THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 706
[2018 No. 708 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

M28 STEERING GROUP

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

AND

CORK COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice MacGrath delivered on the 17th day of November, 2020.

1. This is an application pursuant to s. 50A(7) of the Planning and Development Act, inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act, 2006, ("*the Act*") for a certificate for leave to appeal from the decision of this court delivered on the 20th December, 2019 ([2019] IEHC 929). In its decision the court refused the applicant's application for an order quashing the decision of the respondent of 29th June, 2018 whereby it granted approval for a road development scheme known as the Cork County Council N28 Cork Ringaskiddy Project Motorway Scheme, Protected Road Scheme and Service Area Scheme 2017 ("*the scheme*").

2. Section 50A (7) of the Act provides:-

> *"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 Supreme Court 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 Supreme Court."*

3. The appellate jurisdiction of the Supreme Court referred to in the section is now vested in the Court of Appeal.

The Points of Law

4. The applicant maintains that certain points of law arise for certification pursuant to s. 50A (7) of the Act. It is also contended that certain of these issues ought to be referred to the CJEU under Article 267 of the Treaty of the Functioning of the European Union ("*TFEU*"):

   (a) Under what consent is the extraction of materials for the road in the quantities required authorised?

   (b) What assessments have been undertaken in respect of this extraction and where is it to be found?

(c) Are the assessments "*as complete as possible*" in accordance with the requirements of *European Commission v. Ireland* (Case C-50/09).

(d) In circumstances where the applicant sought to challenge the failure of a competent authority to carry out a complete Environmental Impact Assessment ("*EIA*") and Appropriate Assessment ("*AA*"), and the failure to grant a development consent in respect of all necessary components of the developments (the quarrying work) are the requirements of Article 11 the Environmental Impact Directive satisfied in proceedings where a court has not identified either a consent authorising the said work, or any assessment of same?

(e) Where a development consent is granted that depends on, or will be implemented together with, an earlier development consent (that has not been commenced) which earlier consent was granted pursuant to a provision of national law which did not properly implement the Habitats Directive and was granted in a manner not in accordance with the requirements of the said Directive, can such a grant of consent be lawful having regard to the requirements of EU law?

(f) Is there an obligation on the competent authority to assess such earlier consent to ensure its compliance of EU law?

The Applicable Legal Principles

5. The principles to be applied on an application such as this were outlined by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanala* [2006] IEHC 205. They are as follows:-

"1. The requirement 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 that 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.

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

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."*

6. In *Harding v. Cork County Council* [2006] 1 I.R. 294 Clarke J. (as he then was) added that there might be some cases where the point did not arise from the decision simply because through inadvertence it was not considered.

7. Clarke J. also pointed out in *Arklow Holidays Ltd v. An Bord Pleanala* [2006] IEHC 102 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 to determining whether it is an important point of law. He accepted as correct the position as stated by Simons (now Simons J.), *Planning and Development Law* (2nd ed., Round Hall, 2007) that the Court should not attempt to predict the outcome of the appeal but should take the appellant's case at its height and consider whether the point of law is of exceptional public importance. It is the decision of the Court which must give rise to the point of law and it is not permissible to allow an appeal on moot or theoretical points of law which may have arisen from discussion during the hearing. The point of law must be "*of*" or in some way "*contained in*" the decision or determination in the first instance and must at the same time transcend the case itself to meet the requirements of exceptional public importance and public interest.

8. In *Rushe & Ors v. An Bord Pleanala & Ors* [2020] IEHC 429, Barniville J. observed, inter alia, at para. 21 as follows:-

> *"…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 …"*

9. He added, as was pointed out by the Supreme Court in *Grace and Sweetman v. An Bord Pleanala* [2017] IESC 10, that 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 new constitutional architecture created by the 33rd amendment of the

Constitution and the enactment of the Court of Appeal Act, 2014. Thus, an appeal from the decision of the High Court in respect of an application in a judicial review of a planning decision might potentially be brought to the Court of Appeal or directly to the Supreme Court. But it was also observed by Barniville J. at para. 24 of *Rushe* that the clear intention of the Oireachtas when enacting s. 50A:-

> *"24… 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."*

10. Barniville J. noted that it was also not appropriate for an intending appellant to seek to reargue the points already decided upon by the court in its substantive decision and that:-

> *"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..."*

Further, referring to *Halpin v. An Bord Pleanala* [2020] IEHC 218, he noted that Simons J. had there stated that the approach taken by the Supreme Court in determining applications for leave to appeal provided valuable guidance to the High Court in considering applications for leave to appeal under s. 50A (7). Simons J. observed at para. 15 of his judgment:-

> *"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."*

Simons J. referred to the determination of the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134 where the court, having acknowledged 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 nevertheless recognised that general principles operate at a range of levels. The determination continued:-

"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."

In *Rushe*, having considered the authorities, Barniville J. observed at para. 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)."

The Applicant's submissions

(i) In *Glancré Teoranta,* MacMenamin J. observed that in considering the requirement to obtain leave to appeal, the statutory regime which has been devised by the legislature indicated an interest to ensure that the planning process is not to be hampered by a completely unrestricted access to the court which may cause harmful delays, and that such a restriction can be lifted only in an exceptional case. It is submitted, however, that such wider legislative intention can no longer be assumed in the light of Article 11 of the EIA Directive and the jurisprudence of the CJEU, in particular *Gemeinde Altrip and Others v. Land Rheinland-Pfalz* (Case C-72/12) ("*Altrip*") where at para. 27 the following is stated:-

> "However, neither the new requirements arising from Article 10a of Directive 85/337, nor the actual requirement that the project be subject to an environmental assessment, can in themselves be considered to make

administrative procedures more cumbersome and time-consuming. As the Advocate General observed in point 59 of his Opinion, the legislation at issue in the main proceedings does not create new requirements of that kind but is instead designed to improve access to a legal remedy. Furthermore, if extending the right of action of the public concerned to challenge acts or omissions relating to such projects is likely to increase the risk that those projects will become the subject of contentious proceedings, that increase of a pre-existing risk cannot be regarded as affecting a situation already established.

28 Although it is true that that extension may have the effect, in practice, of delaying the completion of the projects involved, a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions falling within the scope of Directive 85/337, a review in which the legislature of the European Union has, in accordance with the objectives of the Århus Convention, sought to involve members of the public concerned having a sufficient interest in bringing proceedings or maintaining the impairment of a right, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health."

(ii) In written submissions it is contended that, in the instant case, the issue concerned the capacity of the public to participate in an application for leave to seek what is described by the applicant as a substitute consent. It is submitted that this is an issue of exceptional public importance and on which it is in the public interest to have resolved. There is considerable uncertainty in relation to this points of law and it is in the public interest that these matters are resolved.

(iii) The central question to be determined in this case concerned the assessment of the quarry. The proposed operation of the quarry involved a ten to twelve fold increase in the historical rate of extraction. It is clear from the judgment that it was envisaged that the quarry would operate under its existing permission and no additional assessment was conducted. No assessment of the extraction works was undertaken by the Board as part of the road scheme. The extraction is to be carried out solely under the quarry permission. The court expressed satisfaction that the inspector's conclusions were based on the quarry operating within the confines of its existing permission. It is contended that this presents a very clear and significant difficulty, as the road scheme was not contemplated at the time of the original quarry permission and the works required and envisaged by the road scheme are very different to those contemplated by the permission. This begs the question as to whether or how such works could be authorised by the permission. The court noted in its judgment that nothing in the decision was to be taken as an expression that the court's view as to whether any activity which may be engaged in by the quarry operators in the future, whether as part of the extraction of materials for the project, or otherwise, may or may not amount to a breach of the planning permission or constitute, or not, an intensification of user, requiring a

further planning application. It is submitted that the court did not express a view on the critical question to be determined as to whether the development of the road, as proposed, can be carried out by means of the existing planning permission and this uncertainty gives rise to a number of points of law of exceptional public importance. First, the applicant challenged the procedural and substantive legality of the EIA and AA carried out by the Board. It was contended that the quarry development is an integral part of the overall road development, which it is suggested the court has accepted. Second, the applicant contended that the original quarry permission has not been altered by the approval for the road, which was also accepted by the Court. A question therefore arises that if the court has found that the development of the road requires the quarry, and the original permission is unchanged, but the Court has not found that the original permission authorises the extraction required, then under what development consent is quarrying at the levels required for the road scheme being conducted, and what assessments have been conducted in respect of same. This fundamental issue forms the basis of the first three questions.

(iv) There is a significant lacuna both in the development consent for the extraction works required and in terms of the assessments conducted. There is a further lacuna within the judicial review proceedings having regard to the obligation under Article 11 of the EIA Directive. The judgment of the court gives rise to considerable uncertainty. The proceedings were specifically brought to challenge the development of the quarry as it will now be carried out under the scheme, had never been consented to, or assessed. The court has not found that the quarry permission permits the development of the quarry to the levels required by the scheme. The court has expressly found that the development of the quarry is not authorised by the road scheme consent. The works in the quarry will require to be carried out as part of the scheme, yet their consent and their assessment are uncertain. This is fundamentally at odds with the requirement of the EIA and Habitats' Directives which mandate both consent and assessment. The lack of identification of a consent and/or assessment in respect of these works is in breach of EU law and the court must do everything within its sphere of competence to correct such a breach in accordance with its remedial obligations under EU law, including certifying the within application for leave to appeal. The applicant is entitled to bring a judicial review under Article 11 of the EIA Directive to clarify where the development consent for the development of the quarry is to be found and what if any assessments have been taken and/or whether or not they are adequate.

(v) This issue of the existence of the development consent remains unanswered. What is permitted and where it has been assessed remains unanswered. This, it is submitted, gives rise to the fourth point of law of exceptional public importance and that it is in the public interest to have it determined. The applicant is an NGO and has sought to exercise its rights of access to justice pursuant to the Aarhus Convention and pursuant to Article 11. While the court has refused the relief

sought by the applicant, it still does not have an answer to the principle issues raised in the proceedings namely under which consent and pursuant to what assessment the work will be carried out. It is clear that the road scheme and the associated materials balance is predicated on the use of materials in the quarry and that no other proposal has been assessed. The uncertainty which the court has found, flies in the face of the certainty that is required under the EIA and AA as a matter of EU law and the uncertainty which arises remains unresolved.

(vi) The applicant places considerable reliance on *Friends of the Irish Environment Ltd v. An Bord Pleanála* (Case C-254/19) ("*the Friends of the Irish Environment*") which concerned a reference by Simons J. It is argued that although a question of the extension of a lapsed permission does not arise on the facts of this case, an issue of significance arises as to whether it is lawful for a competent authority to grant a development consent to an emanation of the State, a roads authority, which requires as a necessary component the extraction of material from the quarry on foot of a permission that was subject to an assessment conducted at a time when the legislative regime in place did not properly meet the requirements of the Directive. Mr Collins B.L., on behalf of the applicant, argues that the 2008 permission at the heart of the decision in *Friends of the Irish Environment* and the 2008 quarry permission are identical in terms of the recording, or lack thereof, of any appropriate assessment. The 2008 permission was not proceeded by an assessment in accordance with Article 6(3) of the Habitats Directive which established that there would be either no significant effects or no adverse effects from the development on the integrity of a nearby European site. This renders the 2008 quarry consent infirm. The appropriate course is for the competent authority to revoke that permission. The local authority, being the notice party, cannot now lawfully carry out the development that was subject to the 2008 permission, a development which has not yet commenced. It is submitted that it is important that the applicant be afforded a right of appeal to have clarity as to what precise development consent under which the notice party will operate. This is a question of law, as are the questions surrounding whether the conducted assessments are as complete as possible for the purposes of the EIA and Habitats Directives.

(vii) It is also submitted that a reference to the CJEU is required in respect of the two questions at (e) and (f), and that at this stage of the proceedings the court ought to refer these questions in accordance with the requirements of decision of the CJEU in *Kenny Rolan Lycksekog* (Case C-99/00). The notice party, the respondent and this court have been in breach of their obligations of remediation. In the circumstances this court is obliged pursuant to *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* (Case C-283/81) ("CILFIT") and *João Filipe Ferreira da Silva e Brito and Others v. Estado português* (Case C-160/14) ("Ferreira") to refer the matter to the CJEU. The obligation to refer arises even though the quarry owners are not currently party to the proceedings. They can be joined as notice parties on any such reference should they wish to be heard.

The response of the respondent

11. The respondent submits as follows:

(i) The court's jurisdiction in relation to certification is to be exercised sparingly. The clear legislative intention is that planning cases should generally be confined to the High Court and that the applicant must show positively that some public interest is served by an appeal in the sense that the Court of Appeal is required in the public interest to deal with the points identified. In accordance with *Glancré Teoranta* principles, the requirements of s. 50A(7) are cumulative. The point must be more than of public importance, it must be of exceptional public importance. In planning terms, all points of law regarding the operation of the Planning and Development Acts affect the public. There must be something serious and significant about the point of law on which it is alleged that the trial judge has erred. It is not sufficient to argue that a planning point affects the public generally. The questions raised are not points of law.

(ii) It is critically important for the court to decide whether there is an uncertainty in the law. Reliance is placed on the decision of Barniville J. in *Shillelagh Quarries v. An Bord Pleanala* [2020] IEHC 22 where he observed at para. 28, that "*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*". If the law is clear, no points can arise. Legal uncertainty cannot be imputed by an applicant by simply raising a question as to a point of law. Uncertainty cannot be imputed because the party seeking certification disagrees with the trial judge's findings of fact to which the law has been applied.

(iii) The first three questions seek answers to questions of fact which are specific to the circumstances of the case and do not reach the threshold.

(iv) To the extent that the questions raise an issue of whether the assessment was as complete as possible, it is submitted that this reflects the legal standard of environmental assessment under EU law and no uncertainty of law arises.

(v) While there was a dispute between the applicant and the notice party as to whether the additional material required for the road works to be sourced from the quarry would necessarily mean an intensification of activity at the quarry beyond that permitted by planning permission, nothing in the Board's decision permits such intensification nor breach by the quarry operator of its planning permission. The Board, through its inspector, fully assessed the cumulative and in combination effects of the proposed road development and the already permitted quarry development. The applicant appears to misunderstand the nature of the cumulative assessment which looks at the environmental impacts of the proposed development along with those of existing and permitted development in the area. A cumulative assessment does not require that a full EIA or AA be carried out of those already existing or permitted developments. It follows, therefore, that depending on the nature of the existing or permitted development, those assessments will have been

screened or carried out in the development consent process which led to permission(s) being granted for them. They are unaffected by the subsequent application for approval of the road development.

(vi) The applicant's submissions are based on the very argument that the court rejected, namely that the quarry formed an integral part of the proposed road development. The court rejected the contention that there has been project splitting and did not accept the contention of the applicant that it was impermissible to regard the quarry development as being a discrete development from that of the road itself. Thus, the Board assessed the quarry by reference to its permitted levels of operation under its existing planning permission and the decision of the Board does not permit any exceedance of that permission. The full extent of the permission attached to the quarry was considered as part of the assessment. The applicant's case, it is submitted, rests on an anticipated breach of the quarry permission by a third party who is not before the court and this is an assumption which cannot be made by the court.

(vii) There is no transcendent point of law involved. Fundamentally, it is reiterated that if the quarry permission is insufficient to allow for extraction of the necessary material, the quarry operator may be able to seek a further permission, but that does not point to any uncertainty in the law nor invalidity in the road development approval. To the extent that the applicant contends the case and consequently the point of law is concerned with where the assessment is to be found, it is submitted that this is misconceived because it is premised on the assertion that the quarry is an integral part of the road development such that there must be an assessment of both together. The respondent submits that the court has not accepted that proposition. It is further submitted that in circumstances where the road and the quarry are separate developments there must be a cumulative assessment of the proposed development (i.e. the road) with that which already exists or is permitted (i.e. the quarry) and the court has found as a matter of fact that this was done in detail. The respondent also submits that any further complaint about "*where this is to be found"* is a reasons type argument at the decision making process, and no case in respect of reasons was raised.

(viii) The applicant expressly contended at hearing that it was not engaging in a collateral attack on the quarry permission. There is no dispute but that the Board's decision in respect of the road development scheme does not authorise quarrying activity, the authorisation for same arising only by reference to the quarry permission itself. Planning permission for quarries authorise extractions but generally do not specify the development for which the extracted material may be used. Had the issue of identifying the permission for extraction of material from the quarry been a live one before the court, it would have been a matter of a case specific analysis of the relevant permissions which itself is a task governed by clear and settled law. At best what arises is a question as to what a consent means in any given case. This does not arise from the judgment of the court. The court was

live to the dispute between the applicant and the notice party as to the interpretation of the quarry permission and to the fact that the beneficiary of that permission was not before the court. The court did not purport to decide that future activity on the part of the quarry operator would or would not amount to a breach of the quarry permission.

(ix) The applicant's argument that the court's judgment is authority for the proposition that extraction works did not need to be assessed, is premised on a finding which the court did not make, namely that the quarry is an integral part of the road development which was the subject of the application before the Board and that quarrying activity will take place pursuant to the road scheme. The developer's intention to source material from the quarry is no different to a party seeking to carry out development saying that in doing so it will have to resort to other previously permitted and assessed activity.

(x) Regarding the fourth question, the respondent submits that it is impermissible for the applicant to reformulate its case in order to seek a certificate, the applicant having expressly disavowed that it was mounting a collateral challenge to the quarry permission. The validity of the EIA and/or AA carried out in respect of the grant of the planning permission of the quarry was not a matter which was or is before the court. The grant of the approval for the road development does not authorise the breach of the quarry permission. If a breach occurs, enforcement remedies will be available.

(xi) With regard to the fifth and sixth questions, it is reiterated that in circumstances where the applicant has disavowed any collateral challenge to the grant of the planning permission of the quarry, it is difficult to see how any question can arise from the court's judgment predicated on the assertion that such permission was granted in a manner which was not in accordance with the requirements of the Habitats Directive. The point suggested by the applicant depends entirely on the proposition that the assessment must necessarily have been invalid, which is not the case. The applicant cannot request the court to assume the invalidity of such previous assessments in order to frame a question for certification.

(xii) To the extent that the applicant relies on the decision in *Friends of the Irish Environment*, the respondent submits that no attempt is made to extend the permission that attaches to the quarry. It is suggested if that was to be in issue in the case, it ought to have been raised and fully argued before the court.

(xiii) No affirmative public benefit has been identified or relied upon by the applicant.

Notice Party's Submissions

12. The notice party repeats many of the points made by the respondent and submits:

(i) Two conditions must be fulfilled before a certificate for leave to appeal can be granted, namely the decision of the court must involve a point of law of exceptional

public importance and it must be desirable in the public interest that an appeal should be taken to the Court of Appeal.

(ii) The points raised by the applicant are not points of law and/or are specific to the facts of this case and/or are not of public importance or exceptional public importance.

(iii) They are not points which flow from the court's decision.

(iv) The points must transcend the individual facts and parties in a given case.

(v) The answer to the first question is readily found in the substantive judgment of the court and no uncertainty as to the law arises.

(vi) The court found that no issue of project splitting arose and that the project is the road scheme. The cumulative impacts of the project and the quarry were fully considered and assessed.

(vii) The second question does not raise a point of law. Emphasis is placed on the finding of the court that as extraction at the quarry must occur in accordance with the conditions attached to the 2008 permission and that an in combination assessments for the purposes of the EIA Directive and the Habitats Directive was conducted on that basis, there is no doubt as to the assessments which have been undertaken.

(viii) The court confirmed in its judgment that the cumulative impacts and effects to the quarry and the road were considered in great detail and that the extraction of the materials, if feasible or permissible, is proposed to be in accordance with the quarry planning permission and conditions attached thereto.

(ix) As framed the third questions does not give rise to a point of law of exceptional public importance and is entirely factually specific. The underlying rationale of the question is to query the validity of the 2008 quarry permission and the 2012 s. 261A assessment neither of which was challenged in the course of the proceedings and therefore enjoyed a presumption of validity. The underlying thrust of the fourth question is that the project ought to have been the road development and the quarry. In fact, the court properly determined that the project was solely the road development and no issue of project splitting arises. The questions are predicated on the basis of the quarry planning permission being deficient, or that the s. 261A screening assessment was invalid, neither of which were challenged at hearing.

(x) This application must proceed on the basis that the applicant did not seek to challenge the quarry planning permission or the 2012 screening assessment.

(xi) The public interest is not served in any way by further delaying the implementation of the road development. This is particularly so in circumstances where, although

the applicant has asserted breaches of both the EIA Directive and the Habitats Directive, it has produced no evidence of actual environmental damage and/or effects on any European site.

(xii) Reliance on *Altrip* is misplaced. There is no requirement under Article 11 of the EIA Directive that the review procedure must have two stages, with the right of appeal to a higher court, still less a prohibition on Member States imposing limitations on any such right of appeal. Such matters come within the procedural autonomy of Member States.

(xiii) With regard to questions five and six it is submitted that as the court has already declined to refer the matter to the CJEU and the issue does not arise for reconsideration. These questions fly in the face of the applicant's stated position that it was not seeking to impugn the validity of the quarry permission or the 2012 assessment. The fifth question is premised on the quarry permission having been granted pursuant to provision of national law which did not properly implement the requirements of the Habitats Directive, a point which was not expressly argued before this Court, nor did it arise for determination by the court, therefore, it is submitted that it cannot be said that this question flows from the decision of the court.

(xiv) Similarly, with regard to the sixth question, it is submitted that this presupposes an issue which was not before the court and which did not arise for determination. The applicant failed to establish any factual basis for contending that the impugned decision was in breach of either the EIA Directive or the Habitats Directive and it follows that no legal flaw has been established having regard to the role of the court. The applicant now seeks to place the cart before the horse by seeking to have the appellate court revisit the validity of the 2008 quarry permission, based on questions that were not before the court of first instance, and thus not addressed by the court in its role in the application of *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 test.

13. In reply, Mr. Collins B.L., counsel for the applicant, submits that although the first question gives rise to a question of fact it also gives rise to a question of law. The difficulty arises because there is no complete consent for the two operations to occur in tandem and there is no interaction or interweaving between the two development consents. The fundamental question that his clients ask in these proceedings, is whether there is in fact a development consent for the development that will actually be constructed. This court has not determined that development can be carried out under the quarry permission. This goes to the applicant's rights, including those of fair procedures and access to justice and the vindication of those rights.

Discussion

14. There is a certain degree of overlap between the basis for the applicant's request for a certificate for leave to appeal, the request for a reference to the CJEU and the applicant's contention that it has not been afforded an appropriate right of access to justice under

Article 11 of the EIA Directive. As a first step, it seems appropriate to consider the extent to which the *Glancré* test has been affected by the decision of the CJEU in *Altrip* and second the effect, if any, of the recent decision of the CJEU in *Friends of the Irish Environment* on the issues under consideration.

***Altrip* and the *Glancré* test**

15. The effect of *Altrip* on the approach to the application of the *Glancré* principles was addressed recently by Barniville J. in *Rushe* who stated at para. 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."*

16. I see no reason to disagree. I see nothing in *Altrip* which mandates that this court should depart from the well-established *Glancré* principles as discussed and applied the authorities to which the court has referred at para. 5 et seq. I am satisfied that the principles which the court ought to, and is obliged, to apply are those which were outlined in *Glancré*. This conclusion must also have certain implications for the applicant's claim that there has been a breach of its rights under Article 11 of the EIA, which I shall address further below.

The effect of *Friend of the Irish Environment*

17. Questions five and six are largely predicated on the applicant's contention regarding the effect of the decision of the CJEU in *Friends of the Irish Environment*. It also seems to me

that the applicant's contention in this regard is relevant to the suggested remediation obligations of the court and to the request for a reference to the CJEU under Article 267 TFEU (previously Article 234 EC and prior to that Article 177 EEC). I therefore propose to deal with these issues together.

18. The applicant's claim, *inter alia*, that by reason of the effect of that ruling it is beyond doubt that the decision in respect of the quarry did not meet the requirements of the decision of the CJEU in *Friends of the Irish Environment* or the provisions of Article 6(3) of the Habitats Directive. Therefore, it is contended that because the quarry consent is infirm it cannot form the basis for any subsequent permission nor can it form the basis of a cumulative assessment between those permissions or consents, and a later permission predicated upon or, as described by the applicant, parasitic upon such consent. It is submitted that this is so even in circumstances where the quarry permission was not the subject of challenge and in circumstances in which the applicant, during the course of the hearing, disavowed any suggestion that it was mounting such challenge.

19. The applicant submits that it is not centrally relevant that the application for consent in this case does not involve an application for an extension of a permission, as was the case in *Friends of the Irish Environment*. The issue is whether it is lawful for a competent authority to grant a development consent to a roads authority, an emanation of the State, in respect of a development that requires, as a necessary component, the extraction of material from a quarry where the quarry permission was subject to assessments conducted at a time that the legislative regime in place did not properly meet the requirements of the Directives.

20. The ruling of the CJEU in *Friends of the Irish Environment* was addressed in great detail by Mr. Collins B.L. during the course of his oral submissions. In considering the ruling I intend to leave aside, for the moment, any issue which might arise concerning the continuing effect of the collateral attack doctrine when viewed in the context of European Community environmental law obligations, a debate which was briefly touched upon at hearing. In this regard the court is nevertheless conscious of *dicta* of McKechnie J. in An *Taisce v. An Bord Pleanala* [2020] IESC 39 where he observed at para. 155:-

> *"This Court, in granting leave on this point, anticipated that the influence of European law on the area of substitute consent may require a particular approach to the exercise of the collateral attack jurisprudence in at least some cases. While this remains the position and the Court is grateful to counsel for the submissions made, nonetheless it is satisfied, in light of the answers given on Issues One and Two above, that it is no longer necessary for the purposes of these proceedings to resolve or further advance this particular question.*
>
> *156. In the context of any future discussion however, it can be said at a general level that the doctrine of collateral attack is of course judge made and driven, and thus is capable of some adaptation or relaxation if a particular situation demands it. It is not, and not intended to be applied in some mechanical or formulistic way. In addition, a legislative challenge on constitutional grounds or where an issue of EU*

law arises could well attract different considerations from those which apply to an administrative law decision where a statute or the rules of court have provided for a certain timeframe. Such questions however, will have to remain for another day."

21. In *Friends of the Irish Environment,* the CJEU was requested to provide a preliminary ruling on the interpretation of Article 6(3) the Habitats Directive. On 31st March, 2008, the respondent Board granted permission for the construction of a liquefied natural gas regasification terminal on the Shannon river estuary. The project was to be carried out in the vicinity of two Natura 2000 sites. The permission had a life of ten years. The project was not constructed. Application was made in September, 2017 for an extension of the duration of the development consent for a further period of five years. The application entailed no material alteration of the development. Simons J. requested the CJEU to answer a number of questions. First, whether the decision to extend the duration of a development consent constituted the *agreement of the project* such as to trigger the requirements of Article 6(3) of the Habitats Directive. Second, he queried whether certain considerations affected the answer to the first question. These included:

    (i) whether the development consent, the duration of which is to be extended, was granted pursuant to a provision of national law which did not properly implement the Habitats Directive because domestic legislation incorrectly equated an AA, for the purposes of the Habitats Directive, with an EIA for the purposes of Directive 85/337;

    (ii) the development consent as originally granted did not record whether the consent application was dealt with under the first stage (the AA) or second stage of Article 6(3), nor did it contain "*complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned*", as required by the decision of the CJEU in *European Commission v. Spain* (C-404/09);

    (iii) the original period of the development consent had expired and in consequence, the development consent ceased to have effect and thus no development works can be carried out pursuant to the development consent pending a possible extension;

    (iv) No development works were carried out pursuant to the consent.

22. In the event of the first question being answered in the affirmative, a third question was raised as to the considerations to which the competent authority is required to have regard in carrying out a first-stage screening exercise pursuant to Article 6(3) of the Habitats Directive. A number of examples of matters which might have to be considered were outlined, including:

    (i) whether there are any changes to the proposed works and use;

(ii) whether there has been any change in the environmental background such as, for example, the designation of the European Sites subsequent to the date of the decision to grant the development consent; and

(iii) whether there have been any relevant changes in scientific knowledge, such as, for example, more up-to-date surveys in respect of qualifying interests of European sites.

Alternatively, the CJEU was asked whether the competent authority is required to assess the environmental impacts of the entire development.

23. The third question was described by the CJEU as a request by the referring court to specify, if the answer to the first question is in the affirmative, the conditions for applying the requirement to carry out an AA of the implications for the site concerned, laid down in the first sentence of Article 6(3) of the Habitats Directive, to a consent such as that in the main proceedings. In particular:-

> *"whether the competent authority is required to take into account any changes to the works as originally permitted and to the proposed use as well as change in the "environmental background" and in scientific knowledge since the original consent was granted. The referring court also asks whether the competent authority must assess the effects of the entire project on the site."*

24. Two further questions were raised, which the court declined to answer primarily because it took the view that there was an absence of factual or legal material necessary to give a useful answer to the question or that the answer was unnecessary.

25. The court considered the effect of the first and second questions posed by Simons J. to be as follows:-

> *"24. Consequently, it must be held that, by its first and second questions, which must be examined together, the referring court asks, in essence, whether a decision extending the period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal constitutes the agreement of a project under Article 6(3) of the Habitats Directive, where the original consent for the project was not preceded by an assessment of its implications for the site concerned in accordance with that provision, that authorisation ceased to have legal effect on expiry of the period which it had set for those construction works and the latter were not undertaken."*

26. It was observed by the CJEU that the authorities established that the concept of a project within the meaning of Article 1(2)(a) of the EIA Directive, can be taken into account in order to assess whether a decision extending the period set in the original consent for the construction in question, in respect of which works had not commenced, relates to a "project" within the meaning of Article 6(3) of the Habitats Directive. The CJEU also stated that since the definition of "project" under the EIA Directive is more restrictive

than under the Habitats Directive, if an activity is covered by the EIA Directive, it must be covered by the Habitats Directive. It therefore followed that if an activity is regarded as a "project" within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive. It also followed from the case law of the CJEU that the definition of the term "project", specifically in the context of the wording of the first indent of Article 1(2)(a) of the EIA Directive, refers to works or interventions involving alteration of the physical aspect of the site. Applying this criteria, the court was satisfied that the decision to extend the period of the permission in respect of which works had not commenced, must be regarded as relating to a project within the meaning of the EIA Directive and a project within the meaning of Article 6(3) of the Habitats Directive.

27. At para. 38 of its ruling the CJEU noted that the purpose of the consent was not to renew the consent for a recurrent activity in the course of operation "*…but to allow the execution of a project which was subject to a first consent that lapsed without the intended works having even commenced".* For this reason, it followed that the consent related to a project subject to the requirements of Article 6(3) of the Habitats Directive, irrespective of whether that provision had to be complied with when the original consent was granted.

28. The CJEU was satisfied that a consent such as the one in issue constituted an "*agreement*" of that project under Article 6(3). It did not accept an argument to the effect that because the construction could have commenced during the currency of the permission or that the consent simply extended the project's construction period without changing it, altered the position. It did not follow from *Wells v. Secretary of State for Transport, Local Government and the Regions* (C-201/02), that only a decision changing the project as originally permitted can constitute a consent within the meaning of Article 1(2)(c) of the Directive. The court was satisfied from a perusal of its judgment in *Wells* that it was the finding that the original consent had lapsed and the fact that a new consent was necessary for resumption of the operation of the activity, which led the court to hold that the decision allowing that activity to resume had replaced not only the terms, but also the very substance, of the original consent. That decision thus constituted a new consent. The CJEU continued:-

> *"45. However, as is apparent from the order for reference, the original consent ceased to have effect on expiry of the 10 year period it had set and work could no longer be carried out. It follows that, at the end of that period, the original consent had lapsed and was therefore not altered by the consent at issue in the main proceedings but replaced by it.*
>
> *46. The fact that the project at issue in the main proceedings could have proceeded under the original consent is, in that regard, irrelevant.*
>
> *47. It follows that a consent such as the consent at issue in the main proceedings does constitute a new consent under the EIA Directive and consequently an 'agreement' under Article 6(3) of the Habitats Directive."*

29. The CJEU summarised its answer to the first two questions as follows:-

"48 ..a decision extending the 10 year period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal is to be regarded as an agreement of a project under Article 6(3) of the Habitats Directive where the original consent for the project, having lapsed, ceased to have legal effect on expiry of the period which it had set for those works in the letter have not been undertaken.".

30. I am not satisfied that there is anything in the judgment of the CJEU which suggests that the fact that the original consent had lapsed was not relevant to its conclusion. In my view, when read in its entirety, the emphasis placed the consent in the main proceedings having lapsed and therefore no longer of legal effect was of relevance and one which this Court cannot disregard. Of equal if not greater importance is that what the CJEU was requested to address was the consent for the "project" which was under challenge and not consents obtained in respect of other plans or projects being considered as part of a cumulative assessment.

31. The third question arose for determination because the answer to the first question was in the affirmative and the court was requested to specify the conditions for carrying out an appropriate assessment of the implications for the site concerned, laid down in the first sentence of Article 6(3) of the Habitats Directive, to a consent such as the consent at issue in the main proceedings. In particular, whether a competent authority is required to take into account any changes to the works as originally permitted and to the proposed use as well as change in the environmental background and in scientific knowledge since the original consent was granted. The decision of the court on this question is to be found in para. 59 where the court observed as follows:-

> *"In the light of the foregoing considerations, the answer to the third question referred is that it is for the competent authority to assess whether a decision extending the period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal, the original consent for which has lapsed, must be preceded by an appropriate assessment of its implications under the first sentence of Article 6(3) of the Habitats Directive and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as any changes to the project and the existence of other plans or projects. That assessment of a project's implications must be carried out where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives of the site. A previous assessment of that project, carried out before the original consent for the project was granted, cannot rule out that risk unless it contains full, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects." (emphasis added)*

32. It seems to me that the answer to the third question is directed to circumstances where the decision or consent in question constitutes an *agreement of a project* under Article 6(3) of the Habitats Directive, and thus is dependent on the court's answers to the first two questions. I do not believe that anything contained in the answer to the third question affects the conclusion of this court at para. 30 above. The court's focus was on the consent under consideration and not on consents to other plans and projects being considered as part of the in combination effects.

33. In summary, in my view, relevant to the decision of the CJEU in *Friends of the Irish Environment* was that the original consent for the project ceased to have legal effect on expiry of the period which had been set for the works to be carried out. Under Article 1(2)(c) of the EIA Directive, development consent is defined as meaning *"the decision of the competent authority or authorities which entitles the developer to proceed with the project".* This court concluded in the substantive judgment that the project in this case is the road scheme. It is not the road scheme and the quarry development. Thus, the consent which is relevant for the purposes of the provisions of the Habitats Directive is the consent which is the subject matter of the challenge in these proceedings and not, in my view, any other consent, such as consents concerning other developments which must be looked at in the context of the assessment of in combination or cumulative impacts.

34. I am unable, therefore, to read into the decision of the CJEU in *Friends of the Irish Environment,* a statement or ruling to the effect, that it is impermissible to take into consideration, as part of a cumulative assessment of a project, another plan or project whose consent was obtained in circumstances in which the quarry permission was obtained in this case, where the consent to that other plan or project has not lapsed and even though it has not commenced operation.

35. With regard to the request for a reference to the CJEU, I do not see anything in the decision of the CJEU in *Friends of the Irish Environment*, which leads me to a conclusion contrary to that arrived at by this court at para. 178 of its decision in the substantive proceedings.

36. For the sake of completeness, I should address an issue which arose during the course of the hearing on this application as to whether this court is obliged, at this stage, to refer a question for the consideration of the CJEU.

37. In *Lyckeskog*, the court considered the third paragraph of Article 234 EC (Article 267 TFEU) which provides as follows:-

> *"Where any such question is raised in a case pending before a court or tribunal of the member state against the decisions there is no traditional remedy under national law, that that court or tribunal shall bring the matter before the Court of Justice".*

38. It referred the following questions for preliminary ruling:-

"1. Is a national court or tribunal which in practice is the last instance in a case, because a declaration of admissibility is needed in order for the case to be reviewed by the country's supreme court, a court or tribunal within the meaning of the third paragraph of Article 234 EC?

2. May a court or tribunal within the meaning of the third paragraph of Article 234 EC decline to request a preliminary ruling where it considers it clear how the questions of Community law in point must be decided, even if those questions are not covered by the doctrine of acte clair or acte éclairé?"

39. At para. 16 of the judgment the court observed:-

> *"Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article 234 EC. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy."*

40. Earlier, at para. 15, the court observed:-

> *"That objective is secured when, subject to the limits accepted by the Court of Justice (CILFIT), supreme courts are bound by this obligation to refer (Parfums Christian Dior [1997] ECR I-6013) as is any other national court or tribunal against whose decisions there is no judicial remedy under national law (Joined Cases 28/62, 29/62 and 30/62 Da Costa en Schaake [1963] ECR 31)."*

41. The CJEU observed that if a question arose as to the interpretation or validity of a rule of Community law, the Supreme Court will be under an obligation, pursuant to the third paragraph of Article 234 (Article 267 TFEU), to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage. At para. 19 the court concluded:-

> *"The answer to the first question must therefore be that, where the decisions of a national court or tribunal can be appealed to the supreme court under conditions such as those that apply to decisions of the referring court in the present case, that court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC."*

42. There was some debate before this court as to the effect of this ruling, but I do not believe that it is necessary to enter upon consideration of this debate because it seems to me that it is clear from the decision in *CILFIT* that before such jurisdiction arises whether by way of requirement or discretion, the question of interpretation must be one which is necessary to enable the court to give its judgment. In *CILFIT* the court stated:-

"9. In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to the case pending before

the national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177. On the other hand, and national court or tribunal may, in an appropriate case, refer the matter to the court of justice of its own motion.

10. Secondly, it follows from the relationship between the second and third paragraphs of Article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the court of justice a question concerning the interpretation of community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

11. If, however, those courts or tribunals consider that recourse to community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise."

43. The decision of the ECJ in respect of the question submitted, which included an issue as to previous interpretations by the Court of Justice, was stated as follows:-

"The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a court or tribunal against whose decision there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Courts of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Courts of Justice or that the correct application of Community Law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

44. It seems to me, therefore, that a fundamental question to be addressed is whether the question(s) sought to be referred is one the answer to which is necessary for the court to arrive at its determination. I am not satisfied that it is (or they are). In my view the answers to the question or questions sought to be raised are not necessary to enable the court to come a determination. The questions as framed, in my view, are based on the continuing maintenance by the applicant that the project under consideration is the road scheme and the quarry. The court has found that the project is the road scheme. In the circumstances to accede to the request for a reference would involve requesting the CJEU to consider an issue which this Court has concluded is not necessary for the determination

of the issues in the case. In the circumstances, I do not believe it is necessary to address the issues raised in respect of the effect of *Lyckeskog*.

Certificate for Leave to Appeal

Questions (a), (b) and (c).

45. I now turn to a consideration of the first three questions and to the application of the *Glancré* principles to those questions. Central to the contention of the applicant in respect of first three questions, (a), (b) and (c) is that the judgment of the court gives rise to uncertainty and is authority for the proposition that even though the extraction is an integral part of the development of the road, the extraction works did not require to be assessed as part of the consent; and that the court did not require to be satisfied and expressed no view that the works required had been assessed as part of the earlier planning permission. It is contended that the extraction will be carried out "*as part of the scheme*" in circumstances where their consent and assessment are uncertain.

46. As previously stated in its substantive judgment this court concluded that no question of project splitting arose and that the '*project'*, the subject matter of the application for a consent to the Board and that which was challenged, was the road scheme. The court did not find, as contended by the applicant, that the project was the road scheme *and* the quarry. This court also rejected the applicant's contention that the project had not been appropriately or properly assessed in its own right and/or in the context of the obligation to consider the in combination or cumulative effects of the development when considered in conjunction with the quarry. The court, in arriving at its conclusions, relied, *inter alia*, on the decision of Finlay Geoghegan J. in *Friends of the Curragh Environment Ltd v. An Bord Pleanala* [2006] IEHC 390, which the notice party points out has since been endorsed by the Supreme Court in *Fitzpatrick v. An Bord Pleanala* [2019] IESC 23.

47. In my view questions (a), (b) and (c) raise matters of fact in which the applicant seeks to re-engage with the court in respect of its findings on the above issues; that the project for the purpose of the Directives is the road scheme, and to revisit the court's conclusion, on the Court's analysis of the facts, that this is not a case of project splitting.

48. During the course of the hearing the applicant did not seek to challenge the validity of the quarry permission or the 2012 assessment. While in the light of the sentiments expressed by McKechnie J. in *An Taisce*, it may be permissible for an applicant to raise such a challenge in an appropriate case (and upon which I express no opinion or conclusion), nevertheless, in my view, fundamental to the foundation for the questions which the applicant wishes to have this court certify is that the court ought to proceed on the basis that the quarry permission is at the very least infirm and cannot be taken into consideration. This would not appear to be very far from the adoption by the applicant on this application of a position which in substance differs to that adopted at hearing, where a challenge to the quarry permission was disavowed. On the face of it, it is difficult to see how a point of law could be said to *arise out of the decision* of the court in such circumstances.

49. It also seems to the court that the uncertainty raised by the applicant does not concern generally applicable principles of law. Rather, the suggested uncertainty concerns the manner in which extraction from the quarry might take place and the extent of any such extraction. The court has already ruled that nothing in its judgment is to be taken as conferring on the quarry a planning status which it does not otherwise have. Any interpretation of the quarry permission that may be required, as with any planning permission, including the consent under challenge, fall to be considered in accordance with the well established legal principles outlined by the Supreme Court in *Re XJS Investments* [1986] I.R. 750 and *Lanigan v. Barry* [2016] 1 I.R. 656 and, in my view, no legal uncertainty arises in respect of these applicable legal principles.

50. I conclude, therefore, that the issues which have been raised in the first three questions are fact specific, do not give rise to points of law, or points of law which arise out of the decision of the court or concern matters of legal uncertainty. *A fortiori*, I am not satisfied that the applicant has raised points of law of exceptional public importance.

51. The Court has concluded that the points or questions which have been raised by the applicant do not constitute points of law or points of law of exceptional public importance within the meaning of s. 50A(7) of the Act. On the face of it, therefore, it would seem unnecessary for the court to consider whether an appeal is desirable in the public interest. In this regard, nevertheless, I have considered the submissions of the notice party on this issue.

52. In *Rushe*, Barniville J. referred to his decision in *Shillelagh* where he noted that it was open to the court to consider a range of different factors as a basis of informing its view as to whether it is desirable in the public interest that an appeal be taken from its decision. Particular emphasis was placed on *Arklow Holidays Ltd v. An Bord Pleanala* [2006] IEHC 102 where Clarke J., albeit satisfied that the particular point raised was a point of law of exceptional public importance, nevertheless considered that it was not desirable in the public interest to grant the certificate sought. Clarke J. considered that the public interest had to take into account the nature of the proposed development and potential consequences of significant further delay in the matter being finally disposed of before the courts. While any such delay might not be considered determinative in its own right, in my view it is nevertheless appropriate to take into account any further delay which may be occasioned by further appeals.

53. Further, as was pointed out by Barniville J. in *Shillelagh*, the existence of uncertainty in the law and the evolving nature of the law are factors which may also be considered, not only in relation to the question as to whether the point of law is one of exceptional public importance but also in the question as to whether it is desirable in the public interest that an appeal should be permitted I am not satisfied that there is uncertainty as to the law which the court is obliged to apply to the facts of this case, or any uncertainty that is relevant to the issues in this case, such that it might be desirable in the public interest that an appeal should be permitted.

54. To the extent that it is also contended that an appeal or reference ought to be permitted in order to fulfil the applicant's rights under Article 11 of the EIA, the court adopts the reasoning of Barniville J. in *Rushe* which is also relevant to the suggested remedial obligations of the Court. In *Rushe* an argument was advanced that there was a remedial obligation on national courts to rectify breaches of EU law and that, in consequence, the court was required to grant leave to appeal in all cases where the case being made was that the Board's decision breached EU law. Barniville J. stated at para. 40 of his judgment in Rushe as follows:-

> *"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. 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."*

55. Barniville J. observed that 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. It seems to me that the sentiments expressed by Barniville J. in Rushe are equally applicable to the points raised by the applicants. While it may be said that facts in the instant case were in dispute, the court was nevertheless applying well-established principles to its conclusion on the facts and any suggested misapplication of the law to those facts, does not, it seems to me, give rise to a point of law of exceptional public importance or to the suggested remedial obligations placed on the court. The

applicant in this case has raised a point or points of law, which, for reasons expressed above, I conclude do not arise on the facts.

56. For all of the above reasons I must refuse the application for a certificate in respect of the first three questions (a), (b) and (c).

57. In its fourth question/issue, the applicant describes the quarrying works as a necessary component of the development. This question, in my view, is also predicated on the contention that the quarrying works and the scheme ought to be considered as one or a unitary scheme. The consent with which the Court was concerned and that which was challenged by the applicant in the proceedings, was the consent to the road scheme. The Court found that the project for the purpose of the EIA Directive is the road scheme. The applicant's arguments were fully ventilated and considered by the court. Having considered the arguments and having heard the applicant, the court arrived at its conclusion. For these reasons and also on the basis of the principles accepted by Barniville J. in *Rushe*, referred to at para. 15 above, I am not satisfied that it has been established that there has been a breach of the applicant's rights under Article 11 of the EIA Directive. For similar reasons outlined by the court in respect of questions (a), (b) and (c), I am also not satisfied that a point of law arises in respect of the contention that the requirements of Article 11 of the Directive have not been satisfied.

58. I have also concluded at para. 44 above that I am not satisfied that it has been established that the court ought to refer the suggested questions to the CJEU or that it is necessary, desirable or incumbent on this court to do so. The questions as phrased are predicated on a factual basis which the court has not accepted and the answer to those questions are not necessary for the court to arrive at its conclusions. For the sake of completeness, and for similar reasons, I am also not satisfied that arising from the court's judgment, a point or points of law of exceptional public importance arise in respect of the issues raised at questions five and six, and/or that it is desirable in the public interest that certificate should issue in respect of leave to appeal this issue.

59. I must therefore refuse the application.