Board did not invite submissions on a specific point as it had no obligation to do so. That is an unexceptional finding deriving from existing case law on fair procedures, including the decision of *JJ Flood* where a similar type point was raised in a different statutory context. The mere fact that the question arises in a statutory context not previously the subject of consideration by the Courts cannot result in it amounting to a point of law of exceptional public importance. No real reason was given by the applicant as to why it should be treated in this way, save that the applicant strongly disagreed with my conclusion that no breach of fair procedures had occurred. The threshold for leave is not met in respect of this question.

30. **Question 8** addresses the temporal application of s.177D(2)(b) and asks an open-ended question, i.e. what is the appropriate point in time for the consideration of the "reasonable belief" of an applicant. Unsurprisingly, this is not framed as a point of law arising from my decision since that question was not before the Court. Rather, I adjudicated on the specific legal ground raised by the applicant in this respect i.e. that the Board had only considered events from 2017 onwards and was confined to considering events up to 2012 (see paragraphs 137 - 145 of the judgment). I decided that an ordinary reading of the section suggests that, when the Board is considering an applicant's belief as to whether the development was authorised, it may consider the entire time period relevant to the facts of the particular case and that where the development is an ongoing one, as in the instant case, there was no basis for ring fencing any given time period whether that be after the date upon which the necessity for substituted consent first arose or any other date. I concluded that the Board is obliged to consider the applicant's belief over the relevant period and this will vary depending on the factual situation.

31. There is nothing exceptional or novel about this finding in my view: it is an example of a statutory provision being interpreted on conventional principles of statutory interpretation. A decision as to when a person's state of mind must be analysed for the purposes of a statutory provision, having regard to the provisions of the statute, is commonplace in legal analysis. The applicant has not explained why this constitutes a point of law of exceptional public importance save for the fact that it argues that this point was unanswered. I do not agree for the reasons set out above. Moreover, even if that was the case, a failure to answer a point raised does not equate to a point of law of exceptional public importance. I refuse leave on this question.

32. The first part of **Question 9** returns to the ground covered by questions 1 and 2, and I have already dealt with these. The second part i.e. can a developer rely on the conditions or must they continue to comply with same is linked to questions 10 and 11 so I will deal with them together. **Question 10** asks whether the Board is entitled to have consideration for a failure to comply with such a condition in the context of the determination under s.177D(2)(b). **Question 11** simply restates the same question in the context of the facts of this case, but for some unknown reason only refers to the applicant's failure to comply with the limitation period and not the applicant's failure to comply with the geographical scope of the conditions. In fact, the applicant breached both conditions.

33. These questions relate to an issue in the case that I initially thought might raise a point of law of public importance i.e. as identified at paragraph 122 of my judgment … "*how compliance with the conditions cannot be relied upon to save the activity but breach of them can damn the activity*" and whether breach of conditions can be used by the Board as the basis for a finding under s. 177D(2)(d) and (f).

34. However, the observation of Simons J. in *Halpin* that, in that case, the judgment sought to be appealed against was of almost nil precedential value because it arose out of a very unusual set of circumstances, is one that resonates here. It is relevant to the question of whether the issues in the case have ramifications beyond the instant case and whether there is uncertainty, for example in the daily operation of the law. I do not think this is the case here. The reason that non-compliance with the conditions was looked at by the Board in deciding whether the applicant (a) could not reasonably have had a belief that the development was not unauthorised and (b) had previously carried out unauthorised development, was specifically because the applicant had put it in issue. After the enforcement notice was served, the applicant issued proceedings and it

was assumed by all that a stay had been granted on the enforcement notice. The applicant continued to quarry. In making its application for substituted consent, it explicitly identified its belief that there was a recognition of the site under s.261 and that it operates in accordance with the s.261 decision. The Board were therefore entitled to consider the question of the applicant's operation in accordance with the conditions when looking at its state of mind in respect of unauthorised development. This was particularly so since the Direction makes it clear that, on the particular facts of the case, given the stay in the *Fursey Maguire* proceedings, it was not treating the breach of the enforcement notice as a factor relevant to knowledge of an unauthorised development.

35. Counsel for the applicant relied upon an error in the quotation at paragraph 123 of the judgment where I quote the letter of application for leave to apply for substitute consent as stating that "*The applicant believed there was a recognition of the site under s.261 and operates in accordance with section 261 decision*" whereas it ought to have read that the applicant "believes". The error in the tense seems to make no difference to the core point I was making in the judgment, i.e. the applicant was putting up its belief in the conditions to justify its continued operation.

36. By making compliance with the conditions the cornerstone of its argument on why it was entitled to continue quarrying, the Board was explicitly invited to consider that issue when considering the applicant's belief as to the development not being unauthorised (subsection (d)) and the question of unauthorised development (subsection (f)). In those circumstances, the Board's decision to consider the conditions, and the applicant's compliance with same, was fact specific. The case does not raise a question of general principle that will govern other cases i.e. whether a failure to comply with conditions will be relevant to the state of mind of an applicant for leave to apply for substituted consent. Rather it deals with the fact specific question as to

whether, when an applicant relies upon compliance with conditions as evidence of its belief that its development was authorised, the Board can consider that compliance as a matter of fact. The judgment is considering the application of principles to the facts of a specific case. As such, it is difficult to see how an answer to the questions 9, 10 and 11 would be of any assistance in other cases or transcend the facts of this case.

37. Moreover, insofar as uncertainty is concerned, s.261(6)(aa), addressed in the judgment at paragraph 127-128, identifies unambiguously that a failure to comply with conditions shall be unauthorised development. There is no uncertainty in that respect. In those circumstances it is hard to see how the question of exceptional public importance arises.
38. Finally, **Question 12** asks a question of statutory interpretation i.e. whether s.177D(2)(f) relates to the development the subject of the application for leave or whether it relates to other developments not the subject of the application for leave to apply for substituted consent. I addressed this question at paragraph 132 of the judgment where I concluded that the argument that subsection (f) only applies to other unauthorised developments was not pleaded. As I identify above, the applicant is not entitled to use the leave to appeal stage to seek to introduce unpleaded arguments. In those circumstances, it is hard to understand why this question was included at all.
39. For those reasons I refuse to certify questions 5-12 as none of them disclose a question of law of exceptional public importance.

Desirability of an appeal in the public interest

40. Because of my conclusions on a question of law of exceptional public importance, I do not have to decide upon the condition of desirability of an appeal in the public interest. However, I should note that submissions were made by counsel for the applicant as to a significant number of other quarry cases "backing this case up", to another quarry case in the judicial review list that is apparently awaiting the resolution of this leave to

appeal application before being heard, to the quarry industry being seriously affected by the issues in this case and to the impact this may have upon the availability of quarry materials necessary for housebuilding. None of these matters were introduced in evidence, either at the hearing of the substantive matter or in the course of the leave application. There was no application made by the applicants to introduce affidavit evidence in this respect for the purposes of the leave. In those circumstances, I have no knowledge about the matters the subject of submission and cannot take them into account for the purposes of the public interest test.

41. Nor was there any concrete identification as to why it would be in the public interest to resolve the questions identified by the applicants. Rather the gist of the reliance upon the public interest appeared to be that it would be helpful to have an advisory type opinion from the Court of Appeal as to how s.177D operates in practice, given the negative impact on the quarry industry of the planning regime as it applies to quarries. None of this in my view was capable of establishing that leave on the questions identified were in the public interest.

Conclusion

42. For the reasons set out in this judgment, I refuse the applicants in both the *Fursey Maguire* and *Phoenix Rock* proceedings leave to appeal under s.50A(7) in respect of any of the 12 questions identified.