

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 593
[2020 No. 54 JR]

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS
AMENDED**

BETWEEN

THOMAS REID

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INTEL IRELAND LIMITED

NOTICE PARTY

(NO. 3)

JUDGMENT of Humphreys J. delivered on Wednesday the 6th day of October, 2021

1. In *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021), I determined a motion regarding the exclusion of certain evidence prior to the trial.
2. In *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362 (Unreported, High Court, 27th May, 2021), I dismissed the applicant's proceedings.
3. I am now dealing with leave to appeal and costs.

Leave to appeal

4. The applicant seeks leave to appeal pursuant to s. 50A(7) of the Planning and Development Act 2000 and I have considered the law in that regard, including *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112, *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July, 2006), *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, [2015] 6 JIC 1805 (Unreported, High Court, McGovern J., 18th June, 2015), *S.A. v. Minister for Justice and Equality (No.2)* [2016] IEHC 646 at para. 2, *Conway v. An Bord Pleanála* [2020] IEHC 4, [2020] 1 JIC 1404 (Unreported, High Court, Barniville J., 14th January, 2020), *Dublin Cycling Campaign CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 146, [2021] 2 JIC 2508 (Unreported, High Court, McDonald J., 25th February, 2021). I will first address the applicant's questions as drafted and leave aside until later in the judgment any more general issues raised by the Supreme Court's determination in *An Taisce v. An Bord Pleanála* [2021] IESCDT 109.

Applicant's first question – obligations on a developer in preparing a Natura Impact Statement

5. The applicant's first proposed question of exceptional public importance is as follows:
"What is the nature of the obligation on a developer when preparing a Natura Impact Statement in the light of Article 6(3) Habitats Directive and s177T PDA 2000? What are the consequences of failure to comply? Is the obligation met by an NIS where the information is incomplete? Were those principles correctly applied here?"

6. The essayistic nature of this question is a poor start: see *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016). A question of this form invites the sort of discursive roving response that almost inevitably takes us well away from the actual context of the case. That is demonstrated, if demonstration be needed, by the fact that the factual premise of the question is incorrect. One cannot ask what are the consequences of failure to comply with the obligations on the developer when preparing a Natura Impact Statement unless that has been an issue in the case and there has been a pre-existing finding of fact of such failure. That is not the case here.
7. In addition, the issue of whether principles were correctly applied in a specific case is not normally a question of law of exceptional public importance and indeed is not a pure question of law at all.
8. A further major problem for the applicant is that s. 177T of the 2000 Act, which features prominently in the question, is not referred to in the statement of grounds at any point. Consequently, it is implausible to now make it the centrepiece of the first question on the basis of which leave to appeal is sought. That is characteristic of the evolving nature of the case, as noted in the No. 2 judgment; a case that mutated significantly from that made to the board insofar as layers of scientific and legal expertise were brought to bear on the judicial review that were not availed of in the administrative process.
9. The applicant takes particular objection to the statement at para. 76 of the No. 2 judgment that the developer's material can be filed under the heading of "correct insofar as it goes". However, as correctly pointed out by the board at para. 23 of its submissions, "[t]his argument, again, entirely ignores the different decision-making roles played by the Board and the Court in the context of the raising of objections to a proposed development." That really gets to the heart of what is wrong with the applicant's complaint under this heading. The concept of the material being correct insofar as it goes is not an absolution to the board from the requirement to apply best scientific knowledge and remove scientific doubt. It is a description of the forensic situation where an applicant has not displaced the developer's material or pointed to a way in which evidentially it can be demonstrated to be inadequate on its face.
10. The applicant's interpretation is that a developer can now put in material that is incomplete as long as it is not positively incorrect and will, therefore, "get away with it" because "it is correct insofar as it goes". But that is not the sense in which I meant "correct insofar as it goes". What I meant by that is that the developer's submission can be accepted in the absence of it being demonstrated that the board should have autonomously interrogated the material and in the absence of contrary material brought forward by somebody (not necessarily the applicant, but even including the developer themselves) which would require such interrogation. That approach does not, as submitted, "predetermine" any or all future cases because, at the risk of stating the obvious, in future cases, anyone opposing a development will be conscious of the option of either putting in or pointing to contrary material; or establishing evidentially that a

reasonable expert would have queried the material; or alternatively of pleading a lack of expertise on behalf of the board and developing that point evidentially.

Applicant's proposed second question – autonomous obligation on the decision-maker under the habitats directive

11. The applicant's proposed second question of exceptional public importance is: "[i]s the court's formulation of the decision-maker's autonomous obligation – the board can accept the developer's material for AA purposes if there is nothing on the face of the material, as it appears to a reasonable person with sufficient expertise, that would create scientific doubt – correct? How is the question of whether the material creates scientific doubt to be resolved? Were those principles correctly applied here?"
12. Again, the point about the correct application of principles is not normally a question of exceptional public importance and not a question of pure law anyway.
13. One further obvious problem here is the fact that there was no relevant pleading regarding the lack of expertise of the board, as noted at para. 81 of the No. 2 judgment.
14. Another problem is that the applicant has not suggested that the test I have articulated regarding the autonomous obligation of the board is in fact incorrect or is fundamentally adverse to his position. Indeed, unless I am misreading or misunderstanding the applicant's submissions, the applicant seems to basically support that test. That illustrates a point that a would-be appellant cannot appeal on a point in her favour. She has to identify an adverse part of the decision.
15. While the applicant claims that this formulation is "novel", all I intended to do was to put together three established factors:
 - (i). the board's submission (which I accepted) that the developer's material should not be defective on its face;
 - (ii). the requirement in the EIA directive 2011/92/EU as amended by directive 2014/52/EU and as applied in the habitats context, either by analogy or by necessary implication, that there must be sufficient expertise in carrying out the appropriate assessment; and
 - (iii). the overall requirement of administrative law that decision-makers must act reasonably.
16. Putting those (I think uncontroversial) points together, one gets the formulation that the materials should not be flawed on their face as viewed by a reasonable person with sufficient expertise. That combination into a formulation might be new, but the elements of it are not new and, as noted above, the would-be appellant is not even saying that it is incorrect or that it is adverse to him.
17. All that said, the applicant was on stronger ground in saying that the removal of scientific doubt was not the whole test, but that the board also had to ensure that material was evaluated in the light of the best scientific knowledge in the field under art. 6(3) of the

habitats directive: see Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Court of Justice of the European Union, 7th September, 2004, ECLI:EU:C:2004:482), at para. 54.

18. I would accept that proposition, but the same basic formal analysis applies to that as applies to the discussion of scientific doubt. The board and the developer have to enjoy or have access to and also deploy the correct expertise, and the board has to be satisfied autonomously that the material can be accepted as representing the application of best scientific knowledge bearing in mind the questions of whether there is contrary material or whether the material would be defective on its face as viewed by a reasonable expert.
19. But even so, an applicant in judicial review still has to overcome an onus in order to have a decision declared invalid. That onus must be to show evidentially that best scientific knowledge was not brought to bear, or that there was material to the contrary that required to be dealt with, or that the material on its face indicated otherwise. So the judgment would have been the same had I phrased it in terms of both the application of best scientific knowledge as well as the lack of scientific doubt (as perhaps in retrospect I should have done, but filing that shortcoming of wording under the label of judicial fallibility doesn't make any difference because the same principles applied to the scientific knowledge issue result in the same outcome – the applicant hasn't discharged the necessary onus). An appeal is not necessary to clarify that point: I am doing so now.

Applicant's third question – failure by the court to consider material that was before the board

20. The applicant's proposed third question of exceptional public importance is: "[i]n what circumstances is it appropriate for the Court to decline to consider material which was before the Board when making its decision? Were those principles applied correctly here?"
21. Again, the "write an essay" nature of this question invites an appellate court to roam away from the actual case. Such a process is rarely a proper basis for leave to appeal.
22. The question relates to the fact that the applicant did not properly adduce in evidence a Natura Impact Statement prepared in 2016 regarding a previous planning application. As the notice party correctly points out in written submissions, "[t]he Court made no finding that such evidence could never be adduced. Having regard to the Court's reasons for excluding the 2016 NIS, there is no question of the Court declining to consider material which was before the Board. Instead, the Court's reason for excluding the 2016 NIS is that it was not properly in evidence before the Court."
23. Likewise, the board correctly submits at para. 31 of its written submissions, "[t]his was not a case of the Court "declining" to consider material which was before the Board. Instead the Court simply did not allow reliance on evidence which was not in the substantive proceedings in accordance with the rules of evidence. This is entirely consistent with the obligation on the High Court to be clear as to what documents have actually been admitted into evidence (see, *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4)."

24. Had the 2016 NIS been properly admitted in evidence, I would have given due consideration to it and in particular to the location of an additional tufa formation to the north of the site. Indeed I did refer at para. 74 of the No. 2 judgment to a complaint regarding bryophytes to the north of the site. The applicant sought to introduce an extract from the 2016 NIS for leave to appeal purposes which was a satellite photograph showing grid coordinates for the tufa deposit recorded in the 2016 NIS on the north bank of Rye Water, at coordinates N 98642, 37564. That is in the path of the projected emission plumes which were central to the issue of ecological impact.
25. Assuming for the sake of argument that the applicant should be permitted to refer to this document at the leave to appeal stage, even though it is not part of the substantive case, that does not take away from the fact that it was not properly admitted in evidence. Why wasn't it? The last minute nature of the attempt to rely on it was really the problem because that deprived the notice party of the opportunity to put in a further affidavit providing additional contextualising information. Thus, I considered it would have been unfair to the notice party to allow the applicant to introduce such an affidavit at the eleventh hour even though the material proposed to be exhibited was before the board originally.
26. All that goes to show is that there would not have been a problem in principle in having the document before the court. But an applicant has to decide what to put before the court in a timely manner so that other interested parties in the proceedings will have the opportunity to contextualise or explain evidentially anything that arises from such a document.
27. For what it's worth, it may be that the formations described to the north of the development may constitute tufa formations *simpliciter* rather than petrifying springs with tufa formations, which was the qualifying interest concerned for the purposes of the relevant European site. The wording of the 2016 NIS is somewhat ambiguous in that regard, but that only illustrates the point that one cannot allow such a complex matter to be floated into evidence at the last minute, particularly where there may be a considerable amount of further clarification that other parties might be legitimately entitled to provide.
28. The applicant makes the separate point that the board purported to exhibit the complete file, but without explaining that there were other materials before the board that were not on the file. He now poses the rhetorical question "what do you ask for?"; and suggests that it would be "massively helpful" to have that clarified by an appeal to the Court of Appeal. But we do not need an appeal to clarify that; I can do so now. Essentially this case and the recent *Clifford and O'Connor v. An Bord Pleanála* [2021] IEHC 459 (Unreported, High Court, 12th July, 2021) case have illustrated that to be truly comprehensive, an applicant can request:
 - (i). the complete file;

- (ii). any documents removed from the file (which was an issue in *Clifford and O'Connor* because such a document only came to light at a very late stage before the hearing); and
- (iii). as in the present case, any documents that were never on the file, but were before the board at the time of the board's consideration of the matter, for example by reason of being part of a linked or related file that the board considered.

29. Now that applicants generally know what has happened in this case and in *Clifford and O'Connor* they can presumably tailor their requests accordingly. Perhaps there are other categories lurking out there which at some point will require a fourth or subsequent heading of request, but for now all I can do is identify what we do know, and encourage the board to be as transparent as possible in terms of how all relevant information can be identified and accessed in each case.

***An Taisce* determination and question of whether appeal to the Court of Appeal is in the public interest**

30. While I don't think that the questions as drafted pass the necessary tests, I have reconsidered whether there might not be some other, broader, question that could be certified in relation to the habitats directive, following the Supreme Court determination in *An Taisce*. In fairness to the applicant, in the No. 2 judgment here, I drew an analogy with my own decision in *An Taisce (An Taisce v. An Bord Pleanála [2021] IEHC 254)* when rejecting the application (para. 76 of the No. 2 judgment). However that is in the context where there were broader problems for the applicant such as attempting to make points that were not pleaded or lacked adequate support in the materials. But even assuming for the sake of argument that the applicant could get past the pleading and evidential problems and that the present case could be said to raise a point of public importance, and that it would be a short step to call that exceptional in the circumstances, I am not convinced that it is in the public interest that there be an appeal to the Court of Appeal, because that court would be in the position of having to await the Supreme Court decision for any clarification. The only thing the applicant could point to of benefit was that the Court of Appeal could then apply any such decision and correct any errors. But the leave to appeal procedure is not meant to cover error-correction, but rather overarching points going well beyond the case concerned – under the statutory procedure, an appeal has to be in the public interest, not just the parties' interests. So I don't, on balance, think that, in these specific circumstances, an appeal to the Court of Appeal is going to clarify matters sufficiently beyond the present case such as to warrant leave to appeal being granted. Admittedly an interesting procedural situation exists by reason of the applicant's interlocutory appeal [Court of Appeal record no. 2021/157] against the No. 1 judgment (*Reid v. An Bord Pleanála (No. 1) [2021] IEHC 230*) regarding striking out of evidence, but an applicant can't earn an entitlement to appeal a substantive decision merely by the expedient of appealing an interim decision that doesn't require leave to appeal. What should happen procedurally if the existing appeal is allowed can safely be left to appellate fora to determine.

Order regarding leave to appeal

31. Accordingly, the application for leave to appeal is dismissed.

Costs

32. I now turn to the question of costs. The applicant seeks costs against Intel under s. 50B(3)(b) of the 2000 Act and against the board under s. 50B(4).

33. Intel and the board are not seeking their costs.

Application against Intel

34. Section 50B(3) provides as follows:

“The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so —

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.”

35. There is simply no basis to suggest that this provision has any application here. Intel were entitled to object to the last-minute introduction of a document in evidence without there being a reasonable opportunity to contextualise or reply before the hearing date that had already been fixed. Indeed, in circumstances where I upheld that objection, I don't see how there could be any reasonable basis to then suggest that the objection was inappropriate either at all or in some way as to warrant an order for costs against Intel.

Application for costs against the board

36. Section 50B(4) provides as follows in the context of the general rule for no order as to costs in sub-s. (2): “Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.”

37. The context of the subsection is that an applicant (and realistically we are almost always talking about an applicant due to the not-prohibitively-expensive rule) might lose the case, but in the process of losing might address a matter of exceptional public importance.

38. I think it can be reasonably concluded here that the applicant did raise a number of points that, had they been decisive, would probably have legitimately given rise to a leave to appeal application by the board or Intel on the basis of being points of exceptional public importance.

39. That leaves the question of what does “special circumstances” mean. I think it is possibly relevant that many of the important issue in the case only arose indirectly rather than being central to the applicant's case. The fact that the applicant was pursuing a private interest to some limited extent is relevant, although not hugely decisive.

40. A really central consideration is that in environmental litigation such as this, the applicant is not exposed to costs for losing, so in general terms fairness leans against the award of costs to a losing applicant except in truly limited circumstances, because otherwise that would make the process even more one-sided than it already is.
41. That context suggests setting the bar fairly high. Cases can range from the quite fact-specific to the very general and publicly important *cause célèbre*, and without detracting from its importance I think this case is insufficiently close to the top end to warrant the categorisation of "special circumstances". That description could apply if some properly pleaded and really substantial non-transposition issue or legislative or guideline validity challenge was brought against the State, or some properly pleaded and really substantial and decisive general principle regarding the systemic role of the administrative decision-maker was raised. On balance, I don't think we're quite at that point here, although, possibly, reasonable people could disagree about that.

Order regarding costs

42. The appropriate order regarding costs is, therefore:

- (i). that there will be no order as to costs; and
- (ii). since the costs decision itself is subject to the leave to appeal procedure, I will direct that the order not be perfected for a further period of 7 days from the date of delivery of this judgment, or, if the applicant reverts to the court within that period if he intends to make any such application, until the determination of such an application.