[2020] IEHC 429

THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2016 No. 232 JR.]

BETWEEN

JOHN RUSHE and MAIRE NI RAGHALLAIGH

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WESTERN POWER DEVELOPMENTS LIMITED

NOTICE PARTY

AND

GALWAY COUNTY COUNCIL

NOTICE PARTY

AND

MARTIN WALSH, AN TAISCE, IRISH PEATLAND CONSERVATION COUNCIL, AINE NI FHOGARTAIGH AND MICHAEL O RAGHALLAIGH, STIOFAN Ó CUALAIN and MAIRE NI RAGHALLAIGH ON BEHALF OF OLD

TOWN/KNOCKRANNY RESIDENTS FOR ENVIRONMENTAL CONSERVATION AND DEVLOPMENT CONSULTATION

NOTICE PARTIES

JUDGMENT of Mr. Justice David Barniville delivered on the 31st day of August, 2020

Introduction

1. This is my judgment on an application by the Applicants for leave to appeal to the Court of Appeal pursuant to s. 50A(7) of the Planning and Development Act, 2000 (as amended) (the "2000 Act (as amended)"), from a decision made by me in a judgment delivered on 5th March, 2020 in which I refused the Applicants' application for judicial review in respect of a decision of the respondent, An Bord Pleanála (the "Board"), dated 19th February, 2016 to grant permission to the first notice party, Western Power Developments Limited (the "Developer"), for the development of a windfarm in County Galway (the "principal judgment"). The Applicants have asked me to certify four questions which they assert involve points of law of exceptional public importance and have contended that it is desirable in the public interest that an appeal be taken to the Court of Appeal on those points of law.

2. I have had the benefit of written and oral submissions from the Applicants and from the Board and the Developer, who oppose the Applicants' application for leave to appeal. The Applicants' application is supported by another of the notice parties, Martin Walsh. I heard the Applicants' application on 3rd July, 2020 and reserved judgment. While I had intended that this judgment would be available to the parties on or before 31st July, 2020, that did not prove possible. However, I was in a position to inform the parties on that date of my decision on the Applicants' application. I indicated that my written judgment would be provided as soon as possible during the vacation.

3. I have concluded for the reasons set out in this judgment that the Applicants' application for leave to appeal to the Court of Appeal should be refused. I was not persuaded by the Applicants that the questions put forward by them involved points of law of exceptional public importance. I am satisfied that they do not. Nor was I persuaded that it is in the public interest that the Applicants should be permitted to appeal to the Court of Appeal on the points put forward by them. In those circumstances, I informed the parties that I was refusing the Applicants' application for leave to appeal. I set out the reasons for those conclusions in this judgment.

The Principal Judgment

4. The Applicants challenged the Board's decision on Appropriate Assessment ("AA") and Environmental Impact Assessment ("EIA") grounds. It is unnecessary for the purpose of this judgment to consider the EIA part of the Applicants' case as it is not relevant to the questions or points of law on which the Applicants rely in support of their application for leave to appeal. All of the points or questions put forward by the Applicants are directed to the AA part of the case.

5. At para. 6 of the principal judgment, I noted that all of the parties were agreed that the judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 ("*Connelly*") was the most directly relevant authority for the AA part of the case and that most of the submissions of the parties were directed to the question as to whether the Board had complied with the AA obligations on the Board, as discussed in *Connelly*. I also noted that the parties also sought to rely on emerging case law from the CJEU, including the opinion of Advocate General Kokott and the subsequent judgment of the CJEU in *Case C-461/177 Holohan & ors v. An Bord Pleanála* (opinion delivered on 7th August, 2018; judgment delivered on 7th November, 2018) ("*Holohan*").

6. At para. 10 of the principal judgment, I summarised my conclusion that the Board had correctly identified and applied the test for AA set out and discussed by the Supreme Court in *Connelly* and that there was nothing in the recent judgment of the CJEU in *Holohan* which would persuade me to reach a different conclusion. In their written submissions in support of the application for leave to appeal, the Applicants asserted that the Board could not have been aware of the test in *Connelly* when making its decision and could not, therefore, have *"identified and applied"* the test set out in that judgment. However, that contention was misplaced and misinterpreted the point I was making in my summary at para. 10 of the principal judgment. As was clear from later paragraphs of the judgment (including para. 179), the decision of the Board in this case predated the judgment of the Supreme Court in *Connelly*. However, *Connelly* did not set out any new principles or lay down any new obligations on the Board in carrying out an AA under the Habitats Directive and Part XAB of the 2000 Act (as amended). The Supreme Court in *Connelly* drew together, discussed and applied the principles set out previously by the High Court (Finlay Geoghegan J.) in *Eamon (Ted) Kelly v. An Bord Pleanála* [2014] IEHC 400 ("*Kelly*") which had in turn drawn together, discussed and applied the principles set out in the case law of the CJEU. The point I was making in the summary at para. 10 of the principal judgment was that it was my conclusion that the Board had correctly identified and applied the test for a valid AA under EU law, on the basis of the pre-existing Irish and European case law, as subsequently set out and discussed by the Supreme Court in *Connelly*. I also concluded that the Applicants failed in their challenge to the Board's decision on the EIA grounds advanced by them.

7. Before I dealt with the relevant legal principles applicable to AA and considered the Board's decision by reference to those principles, I set out in the principal judgment the principles applicable to pleadings in planning judicial review cases by reference to O. 84 RSC, the case law of the Superior Courts and s. 50A of the 2000 Act (as amended). One of

the points or questions put forward by the Applicants in support of their application for leave to appeal concerns that part of the principal judgment which addressed those principles and my conclusions in relation to the pleadings in respect of certain of the arguments which the applicants sought to advance at the hearing. My discussion of the principles applicable to pleadings in planning judicial review proceedings is found at paras. 99 to 116 of the principal judgment. I concluded in the principal judgment that the Applicants had failed to comply with the requirements in relation to pleadings in planning judicial review proceedings in respect of certain of the arguments which they sought to advance. However, notwithstanding my conclusions in relation to those parts of the Applicants' case, I nonetheless proceeded to consider the substance of the arguments which the Applicants sought to advance and found against them on those arguments.

8. At paras. 117 to 142 of the principal judgment, I set out and discussed the legal principles applicable to AA. Those principles were not in dispute between the parties. I considered the relevant legislative provisions. I then considered the judgments in *Kelly* and *Connelly* and noted that, in its judgment in *Connelly*, the Supreme Court had quoted in full the summary of the requirements for a valid AA under EU law, which had been set out in the judgment of Finlay Geoghegan J. in the High Court in *Kelly* (para. 130). I then referred to other relevant aspects of the judgment in *Connelly*. I considered the judgment of the CJEU in *Holohan*. I concluded (at para. 142) that the necessary requirements for a valid AA under EU law were as set out by the High Court in *Kelly*, as discussed and approved by the Supreme Court in *Connelly*. I then went on to consider the Applicants' case in relation to the AA carried out by the Board, by reference to the principles set out in those judgments (on which there was no dispute between the parties).

9. I considered the Applicants' case on AA at paras. 143 to 223 of the principal judgment. I first considered the case made by the Applicant that the Board had failed to

disclose the *"further evaluation and analysis"* and the *"comprehensive evaluation"* referred to in the Board Order and Board Direction (together comprising the Board's decision). I considered the terms of the Board's decision and the documents referred to in it and concluded that, on the basis of the uncontested evidence of the Board, and on the basis of what was expressly stated in the Board's decision, the *"further evaluation and analysis"* and the *"comprehensive evaluation"* referred to was that which was carried out by the Board at the meetings referred to in the Board's affidavit evidence and recorded in the Board's decision. I did not accept that the evaluation had not been provided by the Board (paras. 150 and 151). It is fair to say that my conclusions on this part of the Applicants' AA case featured prominently in the Applicants' application for leave to appeal.

10. I then considered the Applicants' pleaded grounds of challenge to the Board's decision on AA grounds which focused on three issues, namely, (a) the *"probably/unlikely"* methodology referred to in the NIS and revised NIS (paras. 158 to 162), (b) the potential impacts of the proposed development on the Golden Plover (paras. 163 to 188) and (c) the treatment of the Marsh Fritillary butterfly (paras. 189 to 196). In rejecting the Applicants' claims in relation to these three issues, I applied the principles set out in *Kelly* and *Connelly*.

11. After that I considered certain further AA arguments made by the Applicants at the hearing which had not been pleaded by them in their amended statement of grounds and were not referred to by them in their affidavit evidence or in their written submissions. Those additional arguments concerned (a) the failure by the Board to obtain further information and to require a revised NIS to deal with issues concerning protected bird species apart from the Golden Plover and (b) the failure by the Board and its inspector to identify other *lacunae* or deficiencies in the NIS in relation to peat stability, hydrology and water quality. I concluded that the Applicants had not pleaded a case in respect of those arguments in their statement of grounds or amended statement of grounds and had not addressed the points raised in their

affidavits or in their written submissions. However, despite reaching that conclusion, I nonetheless went on to consider the merits of the Applicants' case on those arguments and found against them (paras. 197 to 206).

12. Finally, as regards the AA part of the Applicants' case, I considered the Applicants' contention that the Board had not conducted a proper assessment of the in-combination effects of the proposed development with other permitted windfarm developments in the vicinity and that the revised NIS provided by the Developer was fundamentally deficient, in that it did not refer to another application (the Ardderroo application) which had been refused by the Board by the time the Board came to decide on the application the subject of these proceedings. In rejecting the Applicants' case in reliance on these arguments (at paras. 207 to 223), I again applied the principles in *Connelly* (see, for example, para. 216).

13. Having rejected the Applicants' case on AA grounds (and also on the EIA grounds advanced by them), I refused their application for judicial review.

Points of Law put Forward by the Applicants

14. In written legal submissions furnished by the Applicants following the principal judgment, the Applicants put forward four questions which they contended gave rise to points of law which should be certified by the court as being points of law of exceptional public importance, which it is desirable in the public interest should be taken by way of appeal to the Court of Appeal pursuant to s. 50A(7) of the 2000 Act (as amended).

15. The questions put forward by the Applicants were as follows:-

> *"(1) Has the learned trial judge correctly applied the test in* Connelly *and* Kelly *in the instant case?*
>
> *(2) In particular, in circumstances where the Board expressly refers to the carrying out of a further and comprehensive evaluation in the context of AA, is the Board obliged to make same available or identify where it can be found?*

(3) If not, how is the public concerned to understand and/or scrutinise the decision in the instant case, where is such assessment to be found, and does it properly engage with the concerns expressed by the inspector and are they resolved to the required legal standard?

(4) What is the standard of pleading in environmental judicial proceedings, and was this Honourable Court correct in concluding that it was not (sic)?"

16. Before considering whether those points satisfy the statutory requirements as considered in the case law, I will briefly refer to the applicable statutory provision and to the relevant legal principles.

Statutory Provision: Section 50A(7) of 2000 Act (As Amended)

17. The relevant provision of the 2000 Act (as amended), under which leave to appeal from the decision of the High Court to the Court of Appeal is required, is s. 50A(7). Section 50A(7) provides as follows:

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

18. Section 50A(7) originally referred to the Supreme Court. That reference was replaced by the reference to the Court of Appeal by s. 75 of the Court of Appeal Act, 2014.

19. The term "*section 50 leave*" is defined in s. 50A(1) as meaning, "*leave to apply for judicial review*" under O. 84, RSC in respect of a decision of (inter alia) the Board in the performance or purported performance of a function under the 2000 Act (as amended). It was

agreed between the parties that, in order for the Applicant to appeal the decision contained in the principal judgment, leave to appeal must be obtained under the provisions of s. 50A(7).

Relevant Legal Principles

General

20. The most authoritative statement of the summary of the principles to be applied by the court in considering an application for leave to appeal under s. 50A(7) of the 2000 Act (as amended) is to be found in the judgment of MacMenamin J. in the High Court in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 ("*Glancré*"). Before turning to consider those principles, I should refer to a number of considerations which I highlighted in *John Conway v. An Bord Pleanála* [2020] IEHC 4 ("*Conway*") and in *Shillelagh Quarries Limited v. An Bord Pleanála* [2020] IEHC 22 ("*Shillelagh*") and which are relevant to the Applicants' application.

21. First, in considering the points or questions put forward by the Applicants as amounting to points of law of exceptional public importance, the task of the court is not to assess the merits of the arguments which may be made by the parties in respect of those points or the strength or prospects of any appeal based upon them. That is not part of the exercise required to be undertaken by the court. As can be seen from several of the judgments in this area, and as discussed further below, the main task of the court in considering whether a point of law is of exceptional public importance, is to determine whether the law with respect to the particular point advanced is unclear or uncertain (see: *Lancefort Limited v. An Bord Pleanála* (unreported, High Court, Morris J., 23rd July, 1997), *Arklow Holidays Ltd v. An Bord Pleanála* [2008] IEHC 2 ("*Arklow Holidays (No. 2)*") (per Clarke J. at para. 43) and *Callaghan v. An Bord Pleanála* [2015] IEHC 493 ("*Callaghan*") (per Costello J. at para. 16)).

22. In *Arklow Holidays (No. 2)*, Clarke J. agreed that in the second edition of his leading textbook, *"Planning and Development Law"*, Simons (now Simons J.) had correctly stated

that in determining whether to grant leave to appeal, the court had to have regard to the decision itself and not to *"merits of the arguments which resulted in that decision"* and that the court should, therefore, not *"attempt to predict what the outcome of the appeal might be; instead, it should take the appellant's case at its height and consider whether or not the point of law is of exceptional public importance"* (Simons at p. 641, quoted with approval by Clarke J. in *Arklow Holidays(No. 2)* at paras. 4.2 and 4.3). At para. 4.3 of *Arklow Holidays (No. 2),* Clarke J. confirmed that the *"court's view as to the strength or weakness of the argument in favour of the intending appellant's point of view on the issue concerned, is not relevant in determining whether it is an important point of law or not"*. He further stated that *"subject to the caveat that no certificate could be given where the law is clear and the intending appellant has, therefore, lost on the basis of an application of clear and established legal principles to the facts of his case, I agree that the court should not attempt to consider what the chances of the intending appellant on appeal might be"* (para. 4.3). I agree and have adopted that approach in considering the applicants' application for leave to appeal in the present case.

23. Second, as pointed out by the Supreme Court in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 ("*Grace and Sweetman*")(at para. 3.9), and as noted by Simons J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820 (at para. 14) and again recently in *Halpin v. An Bord Pleanála* [2020] IEHC 218 ("*Halpin*") (at paras. 12 to 14), it is necessary for the court which is asked to grant leave to appeal under s. 50A(7), and to certify a point or points of law under that section, to have regard to the effect of the 33rd Amendment to the Constitution and the enactment of the Court of Appeal Act 2014 and to the new *"constitutional architecture"* created thereby, whereby an appeal from a decision of the High Court in respect of an application for leave or for judicial review of a planning

decision might potentially be brought to the Court of Appeal or directly to the Supreme Court. In that regard, in *Grace and Sweetman* the Supreme Court stated:-

> "We *would merely add that we consider that it would be appropriate for High Court judges, in considering whether to grant a certificate, to at least have regard to the new constitutional architecture, to the fact that an appeal to this Court under the leapfrog provisions of Article 34.5.4. is open but also to the fact an appeal to the Court of Appeal should remain the more normal route for appeals from the High Court.*" (para. 3.9, p. 8)

24. Third, as has been pointed out in many of the judgments (including that of Costello J. in the High Court in *Callaghan,* at para. 10), the clear intention of the Oireachtas in enacting s. 50A was that, in most cases, the decision of the High Court on an application for leave to seek judicial review of a planning decision or on an application for judicial review of such a decision will be final and, in most cases, there will be no appeal. That is why s. 50A(7) was enacted. An appeal to the Court of Appeal is available where the statutory requirements of that subsection are complied with. To that, it must be added that an appeal to the Supreme Court may also be available where the requirements of Article 34.5.4 of the Constitution are satisfied.

25. I must consider the Applicant's application for leave to appeal, having regard to and taking full account of those considerations.

The Glancré principles

26. The leading summary of the principles to be applied by the Court in considering an application for leave to appeal under s. 50A(7) is that provided by MacMenamin J. in the High Court in *Glancré.* The principles set out by MacMenamin J. in that summary (the *"Glancré* principles") have been adopted and applied in almost all, if not all, the available judgments on such applications. Those principles are so well-known and have been so widely

applied in the case law that it is scarcely necessary to repeat them here. However, for ease of reference, I set them out below.

27. MacMenamin J. summarised the applicable principles in *Glancré* as follows:-

"I am satisfied that a consideration of [the] *authorities demonstrates that the following principles are applicable in the consideration of the issues herein.*

1. *The requirement* [that there be a point of law of exceptional public importance] *goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.*
2. *The jurisdiction to certify such a case must be exercised sparingly.*
3. *The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer the law not only in the instant, but in future such cases.*
4. *Where leave is refused in an application for judicial review i.e., in circumstances where substantial grounds have not been established, a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).*[1]
5. *The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.*
6. *The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (Raiu).*[2]

[1] *Kenny v. An Bord Pleanála* [2002] 1. ILRM 68
[2] *Raiu v. Refugee Appeals Tribunal* [2003] 2 I.R.63

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.

8. Normal statutory rules of construction apply which mean inter alia that 'exceptional' must be given its normal meaning.

9. 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather, the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases" (Per MacMenamin J. at pp. 4- 5)

28. In *Ógalas Limited (trading as Homestore and More Limited) v. An Bord Pleanála* [2015] IEHC 205 ("*Ógalas*"), Baker J. in the High Court referred with approval to the *Glancré* principles and continued: -

" *. . . . it is not sufficient for an applicant for a certificate to show that a point of law emerges in or from a case, but an applicant must show that the point is one of exceptional public importance and must be one in respect of which there is a degree of legal uncertainty, more than one referable to the individual facts in a case. There must be a public interest in requiring that the point of law be clarified for the common good, but to an extent, if there exists uncertainty in the law, and because clarity and certainty in the common law is a desirable end in itself, and important for the administration of justice, if it can be shown the law is uncertain the public interest suggests an appeal is warranted*" (Per Baker J. at para. 4)

29. In *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, McGovern J. in the High Court reduced the ten *Glancré* principles to four essential principles to be applied in an application such as this. They were: -

> *"(a) the decision must involve a point of exceptional public importance;*
>
> *(b) it must be desirable in the public interest that an appeal shall be taken to the Supreme Court;*
>
> *(c) there must be an uncertainty as to the law; and*
>
> *(d) the importance of the point must be public in nature and transcend the individual facts and parties of any given case."* (per McGovern J. at para. 5)

30. In a helpful discussion and consideration of the applicable principles, Costello J. in the High Court in *Callaghan*, discussed the two cumulative requirements under s. 50A(7) as follows: -

> "*6. The point raised must be important to cases other than the case in issue, it must transcend the facts of the particular case and help in the resolution of future cases. It must also be of exceptional importance. I consider this aspect below.*
>
> *7. It is a separate requirement that it is also desirable in the public interest that an appeal should be taken. As was pointed out by Baker J.* [in Ógalas], *clarity and certainty in the common law is a desirable end in itself and important for the administration of justice. So, if it can be shown that the law is uncertain, then the public interest suggests that an appeal is warranted. Obviously, this is not always the case. In Arklow Holidays Limited v. An Bord Pleanála & Ors [2008] IEHC 2 Clarke J. held that there was a point of exceptional public importance but the delay in bringing forward absolutely necessary public*

infrastructure (a wastewater treatment plant) meant that an appeal was not in the public interest. . ..." (per Costello J. at paras. 6 and 7)

31. In *Callaghan*, Costello J. further observed (at para. 11) as follows:-

"The crucial point I have to consider is whether there is uncertainty in the law in relation to each point of the applicant's three points. If there is no uncertainty then it is clear from Glancré Teoranta (and the many cases in which it has been followed) that a certificate for leave to appeal must be refused."

32. It is also well established that while, as noted above, the court considering an application for leave to appeal should not get into the merits of the arguments which resulted in the substantive decision of the court from which leave to appeal is sought, it is also not appropriate for an intending appellant to seek to reargue the points already decided upon by the court in its substantive decision: see, for example, *Callaghan* (per Costello J. at para. 12) and *Buckley v. An Bord Pleanála (No. 2)* [2015] IEHC 590 (per Cregan J. at para. 10). Much, if not all, of the Applicants' case for leave to appeal on the first three questions put forward by them amounted to little more than an attempt to reargue the case made at the substantive hearing, rather than a focus on the statutory test and the requirements for satisfying that test discussed in the authorities.

33. Where a party has lost on the basis of the application of clear and established legal principles to the facts of a case, it is much more difficult for that party to satisfy the cumulative requirements of demonstrating that there exists a point or points of law of exceptional public importance and that it is desirable in the public interest that an appeal be brought to the Court of Appeal. That point was touched upon by Clarke J. in *Arklow Holidays (No. 2)* (at para. 4.3). It has been considered further in other cases, most recently by Simons J. in *Halpin*. In that case, Simons J. was dealing with an application for leave to appeal under section 50A(7). While noting the differences between the requirement to put forward a point

of law of *"exceptional public importance"* under s. 50A(7) and the requirement which must be satisfied for a leapfrog appeal from the High Court to the Supreme Court under Article 34.5.4 of the Constitution that the decision of the High Court must involve a matter of *"general public importance"*, Simons J. expressed the view that the approach taken by the Supreme Court in determining applications for leave to appeal provides valuable guidance to the High Court in considering applications for leave to appeal under section 50A(7). At para. 15 of his judgment in *Halpin*, Simons J. stated:-

> *"In particular, the distinction drawn between (i) the interpretation of, and (ii) the application of, legal principles can usefully be applied by analogy. The case law of the Supreme Court indicates that it will not normally be enough for a putative appellant to complain that the High Court did not properly apply established legal principles to the particular facts of the case; rather it seems that the basis of any appeal must be that the very legal principles relied upon by the High Court judge were incorrect."* (para. 15)

34. Simons J. referred to the determination of the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134 ("*B.S.*"). In that determination, the Supreme Court stated:-

> *"It obviously follows from what has just been set out that it can rarely be the case that the application of well established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur*

on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.

However, having said that, the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts of an individual case, the less it will be possible to say that any issue of general public importance arises. There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met."

35. Simons J. referred to two determinations of the Supreme Court, in which that court refused leave to appeal from the High Court under Article 34.5.4 on the basis that the judgment of the High Court had involved the application of well-established principles of planning law to the facts of the case and did not raise novel issues of law. Those two determinations were: *Buckley v. An Bord Pleanála* [2018] IESCDET 45 ("*Buckley*") and *Heather Hill Management Company CLG v. An Bord Pleanála* [2020] IESCDET 39 ("*Heather Hill*"). With regard to the latter case, Simons J. observed that insofar as the decision of the High Court in that case had addressed the test governing screening for the purposes of Article 6 of the Habitats Directive, the Supreme Court stated in its determination

that the application of the same legal test to different facts might give rise to different outcomes, but that that did not of itself give rise to any issue of law of general public importance (per Simons J. at para. 18). Simons J. gave, as an example of a determination falling on the other side of the line, the case of *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61 ("*Fitzpatrick*"). It was argued that the determination of the Supreme Court in that case was authority for the proposition that the application, in a particular case, of well-established principles was nonetheless capable of giving rise to important legal issues entitling the intended appellant leave to appeal from the Supreme Court under Article 34.5.4. However, as was clear from the determination of the Supreme Court in *Fitzpatrick*, the principles at issue were said to be found in an opinion of an Advocate General which had not been formally endorsed by the CJEU or discussed in detail in subsequent case law. In contrast, the principles at issue in *Halpin* were found by Simons J. to be very well established.

36. It seems to me that while one cannot rule out the possibility of a point of law which satisfies the cumulative statutory requirements in s. 50A(7) of the 2000 Act (as amended) arising in respect of the application of well-established legal principles to the particular facts of the case, such is only likely to arise in exceptional circumstances and could not in any sense be said to represent the norm. Generally, where a court applies well-established legal principles to the particular facts of the case before it, it will be very difficult for an intended appellant to satisfy the cumulative statutory requirements in section 50A(7).

37. Both the Board and the Developer argued that the principal judgment, both as regards the questions put forward by the Applicants as regards the AA part of the case and as regards the question directed to the pleadings issue, involved the application of well-established legal principles to the particular facts of this case and that, as a consequence, leave to appeal should not be granted. As I explain below, with regard to the points or questions put forward

by the Applicants, I agree with the submissions advanced by the Board and the Developer on that issue.

38. While there was substantial agreement between the parties as to the legal principles applicable to applications for leave to appeal under s. 50A(7), and while the disagreement related primarily to the application of those principles to the principal judgment in this case, there were some areas of disagreement between the parties on the applicability of the *Glancré* principles.

39. First, the Applicants contended that by virtue of Article 11 of the EIA Directive (Directive 2011/92/EU) and the case law of the CJEU, the legislative intention that most challenges to planning permissions would be finally determined in the High Court and that the planning process should not be hampered by completely unrestricted access to the court which might cause harmful delays (as discussed by MacMenamin J. in *Glancré*), could no longer be assumed. The Applicants relied on the judgment of the CJEU in Case C-72/12 *Altrip v. Land Rheinland-Pfalz* (judgment of the CJEU dated 7th November, 2013)("*Altrip*") in support of that contention. However, I agree with the submission of the Board and of the Developer that there is nothing in the EIA Directive or in the case law of the CJEU, including *Altrip*, which would have the effect of disapplying or undermining the legislative intention referred to by MacMenamin J. in *Glancré* and by others, including Costello J. in *Callaghan*. The same argument now advanced by the Applicants in reliance on *Altrip* was decisively rejected by the High Court (Barrett J.) in *Merriman v. Fingal County Council* [2018] IEHC 65 ("*Merriman*"). I agree with the conclusions reached by Barrett J. at para. 6 of his judgment in *Merriman*. In particular, I agree that there is nothing in Article 11 of the EIA Directive which requires that a review procedure should involve a two-stage court process with a right of appeal to an appellate court. I further agree with his conclusion that the reliance placed by the Applicants on the judgment of the CJEU in *Altrip* is misplaced for the reasons set out by

Barrett J. I agree that there is nothing in that judgment which supports the proposition that there must be a second, appellate stage to the review procedure provided for under national legislation. Since I agree with the conclusions of Barrett J., it follows that I must reject the Applicants' submission in reliance of Article 11 of the EIA Directive and the judgment of the CJEU in *Altrip*.

40. The second contention advanced by the Applicants, with which the Board and the Developer disagreed, was its submission that there is a remedial obligation on national courts to rectify breaches of EU law and that, as a consequence, the court was required to grant leave to appeal in all cases where the case being made is that the Board's decision breached EU law. The Applicants advanced that submission on the basis of the judgment of the CJEU in Case C-201/02 *R (on the application of Wells) v. Secretary of State for Transport, Local Government and the Regions* (judgment of the CJEU dated 7th January, 2004) ("*Wells*"). In effect, the Applicants contended that the court should effectively discount or disapply the *Glancré* principles and grant the Applicants leave to appeal, since their case is that the Board's decision was in breach of EU law as it failed to comply with the requirements for a valid AA under EU. I do not accept the Applicants' contention that just because they have alleged a breach of EU law, the court is required to grant leave to appeal. I considered the Applicants' claims that the Board's decision was in breach of EU law and that the Board had failed to comply with the EU law requirements for a valid AA in the principal judgment and I rejected their case. The fact that the Applicants have alleged a breach of EU law (and failed in the High Court) cannot, in my view, mean in and of itself that the court is obliged to disapply the statutory test in s. 50A(7) and the well-established principles applicable to that statutory test and to grant leave to appeal, in circumstances where it would not otherwise be merited. Applications for leave to appeal in cases where planning decisions are challenged on EU law grounds are very common and the courts routinely decide those applications on the

basis of the *Glancré* principles and the statutory test contained in section 50A(7). If the Applicants were correct, then it would mean that in every case in which a party challenged a planning decision on the basis of an alleged breach of EU law, that party would be entitled in every case in which it was unsuccessful in the High Court to obtain leave to appeal to the Court of Appeal. I do not accept that such is the case. I agree with the Board and the Developer that the *Glancré* principles apply and I have proceeded to apply them in determining the Applicants' application for leave to appeal in this case. I do not believe that there is anything in the judgment of the CJEU in *Wells* which compels a contrary conclusion.

41. I will now proceed to consider the Applicants' application for leave to appeal from the decision contained in the principal judgment on the basis of the four questions put forward by the applicants in light of the *Glancré* principles and in light of the other considerations and conclusions I have reached in this section of the judgment.

Consideration of Points/Questions Advanced by the Applicants for Certification

Question (1): "***Has the learned trial judge correctly applied the test in Connelly and Kelly in the instant case?"***

42. The Applicants contended that, in the principal judgment, I did not correctly apply the test in *Connelly* and *Kelly* to the facts of this case. That contention was advanced primarily with regard to the findings and conclusions I reached in the principal judgment at paras. 146 to 151, concerning the Applicants' case that the Board failed to comply with its obligations under EU law in carrying out an AA in respect of the proposed development on the ground that the Board's decision did not disclose or make available for public scrutiny the alleged *"further evaluation"* and *"analysis"* and the alleged *"comprehensive evaluation"* carried out by the Board in respect of the potential impact of the proposed development on the Golden Plover. Questions (2) and (3) are also directed to this issue and I will consider them together below.

43. In various different ways, the Applicants argued that the findings and conclusions on this issue in the principal judgment *"wound back the clock"* in relation to the law applicable to AA, to the state it was in prior to *Kelly* and *Connelly*. The Applicants further argued that the judgments in *Kelly* and *Connelly* were "*set at nought*" by reason of those findings and conclusions and that the effect of the principal judgment on that issue is to *"turn back"* the law to where it was more than a decade ago. While I consider those submissions to be completely overblown, I must refrain from considering the merits of the Applicants' case on this issue in deciding whether to grant leave to appeal, and must confine myself to a consideration as to whether the cumulative requirements of s. 50A(7), as they have been considered and elaborated upon in the *Glancré* principles, have been complied with. In this part of the judgment, I will consider whether the first requirement has been satisfied in respect of each of the questions or points put forward by the Applicants, namely, whether the question or point amounts to a point of law of *"exceptional public importance"*. Having done so, I will separately consider whether it is *"desirable in the public interest"* that an appeal should be taken to the Court of Appeal.

44. While I must refrain from considering the merits of the Applicants' case in respect of this aspect of the principal judgment, I am entitled to consider the approach which the Applicants have taken to this application for leave to appeal. It seems to me that the Applicants have adopted the position of rearguing the case made over the course of a number of days in the High Court. As is apparent from paras. 146 to 151 of the principal judgment, the Applicants argued that the Board had not disclosed or made available for public scrutiny the *"further evaluation and analysis"*, which the Board stated in its decision it had undertaken and that, while the Board had referred to and stated the conclusions of the revised NIS and the submissions and comments received from other parties and observers and carried out a *"comprehensive evaluation"*, the Board did not disclose or make that available for

public scrutiny which the Applicants alleged was in breach of the Board's obligations in carrying out an AA under EU law. I considered and rejected that part of the Applicants' case on the basis of the express terms of the Board's decision and on the basis of the affidavit evidence of the Board. I was satisfied that the evaluation and analysis referred to in the Board's decision, was that carried out by the Board in respect of the material provided to it and identified in its decision at the meetings referred to in the Board's affidavit evidence and recorded in the Board's decision. The evaluation and analysis was the exercise carried out by the Board in respect of its consideration of the information and materials provided to it (which were identified in the Board's decision). I noted, however, that it was a separate question as to whether the recording of the evaluation in this fashion complied with the substantive requirements for a valid AA under EU law as identified by the High Court in *Kelly* and by the Supreme Court in *Connelly*. I then went on in the principal judgment to consider, in respect of both the pleaded claims and the claims that were not pleaded, whether the Board had complied with those obligations under EU law in carrying out the AA by reference to the several different issues raised by the Applicants. I concluded that the Board had complied with those obligations and I reached those conclusions by applying the principles set out in *Kelly* and *Connelly*. By way of example, in considering the Applicants' arguments on the potential impacts of the proposed development on the Golden Plover, I considered the material referred to in the Board's decision including the inspector's report, the revised NIS and the Golden Plover report provided by the Developer in response to the s. 132 request made by the Board. I discussed that material at paras. 163 to 188 of the principal judgment and assessed it by reference to the four distinct requirements for a valid AA under EU law, as summarised by the Supreme Court in *Connelly* (at para. 8.16 of its judgment (commencing at para. 180 of the principal judgment)). I set out my conclusions in respect of the requirements for a valid AA under EU law as discussed by the Supreme Court in

Connelly at paras. 180 to 188 of the principal judgment. In my view, in seeking leave to appeal in respect of this first question (and also in respect of the second and third questions), the Applicants are seeking to reargue the case rather than focusing on the statutory criteria in section 50A(7).

45. Question (1) is premised on the test in *Kelly* and *Connelly* being the applicable test. That was not in dispute between the parties. The hearing of the case was adjourned so that the judgment of the Supreme Court in *Connelly* could be available to the parties and to the court at the hearing. The judgment in *Connelly* was relied on by all of the parties at the hearing. In addition, the hearing was further adjourned so that the parties could have the benefit of the judgment of the CJEU in *Holohan*, as that judgment had not been delivered by the time the case was first heard and the parties advanced arguments based on the opinion of Advocate General Kokott. Once the judgment of the CJEU in *Holohan* became available, the parties made further arguments based on it.

46. As a result of these various adjournments of the hearing, the parties were in a position to present to the court, and the court had available to it, the most recent authoritative statements of the CJEU and of the Supreme Court on the requirements for a valid AA under EU law. The parties and the court proceeded on the basis that the test was as set out in *Kelly* and *Connelly* and the court proceeded to consider and determine the Applicants' case on the basis that the test was as stated in those cases. I am satisfied, therefore, that there was no question of the law being in a state of uncertainty when the case was argued and when the court delivered the principal judgment. Nor has it been argued that the law was evolving or in a state of flux. On the contrary, all parties agreed that the law was as stated in *Kelly* and *Connelly*.

47. In *Shillelagh*, I said the following at paras. 47 and 48 of my judgment:-

> *"47. In considering whether a point of law is of 'exceptional public importance',*

an important task for the court is to determine whether the law in question, to which the point of law relates, is in a state of uncertainty or is evolving. That was one of the fundamental principles summarized by MacMenamin J. in Glancré. It was also stressed by Baker J. in the High Court in Ógalas, by McGovern J. in the High Court in Dunne Stores, by Haughton J. in the High Court in People Over Wind and by Costello J. in the High Court in Callaghan. If the law is not uncertain, then the court will generally conclude that the point of law raised is not of 'exceptional public importance'. Where the law is in a state of uncertainty and, in particular, where the law is evolving in the area, the court will generally be satisfied that the point of law in question is one of 'exceptional public importance'. In Callaghan, Costello J. in the High Court referred to the judgment of Haughton J. in the High Court in People Over Wind where he had rejected the submission that the law on the correct interpretation of the provision at issue was 'settled and certain'. He concluded that the law was 'still evolving' in relation to the point in question and that it was a 'novel issue that has not previously been decided in the Irish courts or, I believe, in the CJEU' (per Haughton J. in People Over Wind at para. 20) (quoted by Costello J. in Callaghan at para. 17). Costello J. then observed:-

> *'Haughton J. [in People Over Wind] referred to the fact that the law in relation to the Habitats Directive (with which he was concerned) was evolving. It seems to me that the combination of a novel point in an area of law which is evolving is likely to lead to the conclusion that the law is unclear and that it would be in the public interest that the law be clarified.' (per Costello J. at para. 18).*

48. *Costello J. concluded that, in respect of one of the points of law advanced,*

namely, the extent of the requirements of fair procedures in light of Dellway Investments Limited v. NAMA [2011] 4 I.R. 1, the law was 'evolving and [was] to that extent uncertain' (para. 22). She continued:-

> *'This is not to say that in every case where a point of fair procedures is raised that it will follow that the law is uncertain and that a certificate of leave to appeal will usually be granted (all other factors in Glancré being satisfied). The strategic infrastructure designation legislation has not been the subject of judicial scrutiny. The interface between a novel point on this legislation with the evolving law of fair procedures and how it is to be applied to this legislation is open to debate. As Haughton J. said, another view of the law is possible. In my opinion this issue can be described as uncertain within point 3 of MacMenamin J's decision in Glancré.' (per Costello J. at para. 22)."*

48. I adopt what I said in those paragraphs of my judgment in *Shillelagh*. I am satisfied, therefore, that the law is not in a state of uncertainty with regard to the applicable test for AA under EU law and, at least insofar as the issues which arose in this case is concerned, was not evolving to any material extent.

49. As this first question is premised on the test in *Kelly* and *Connelly* being the applicable test, and is focused on whether the court correctly applied the test in the principal judgment, I must bear in mind that it will generally be the case that a question which focuses on the application by the court of settled legal principles will not give rise to a point of law of *"exceptional public importance"*. In that regard, I agree with the recent comments of Simons J. in *Halpin* to which I referred earlier and with his reference by analogy to the approach adopted by the Supreme Court in determining whether to grant leave to appeal under Article 34.5.4 of the Constitution. It seems to me that the application of the test in *Kelly* and *Connelly*

to the facts of this case is similar to what was at issue in *Buckley* and *Heather Hill*, where the Supreme Court refused to grant leave to appeal on the basis that the decision of the High Court at issue in each case involved the application of well-established legal principles to the facts of the particular case. This case is different to *Fitzpatrick* where the Supreme Court did grant leave to appeal. In my view, the reasons advanced by Simons J. in *Halpin* for distinguishing that case from *Buckley* and *Heather Hill* apply with equal force to this case. In *Fitzpatrick*, there was still some uncertainty in the law, in that the relevant principles were said to be found in an opinion of an Advocate General which had not been formally endorsed by the CJEU or discussed in subsequent case law of that court or of the domestic courts.

50. I do not rule out that, in an exceptional case, it may be possible to persuade the court that the application of well-established legal principles may, in the particular circumstances of a case, give rise to a point of law of exceptional public importance. However, it seems to me that that will only be so in an exceptional case. I do not believe that this is such a case.

51. I have concluded that the issue as to whether the court correctly applied the test in *Kelly* and in *Connelly* to the facts of this case in the principal judgment does not give rise to a point of law of *"exceptional public importance"*. In its principal judgment, the court was applying well-established and recently confirmed principles to the facts of the case, which themselves were not in dispute.

52. I have concluded, therefore, that the first question does not give rise to a point of law of *"exceptional public importance"*.

Question (2): "*In particular, in circumstances where the Board expressly refers to the carrying out of a further and comprehensive evaluation in the context of AA, is the Board obliged to make same available or identify where it can be found?"*

Question (3): "*If not, how is the public concerned to understand and/or scrutinise the decision in the instant case, where is such assessment to be found, and does it properly*

engage with the concerns expressed by the inspector and are they resolved to the required legal standard?"

53. In my view, the conclusions reached in relation to Question (1) above apply equally to these two questions. In its principal judgment, the court considered the Applicants' contentions in relation to the *"further evaluation and analysis"* and the *"comprehensive evaluation"* in carrying out the AA, referred to in the Board's Decision. The court reached findings in that regard at para. 150 of the principal judgment, on the basis of the express terms of the Board's Decision and on the basis of the affidavit evidence before the court. The evaluation and analysis referred to was the exercise carried out by the Board on the basis of the materials provided to it (which were identified in the Board's decision), as recorded in the decision itself. The decision and the materials referred to in it are, and were, available for public scrutiny. The Board's conclusions and the materials relied on by it to support those conclusions in the context of the AA carried out by it were considered and assessed by the court in the principal judgment as noted earlier. That consideration and assessment by the court was undertaken on the basis of the agreed and well-established principles contained in *Kelly* and *Connelly* and in the case law of the CJEU. In advancing these questions as "*points of law of exceptional public importance*", the Applicants are seeking to reargue the case previously argued at the hearing and carefully considered by the court and rejected in the principal judgment.

54. These two questions do not seek to clarify any uncertainty which exists in the law which, as noted earlier, is not uncertain and is not evolving, at least with respect to the issues relevant to this case. The Applicants have not made the case that the law is evolving, but rather have sought to make the case that the court did not correctly apply well-established legal principles. For the same reasons as are set out above with respect to the first question, I

do not accept that either of these two questions give rise to a point or points of law of *"exceptional public importance"*.

Question (4): ***"What is the standard of pleading in environmental judicial proceedings, and was this Honourable Court correct in concluding that it was not [complied with in the present case]?"***

55. It was quite difficult to follow the Applicants' argument in respect of this question. As noted earlier, in its principal judgment, the court identified and discussed the legal principles applicable to pleading in planning and environmental judicial review proceedings. It did so by reference to O. 84 RSC, the case law of the Irish Courts (including the Supreme Court) and the provisions of s. 50A of the 2000 Act (as amended). These are all well-established principles which are routinely applied in planning cases, including those which give rise to issues of EU law.

56. While the court was critical in its principal judgment of the Applicants' reliance on arguments which had not been pleaded (in the statement of grounds or in the amended statement of grounds) and which had not been referred to in the Applicants' affidavits or in their written submissions, the court did ultimately the arguments advanced by the Applicants and found against them on the merits. This was so in relation to the case which the Applicants sought to make at the hearing in relation to the failure by the Board to seek a revised NIS and further information in relation to protected bird species other than the Golden Plover, as well as the Applicants' argument that the Board and its inspector failed to identify other *lacunae* or deficiencies in the material before them in carrying out the AA with particular reference to issues of peat stability, hydrology and water quality. While I was satisfied that those issues had not been pleaded and had not been referred to on affidavit or in the written submissions, nonetheless I proceeded to consider the arguments advanced on their merits. Therefore, insofar as the Applicants seek leave to appeal in respect of the standard of pleading in

environmental judicial review proceedings and in respect of the court's conclusion that the Applicants ought not to be permitted to raise points which had not been pleaded or otherwise raised in advance, the point would appear to be hypothetical and an appeal on this point would seem to me to constitute a moot (in respect of which leave to appeal should not generally be granted: *Ashbourne Holdings Limited v. An Bord Pleanála (No. 3)* [2001] IEHC 98).

57. However, I have nonetheless proceeded to consider whether this question does give rise to a point of law of *"exceptional public importance"*. It was argued on behalf of the Applicants that EU law is moving towards the position that an applicant who wishes to challenge a planning decision on EU law grounds can raise whatever points the applicant wishes and that the court should not scrutinise the pleadings to ensure that the point has been pleaded. The Applicants contended that under EU law, *"everything"* should be *"allowed in"* the case and that there is a tension between that approach and the approach under Irish law, which is that points raised must be properly pleaded. The Applicants relied in that regard on the requirement to ensure *"wide access to justice"* in the EIA Directive and in the Aarhus Convention and on the recent opinion of Advocate General Kokott in *Case C-524/19 Friends of the Irish Environment Limited v. An Bord Pleanála* (the "*FIE* case"). The Applicants argued that the court, in its principal judgment, set a very high standard in terms of the pleadings required and that by reason of the suggested tension between the approach taken in the judgment under Irish law and the approach under EU law, a significant legal issue arises in the case, which should require the court to grant leave to appeal on this point.

58. I am not satisfied that this question gives rise to a point of law of *"exceptional public importance"*. In its principal judgment on this issue, the court referred to and applied well-established legal principles and case law. I do not accept that there is any uncertainty in the law in this area. A party is required to set out its case in such a way that the opposing party is

aware of that case in advance of the hearing and is not taken short. Otherwise, serious injustice may be caused to the opposing party. In reaching the conclusions which I did on the pleadings issue, I was merely applying well-established legal principles and I do not accept that there is any uncertainty in relation to what those principles are or in relation to their application to planning and environmental judicial review proceedings.

59. Nor do I accept the Applicants' contention that EU law precludes a Member State from requiring an applicant to plead its case in advance or prevents a national court from applying procedural pleading rules in order to ensure that a party is aware of the case being made against it, in such a way that it is not taken short or prejudiced in the defence of that case. Member States have procedural autonomy in that regard.

60. I do not agree with the Applicants that the opinion of Advocate General Kokott in the *FIE* case supports their contention that it is not necessary for a party to set out its case by way of pleadings in advance of the hearing. The background to the reference to the CJEU in the *FIE* case can be seen from the judgment of Simons J., who made the reference, delivered on 15th February, 2019 (*Friends of the Irish Environment Limited v. An Bord Pleanála* [2019] IEHC 80). In that case, the Board had granted an extension to the duration of a planning permission for a liquefied natural gas regasification terminal under a particular section of the 2000 Act (as amended). Simons J. held that such an extension could only be granted under another section of the Act. The fact that the Board had proceeded under the wrong section meant that no Stage 1 screening for AA had been carried out under Article 6(3) of the Habitats Directive. While Simons J. was of the view that his conclusion that the extension had been granted under the wrong section ought to have been sufficient to dispose of the proceedings, the developer objected to the court deciding the case on that basis, as the applicant had not specifically pleaded that the Board's decision to grant the extension of the duration of the permission was made under the wrong section of the Act. In that regard, the

developer relied on s. 50A(5) of the 2000 Act (as amended) and the judgment of the Supreme Court in *A.P. v. Director of Public Prosecutions* [2011] 1 IR 729 ("*A.P.*"), which I referred to in the principal judgment, and on other case law. At para. 119 of his judgment, Simons J. stated:-

> *"The principle that parties should be bound by the pleadings is an important one, and is designed to ensure fairness for all sides. As the facts of the judgment of McDonald J. in* Sanofi Aventis Ireland Ltd.[3] *indicate, the introduction of a new argument at the eleventh hour can prejudice the other side in that it denies them an opportunity of putting forward a detailed response and, in particular, from adducing evidence which may be relevant to the new point. The position in the present case is, however, much less extreme. The issue is a net point of law turning on statutory interpretation. The issue was fully ventilated before me, with all sides offering submissions on the correct interpretation of, and interaction between,* [the two sections of the Act at issue]. *As the issue is one of statutory interpretation, there is no question of evidence being relevant to the issue, and thus no side was denied opportunity to put forward evidence. Moreover, the issue is inextricably linked to the issues that are clearly raised in the pleadings, and again, it is difficult to understand how any of the parties can be said to have been taken by surprise by this issue."* (para. 119)

61. Simons J. continued (at para. 120), stating that:-

> *"…a more flexible approach to pleadings may be required in circumstances where the court is seeking to comply with its obligation under European law to interpret national legislation insofar as possible in the light of the aims and objectives of relevant European Directives."*

[3] [2018] IEHC 719

62. It is important, therefore, to note that what Simons J. was concerned with in the *FIE* case was a situation where the court was seeking to comply with its obligation under EU law to interpret national legislation insofar as possible in light of the aims and objectives of relevant European Directives. Simons J. was of the view that where the court was confronted with two possible statutory procedures for obtaining an extension of the duration of a planning permission, only one of which made provision for compliance with the Habitats Directive, he was obliged under European law to interpret national law in order to ensure compliance with that Directive and that, if and insofar as Irish procedural law precluded him from applying that interpretation, it was at least arguable that the court was required to disapply that procedural rule. It was on that basis that he referred the particular question to the CJEU.

63. In providing her opinion on that question in the *FIE* case, Advocate General Kokott was not expressing any general view on a requirement of national law that a case be properly pleaded. She was considering how a national court should approach its obligation to give full effect to provisions of EU law, by refusing, if necessary, of their own motion to apply any conflicting provision of national law. It was in that context that Advocate General Kokott stated (at para. 67) as follows:-

> *"67. However, it is not necessary for the parties to expressly plead before the national courts which individual provisions of national law those courts should disapply or interpret in accordance with EU law. Rather, the identification of those provisions and the development of the approach for eliminating any contradiction between national law and EU law is part of the obligation of national courts to achieve the result envisaged by the directive.*
>
> *...*
>
> *69. In any event, the obligation of a national court to interpret national law as far*

> *as possible in accordance with EU law does not require that the parties to the proceedings before it expressly assert that specific interpretation, if those parties allege at least an infringement of the relevant provisions of EU law."*
>
> (paras. 67-69)

64. I do not accept that there is anything in the Advocate General's opinion which would require the court to disapply the Irish rules on pleadings in planning and environmental judicial review proceedings. The position addressed in the *FIE* case was completely different. There was no provision of national law which the court was required to disapply or to interpret in accordance with EU law on the facts of the present case. There was, therefore, nothing in the case which required the court to refuse to apply or to disapply any conflicting provision of national law of its own motion. The issues in the *FIE* case were completely different. The case does not provide any support for the Applicants' contention that EU law entitles a party to raise whatever points it wishes at the hearing without having pleaded those points in advance. The Applicants did not refer to any judgment of the CJEU in support of its arguments on the pleadings issue.

65. Nor did the Applicants provide any support for their contention that the reference to *"wide access to justice"* in Article 11(3) of the EIA Directive and Article 9(2) of the Aarhus Convention precludes the national court from applying rules on pleadings in planning and environmental judicial review proceedings, where those rules are applied equally to arguments advanced on the basis of Irish law and those advanced on the basis of EU law. In any event, the references to *"wide access to justice"* in the EIA Directive and in the Aarhus Convention arise in the context of the standing provisions of those measures and do not appear to be relevant to other procedural requirements, including those concerning pleadings.

66. For these reasons, I am not satisfied that the fourth question put forward by the Applicants amounts to a point of law of *"exceptional public importance"* for the purpose of s. 50A(7) of the 2000 Act (as amended).

Appeal not Desirable in Public Interest

67. I have found that none of the points or questions advanced by the Applicants in support of their application for leave to appeal is a point of law of *"exceptional public importance",* as that term is properly understood under s. 50A(7). Therefore, it is unnecessary for me to consider whether an appeal to the Court of Appeal is "*desirable in the public interest*". However, even if I were of the view that one or both of the points advanced by the Applicants satisfied that requirement (and I am not), the Applicants would also have to establish that it is *"desirable in the public interest"* that an appeal should be taken to the Court of Appeal. I am not satisfied that it is *"desirable in the public interest"* that an appeal be taken to the Court of Appeal in respect of any of the points advanced by the Applicants for the reasons outlined below.

68. As I noted at para. 70 of my judgment in *Shillelagh*, it is open to the court to consider a range of different factors and considerations in forming its view as to whether it is desirable in the public interest that an appeal be taken from its decision. Various examples of the sort of factors and considerations which can be taken into account by the court in deciding whether this requirement is satisfied can be seen in the cases. In *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112 ("*Arklow Holidays (No.1)*"), Clarke J. in the High Court was satisfied that the particular point raised on behalf of the applicant was a point of law of exceptional public importance. However, he went on to consider whether it was desirable in the public interest to grant the certificate sought. He came to the view that it was not. In reaching that view, Clarke J. considered that the public interest had to take into the account the nature of the proposed development (in that case a wastewater plant) and *"the*

potential consequences of a significant further delay in the matter being finally disposed of before the courts" (para. 24). Clarke J. continued:-

> *"While it is undoubtedly the case that issues and questions concerning the public nature of the project involved are not necessarily decisive (it would be wrong to say that the public importance of the project concerned must necessarily outweigh all other considerations in the case), such factors are, nonetheless, in my view, matters which have to be taken into account by the court in assessing whether it is in the public interest to grant the certificate."* (para. 24)

69. Clarke J. concluded that having regard to the importance of the issue raised by the applicant, on the one hand, and the importance of the project and the consequences of the likely delay (were an appeal permitted), it would not be in the public interest to grant the certificate sought. It should, however, be noted that in his subsequent judgment in *Arklow Holidays (No.2),* Clarke J. did grant a certificate to enable the applicant to appeal from his decision that the applicant was precluded, by virtue of the rule in *Henderson v. Henderson* [1843] 3 Hare 100, from pursuing any of the issues in respect of which leave to challenge the planning permission at issue had been granted. He was satisfied that the first of the two requirements in s. 50A(7) was satisfied, namely, the point which the applicant sought to raise was one of "*exceptional public importance*". He was also satisfied that the second requirement was satisfied, namely, that it was "*desirable in the public interest*" that an appeal should be permitted on that point.

70. I also noted at para. 73 of my judgment in *Shillelagh* that a number of the judgments demonstrate that the existence of uncertainty in the law and the evolving nature of the law are factors which may be considered, not only in relation to the question as to whether the point of law is one of *"exceptional public importance"*, but also on the question as to whether it is

"desirable in the public interest" that an appeal should be permitted. (See: *Ógalas* (per Baker J. at para. 4) and *Callaghan* (per Costello J. at paras. 7, 18 and 26)).

71. These cases illustrate the broad range of factors and considerations which may be taken into account by the court in determining whether the second of the two requirements in s. 50A(7) is complied with on an application for leave to appeal to the Court of Appeal under that provision.

72. I have concluded that it not desirable in the public interest that an appeal should be taken from the decision contained in the principal judgment to the Court of Appeal in respect of any of the points put forward by the Applicants. I have reached that conclusion for a number of reasons.

73. First, as I have sought to demonstrate in respect of each of the points put forward for certification by the Applicants, neither point or question arises in circumstances where the law in the particular area is uncertain or is evolving. In the absence of any such uncertainty or lack of clarity, it cannot be said that it is desirable in the public interest that an uncertainty or lack of clarity be resolved by an appellate court. If the law were uncertain or evolving in the particular areas concerned, the position might well be different. However, in light of my conclusions that the law is not uncertain or evolving and does not require clarification, it is not in the public interest that an appeal should be permitted from my decision.

74. Second, the hearing was adjourned while the Supreme Court was considering, first, whether to grant leave to appeal in *Connelly* and then to decide that appeal. The parties and the court, therefore, had the most available and most authoritative updated statement of the test for AA under EU law at the hearing. The hearing was further adjourned to enable the judgment of the CJEU in *Holohan* to be delivered and provided to the court. The parties and the court therefore, had the most up to date statement of the law relating to AA when the hearing concluded and when judgment was reserved.

75. Third, the proceedings have given rise to a significant delay in the development which I accept provides for an important piece of renewable energy infrastructure in respect of which planning permission was granted by the Board in 2016. An appeal will lead to further delay. This is a factor which the court can take into account in determining whether it is desirable in the public interest that an appeal be brought to the Court of Appeal (see, for example: *Arklow Holidays (No. 1)*).

76. For these reasons, in my view, even if the Applicants had satisfied the first requirement in s. 50A(7) and had established that one or more of the points advanced by them amounted to a point of law of *"exceptional public importance"* (which they have not), the Applicants have not satisfied the second requirement of demonstrating that it would be *"desirable in the public interest"* that an appeal should be permitted to the Court of Appeal.

77. In my view, for the reasons set out above, it would not be desirable in the public interest that an appeal should be permitted from the decision contained in the principal judgment.

Conclusion

78. In conclusion, I am not satisfied that any of the points or questions put forward by the Applicants involves a point of law of exceptional public importance arising from the decision contained in the principal judgment. Nor am I satisfied that it is desirable in the public interest that an appeal should be taken to the Court of Appeal from that decision. On the contrary, I have concluded that it would not be desirable in the public interest that such an appeal should be brought.

79. In those circumstances, I have concluded that the cumulative requirements contained s. 50A(7) of the 2000 Act (as amended) have not been satisfied by the Applicants.

80. Accordingly, I refuse to grant leave to appeal to the Applicants.