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Judgment

Title:	Fitzpatrick & anor v An Bord Pleanala & ors
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Judgment by:	Clarke C.J.
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Result:	Other

THE SUPREME COURT

Record No. 157/17

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Finlay Geoghegan J.

Between/

Sinead Fitzpatrick & Alan Daly

Applicants/Appellants

and

An Bord Pleanála

Respondent

and

Galway County Council and Apple Distribution International

Notice Parties

and

The Minister for Housing, Planning and Local Government, Ireland and

the Attorney General

Amici Curiae

Judgment of the Chief Justice, Mr. Justice Clarke delivered the 5th December, 2018

1. Introduction

1.1 The plan by the second named notice party ("Apple") to develop a data centre near Athenry, Co. Galway, and in particular this legal challenge to the validity of the permission granted for part of that development by the respondent ("the Board"), has attracted no little controversy. Ultimately, Apple have decided not to go ahead with the development, but the fact remains that there is an apparently valid permission granted in respect of the development which would inure to the benefit of the owner of the lands or, indeed, any purchaser. In those circumstances, the question of the validity of the permission granted remains alive.

1.2 The applicants/appellants ("the applicants") challenged the validity of the permission granted by the Board in the High Court. It will be necessary to say a little more about what occurred in the High Court in due course. However, ultimately that challenge failed and the applicants sought leave to appeal to this Court. That leave was granted at a time prior to the announcement by Apple that it no longer intended to go ahead with the development for which permission had been granted. In those circumstances, the Court put in place urgent measures designed to ensure an early hearing of the issues. In particular, the appeal was listed for case management at a very early stage.

1.3 However, there were a number of developments at the beginning of the case management process, not least the announcement by Apple that it no longer intended to go ahead with the development and that, in those circumstances, it no longer wished to participate in the proceedings. Similarly, the Attorney General and the Minister for Housing, Planning and Local Government ("the State"), who had not participated in the proceedings before the High Court, applied to be permitted to be heard on the appeal.

1.4 More importantly, for present purposes, two questions immediately emerged in the course of case management. The first was a contention, made principally by the Board, which was to the effect that the grounds which the applicants now sought to put forward on this appeal for challenging the permission granted to Apple were inconsistent with, or at least different from, the grounds pursued in the High Court. In those circumstances, a clear issue arose as to the scope of the appeal which could legitimately be pursued before this Court.

1.5 Similarly, a question was raised as to whether it would be appropriate for the Court, as a preliminary matter, to refer a question or questions of European law to the Court of Justice of the European Union ("CJEU") for its opinion, on the basis that, it was suggested, a resolution of at least some issues of European law might be necessary to the final resolution by this Court of this appeal.

1.6 Having regard to Apple's stated position, the immediate exceptional urgency which might otherwise have attached to this appeal had disappeared and, against that background, it was decided that the appropriate course of action to adopt would be to list the appeal for an initial consideration of two issues, being:-

a) The scope of the appeal which could legitimately be pursued; and

b) Whether it is appropriate, at this stage, to refer a question or questions to the CJEU.

1.7 Directions were given, with written submissions being filed by respectively the applicants, the Board and the State. As the State had not been a party to the proceedings before the High Court it was quite properly intimated on behalf of the State that the primary question which the State sought to address concerned the possible reference to the CJEU. Thereafter, an oral hearing ensued and this judgment is directed to the two issues identified in the light of the arguments put forward both in the written and oral procedure.

1.8 It is, perhaps, first important to set out in a little more detail the procedural history of this case so as to identify precisely how the issues which now come to be decided were before the Court. In that context, it is important to emphasise that the remainder of the issues which potentially arise on this appeal were not the subject of the initial hearing and remain for later consideration.

2. Procedural History

2.1 The applicants were granted leave to apply for judicial review in the High Court. Two reliefs were sought. First the applicants sought an order of *certiorari* quashing two determinations of the Board, both made on the 11th August 2016, to grant planning permission in respect of the construction of a data centre and associated grid connection at Athenry, Co. Galway. Second, the applicants sought a declaration that the decisions of the Board were in breach of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, and related jurisprudence ("the EIA directive").

2.2 The applicants set out 13 grounds on which the above relief was sought. Broadly speaking, these grounds related to the alleged failure of the Board to carry out and record a proper environmental impact assessment ("EIA") of the proposed development as well as related issues concerning the electricity demands required if the entire masterplan of eight data centres were to be implemented. It is worth highlighting some of the broad common themes arising in the grounds on which relief was sought by the applicants. It was argued that the Board had failed, in a variety of contexts, to take into consideration the fact that the application in question was part of a broader masterplan which envisaged the construction of eight data centres. Similarly, arguments were raised to the effect that, in adopting a report of an Inspector, the Board had failed to reach or record decisions in relation to certain matters which were said not to be conclusively determined in that report. This is, of course, not an exhaustive enumeration of the arguments raised in the High Court.

2.3 The High Court (McDermott J.) (*Fitzpatrick and anor. v. An Bord Pleanála and ors* . [2017] IEHC 585) refused to grant the reliefs sought having rejected the arguments raised by the applicants. In a separate judgment, McDermott J. refused to grant a certificate for leave to appeal that decision to the Court of Appeal under s. 50A(7) of the Planning and Development Act 2000 (as amended) ("the 2000 Act") (*Fitzpatrick and anor. v. An Bord Pleanála and ors* . [2017] IEHC 644).

2.4 On the 1st December 2017, the applicants applied for leave to appeal directly to this Court from the decision of the High Court refusing the reliefs sought. On the 9th February 2018, a brief oral hearing was held before this Court in relation to the application for leave to appeal. At the request of the applicants, the parties were permitted to submit further brief written submissions subsequent to the oral hearing. By determination dated the 26th April 2018, (*Fitzpatrick & anor. v. An Bord Pleanála & ors* . [2018] IESCDET 61), this Court granted leave to the applicants to appeal from the decision of the High Court. The basis on which leave to appeal was granted was set out at paras. 8 to 10 of the determination in the following terms:-

> "At this point the Court is not persuaded that it can safely be said that there might not be a point of general importance concerning the application of the broad general principles identified in the case law to a category of case such as this. In saying so the Court would wish to emphasise that it is not, at this stage, to be taken as in any way indicating that such a point necessarily arises but rather that one of the matters which the Court will have to consider is whether such a point arises and whether, if that be so, this Court is obliged to make a reference to the Court of Justice under the CILFIT jurisprudence. The Court would emphasise that the CILFIT jurisprudence places a significant obligation on a court of final appeal in cases such as this.
>
> In those circumstances the Court will grant leave to appeal. However, in the light of the assertion by An Bord Pleanála that some of the grounds sought to be relied on are new grounds not previously advanced and the contention of the Board that such grounds should not, therefore, be permitted to be argued, the Court will make certain specific directions for the further and expeditious conduct of this appeal. In addition, and to the same end, the Court is aware that these proceedings have taken some time and is anxious that they proceed with all due expedition.
>
> With that in mind the Court will direct that any notice of intention to proceed must be filed within seven days of this determination. It should be clear that a failure to serve a notice of intention to proceed within that timeframe will result in the leave to appeal hereby granted lapsing. Furthermore, the Court will arrange, on the assumption that a notice of intention to proceed is filed within that timeframe, for an early case management hearing which will take place prior to the filing of written submissions (and will vary the standard directions contained in the statutory practice direction to that effect). Amongst other things the Court will wish to be addressed at that first case management hearing on:-
>
>> (a) The scope of the grounds of appeal which ought properly be permitted to be pursued on this appeal having regard to the way in which the case was fought in the High Court;
>>
>> (b) Whether the Court should direct an early and preliminary hearing on the question of whether it is necessary, in the context of the CILFIT jurisprudence, for the Court to make a reference to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union; and
>>
>> (c) The putting in place of expedited directions to lead either to an early preliminary hearing of the type identified at (b) or to an

expedited full hearing as the Court considers appropriate."

2.5 Next, reference should be made to certain developments during the case management process which were outlined above. First, it should be noted that, on the 31st May 2018, the Court made an order joining the State parties to the proceedings as *amici curiae* , on their request and on the basis that there was no objection from the other parties to such an order being made. At the same case management hearing, the Court directed that the parties should file submissions directed towards the issues highlighted above at paragraph 1.6. Namely, it was directed that the parties should identify what issues they said were still alive before the Court, having regard to the way the case was fought in the High Court as well as having regard to the determination of this Court granting leave to appeal. Furthermore, the Court directed that the submissions should address whether the issues which it was said remained properly before this Court gave rise to questions which would require that a reference be made to the CJEU at this stage.

2.6 On the 22nd October 2018, this Court heard oral submissions from counsel regarding the two issues just identified.

2.7 It is unnecessary, for the purposes of the two discrete issues which fall for decision as a result of the preliminary hearing to which reference has been made, to go into all of the issues which potentially arise on this appeal in detail. However, it is necessary to say a little more about some of the substantive issues which arise on the appeal in order to understand the precise questions which arise in the context of the two discrete issues which require to be determined.

3. The Substantive Issues on the Appeal

3.1 Insofar as relevant to the issues which now fall for decision, it is important to identify the focus of the challenge which the applicants make to the validity of the permissions granted. In that context it is appropriate to start with a description of the permissions themselves. The permissions granted by the Board related to two proposed developments. The first was the proposed data centre mentioned above. The Board came to consider the application in relation to this development on appeal from a previous decision of Galway County Council granting permission to Apple. It is important to note that the application made by Apple, and consequently the permission granted by the County Council and by the Board, related to a single data centre only. However, it was clear from the masterplan submitted by Apple in relation to the site chosen for the development that it was envisaged that a further seven data centres might potentially be constructed on the site in the future.

3.2 The second development in respect of which permission was sought was a 220 kV substation which was to serve the data centre. The substation proposal was considered by the Board at first instance and not on appeal, in accordance with the provisions of s. 182A(1) of the 2000 Act (as amended).

3.3 The Board appointed an inspector ("the Inspector") to report in respect of each proposed development. The Inspector prepared separate reports in relation to each application. Each report was dated the 28th July 2016. In both instances the Inspector recommended that the Board grant permission.

3.4 The Board met on the 5th August 2016 to consider the proposed data centre development and the related proposal for a 220 kV substation. Following a further meeting on the 10th August 2016, directions were agreed in respect of both proposals. The orders granting permission for both developments issued on the 11th August 2016.

3.5 In its decision granting permission for the data centre development, the Board

stated that it had regard to, amongst other things, "the projected demand for data storage in the future, the economic and operational rationale for the clustering of data storage capacity on one site, and the consequent potential site size requirements". The Board also indicated that it had regard to "the indicative Masterplan for the site, and the extent of the site available". The decision goes on to state:-

> "The Board was satisfied that the information before it was adequate to undertake an Appropriate Assessment screening and an environmental impact assessment in respect of the proposed development."

3.6 Later, under the heading "Environmental Impact Assessment", the Board stated as follows:-

> "The Board considered the nature, scale and location of the proposed development, the documentation submitted with the application and further information, including the revised Environmental Impact Statement, the submissions made on file and of the Oral Hearing, the mitigation measures proposed, and the report, assessment and conclusions of the Inspector. It is considered that this information was adequate in identifying and describing the direct and indirect effects of the proposed development, including forestry replanting proposals. The Board completed an environmental impact assessment in relation to the proposed development, by itself and in cumulation with other developments in the vicinity, including the adjoining proposal for a 220 kV substation to serve the proposed development and the proposed N17/M18 motorway, and concurred with the Inspector's assessment of the likely significant impacts of the proposed development, and agreed with the conclusion on the acceptability of the mitigation measures proposed and of the residual impacts. The Board concluded that the effects of the proposed development on the environment would be acceptable. In doing so, the Board adopted the report of the Inspector."

3.7 The decision in relation to the proposed 220 kV substation development was in broadly similar terms.

3.8 The core question which lies at the heart of these proceedings generally concerns the proper approach in law to the consideration by the Board of an application of that type where the specific development in respect of which permission is sought forms part of a larger plan.

3.9 It is next necessary to identify that the principal focus of the challenge made by the applicants concerned an allegation that the Board, in considering Apple's application for permission, had not complied with its obligations in Irish and European law to carry out an EIA. The legal basis for such an obligation can be simply stated.

3.10 At the EU level, the obligation to carry out an EIA arises under the EIA Directive. It should be noted that it is the consolidated 2011 version of that Directive, and not the subsequent amended version, which governs these proceedings. In Irish legislation, it is Part X of the 2000 Act (as amended) which largely governs the carrying out of EIAs by either the relevant planning authority or the Board, as the case may be.

3.11 However, what those legal measures require is that there be an EIA of the "project" (in the EIA Directive), or the "proposed development" (in the Irish implementing measures). It seems clear that the term "project", as used in the European legislation, refers to the development in respect of which permission is sought. Article 1(2)(a) of the EIA Directive defines "project" as follows:-

> "'project' means:

> - the execution of construction works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;"

3.12 Article 2 of the EIA Directive states:-

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4."

3.13 Similarly, the term "proposed development" in the Irish implementing measures seems to refer to the actual development in respect of which permission is sought. Section 172(1) of the 2000 Act (as amended) states:-

> "An environmental impact assessment shall be carried out by the planning authority or the Board, as the case may be, in respect of an application for consent for proposed development where…"

The section then goes on to set out the classes of proposed development to which the preceding requirement applies.

3.14 On that basis, it might be thought that the only matters which both the European and Irish legislation requires to be assessed are the relevant environmental impacts of the development in respect of which permission is sought, rather than any potential impacts which might derive from further extensions of the development as contemplated by a more general plan of which the development in question forms part.

3.15 However, as was pointed out by Advocate General Gulmann in his opinion in Case C-396/92 *Bund Naturschutz in Bayern v. Freistaat Bayern* [1994] E.C.R. I-03717, the grant of a permission for what might be termed the first phase of a more general or master plan may, in practical terms, make it more likely that subsequent phases of the plan will justify permission precisely because the earlier phase has in fact been developed. The precise question at issue in *Bund Naturschutz in Bayern* was an early phase of a proposed roadway. But it is obvious that the decision to grant permission in respect of the first phase of a motorway project will, at least to some extent, influence both the route of any remaining phases (which will obviously have to join up with the first phase when built) and an assessment of the need for the roadway to be completed (on the basis that the first phase may be of limited or reduced utility if the further phases are not built). On that basis Advocate General Gulmann suggested, in his opinion, that "regard must be had" to the remainder of the proposed master development when considering the environmental impacts of the specific project in respect of which permission is being granted.

3.16 However, having identified that obligation in general terms, Advocate General Gulmann said:-

> "There is neither reason nor basis for a more specific determination of the scope of that obligation in the present case."

3.17 It is accepted that both sides sought to place reliance on the opinion of Advocate General Gulmann in the High Court and asserted that the law was as stated in that opinion. It is worth noting that the issue in respect of which the Advocate General gave his opinion in that regard did not ultimately fall for decision in the case in question. As the Advocate General himself pointed out, that issue only arose in the event that certain other, and earlier, questions referred to the CJEU were answered in a particular way. However, the Advocate General suggested that those earlier questions should be

answered in a way which would not render what was the third question relevant to the Court's ultimate determination. The Court broadly agreed with the views of the Advocate General in respect of those earlier questions. On that basis the Court did not find it necessary to answer the third question which is the one which gives rise to those aspects of the opinion of the Advocate General relied on for the purposes of this appeal.

3.18 That explains why there is no decision of the Court itself on the matter. Notwithstanding that, both parties accepted that the views expressed in the Advocate General's opinion accurately describe the law.

3.19 It is against that background that it is argued by the Board that some of the issues now sought to be relied on by the applicants were not properly before the High Court as they were not argued and should not, therefore, be permitted to form part of the scope of the appeal before this Court. In substance, it is said that the argument put forward on behalf of the applicants was to the effect that it was necessary to carry out the equivalent of a full environmental impact assessment in respect of all of the works contemplated in the masterplan. As part of that argument it was acknowledged that there might be aspects of the future parts of that plan, not the subject of the current application for permission, which it might not be possible to assess in full by reason of factors such as the fact that the detail had not been worked out to a sufficient degree or that there might be a degree of speculation as to the relevant conditions which might pertain in the future.

3.20 It was accepted on behalf of the applicants that the application of the opinion of Advocate General Gulmann excluded matters which it was not practicable to assess. But it was asserted that, with that exception, the obligation was to conduct an assessment which was equivalent to a full EIA. No objection is taken by the Board to that issue being the subject of this appeal. However, the Board suggests that, as no lesser or fall-back position was adopted concerning the scope of the obligation to have regard to the potential impacts of the full plan, no such lesser argument should be entertained. As a final fall-back position it is said that, whatever else may be within the proper scope of this appeal, it can only be matters directly connected with the nature of the obligation to conduct an EIA in accordance with law in all the circumstances of a case such as this. Therefore, it is further said, no argument should be permitted which seeks to question the decision of the Board as such rather than the EIA process leading to that decision. In essence, that is the question concerning the scope of this appeal which must be addressed.

3.21 So far as the possibility of a reference to the CJEU is concerned, it is argued by both the Board and by the State that, in the light of the fact that the legal principles were agreed before the High Court, there is no issue of European law which requires to be determined for the purposes of resolving this appeal. Rather, it is said, any issues which properly arise involve the application of an agreed principle or principles to the circumstances of this case. A subsidiary question, in the same area, arose at the oral hearing which was as to whether it might be premature to consider whether a reference was necessary at this stage on the basis that it might be essential to hear full argument before deciding whether there truly was an issue of European law itself which was not *acte clair* and which required to be resolved in order to determine the proper result of this appeal.

3.22 Against that background it is next appropriate to turn to the two issues which require to be determined at this stage of the appeal and I, therefore, turn first to the question of the scope of the appeal.

4. The Scope of the Appeal

4.1 There have frequently been disputes between parties to appeals before this Court as to whether the case sought to be made on appeal was made at trial or, if not, whether

an additional basis for supporting the position of the party concerned on appeal should be permitted to be pursued before this Court even if it was not argued, or at least argued in the same way, in the courts below.

4.2 In this regard, the judgment of O'Donnell J. in *Lough Swilly Shellfish Growers Co-Operative Society Ltd & anor. v. Bradley & anor* . [2013] IESC 16 is of relevance. An aspect of that appeal concerned whether it was permissible for the appellants to raise a point on appeal that had not been argued before the High Court. In that context, O'Donnell J. stated as follows at para. 27 of his judgment:-

> "What the Constitution requires is an appeal which permits the Supreme Court to consider whether the result in the High Court is correct. The precise format and procedure of any such appeal is not dictated by the Constitution. While that object is often and best achieved by a careful analysis of the argument in the High Court and the High Court's adjudication of said argument, it does not follow that the constitutional appeal must always be limited to that process. Prior to the coming into force of the 1922 Constitution, it was possible to seek leave to argue a fresh ground of appeal in the Court of Appeal but only on strict conditions… Nothing in the 1922 or 1937 Constitutions suggests any different understanding of the concept of an appeal form the High Court in performance of the administration of justice. There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K.D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retained the power in appropriate cases to permit the argument to be made."

4.3 On that basis it is clear that the fact that a point was not raised in the courts below is not an absolute barrier to it being maintained on appeal but that there are significant limitations on the extent to which latitude can or should be given, for the very reasons addressed in *Lough Swilly* .

4.4 In addition it is important to recall that *Lough Swilly* was decided in the context of the constitutional appellate architecture which existed prior to the adoption of the 33rd Amendment of the Constitution. Thus, at the level of principle, the appellants in *Lough Swilly* were entitled to advance any grounds of appeal subject only to the limitations discussed in the judgment of O'Donnell J. in that case, which derive from the undesirability of points being considered for the first time on appeal. Since the adoption of the 33rd Amendment of the Constitution it is, of course, the case that leave to appeal must be obtained and the grounds of appeal which can be pursued will necessarily be confined by the terms of the determination granting leave to appeal which record the questions or issues which have been considered to meet the constitutional threshold.

4.5 However, that limitation is also one to be deployed flexibly, as was pointed out by O'Donnell J. in his judgment in *McDonagh v. Sunday Newspapers Limited* [2017] IESC 59.

4.6 In that case a question arose as to whether the Court could entertain grounds of appeal which related to issues in respect of which leave had been sought but refused (but where the Court had granted leave on other grounds that were advanced in the application). In that context O'Donnell J. said the following at para. 14 of his judgment:-

> "The decision on the grant of leave is not itself a final decision in a case. If leave is granted on the basis that it involves a point of law of general public importance, the appeal is extant, and the court has hitherto considered that it is entitled to revise the terms of leave to ensure that the appeal is properly and fairly disposed of. Perhaps one analogy is if a limited order for discovery had been made in High Court proceedings which included the refusing of one category of discovery. If later during the case it became apparent that such discovery was necessary for the fair disposal of the case, I do not think the High Court judge would be powerless, and that the only remedy the parties might have would be to appeal that discrete issue to the Court of Appeal, which by definition would not have the knowledge or familiarity with the issue of the High Court. Of course, a court, particularly a court of final appeal, will be slow to depart from any interlocutory ruling or order made in a case, and in the case of a trial court a change of mind runs the risk of making an appeal inevitable, since by definition both parties will now have had a decision in their favour on the same issue. Nevertheless, if that is what a court considers justice requires, and if it addresses the matter fairly, and gives both sides an opportunity to make submissions, it seems to me that it would be the doing of justice rather than its defeat to maintain the capacity to revisit the question of the scope of the grant of leave while an appeal is still in being and has not been concluded, so long as that is done fairly. Different considerations may apply to a decision to refuse leave on all grounds and which therefore brings proceedings to an end."

4.7 Thus, it follows that the limitation on the scope of appeal which can be found in the terms of the determination granting leave to appeal under the new constitutional architecture should not be inflexibly applied, but nonetheless a court should not lightly depart from the scope of appeal which originally led to the grant of leave. Therefore, the overall position, under the new constitutional architecture, is that an appeal should ordinarily be confined both to the issues identified in the grant of leave to appeal as meeting the constitutional threshold and to grounds or issues raised in the court or courts below. However, there should not be a completely inflexible attitude to allowing some evolution in the issues permitted to be raised by reference to those raised in the court or courts below (as per *Lough Swilly*) or by reference to the terms of the grant of leave, (as in *McDonagh*).

4.8 In that context it needs to be recognised that experience has demonstrated that many cases do evolve to some extent as they progress from a trial court to an appeal court or indeed, since the 33rd Amendment, sometimes through two appeal courts. An overly rigid approach to the question of whether a point was raised in exactly the same way in a court or courts below is neither sensible nor accords with reasonable fairness. That being said, and as is clear from both *Lough Swilly* and *McDonagh* , a court should not allow latitude to pursue a different or adjusted case on appeal or allow grounds to be advanced which are not encompassed in the grant of leave where there would be a real risk of prejudice or unfairness to the party who is respondent to the appeal in question. Furthermore, the orderly conduct of litigation requires parties to put forward their full case at trial. An overly permissive attitude to allowing cases to be significantly

adjusted on appeal will only encourage laxity in the full exploration of all issues by the parties before the trial court. Looking at the system of litigation as a whole, such laxity is likely to contribute to injustice in many cases and thus is highly undesirable. As has been said in the past, a trial is not a dress rehearsal.

4.9 It follows that the proper approach of the Court is to consider the case made below and the terms on which leave was granted for the purposes of determining the issues which are properly before the Court. Clearly those issues can be pursued on appeal. Furthermore, questions which can reasonably be considered to represent little more than an evolution of the case made at trial or identified in the grant of leave can be permitted to be pursued provided that they do not give rise to any risk of prejudice. Allowing any more substantive change in the case made on appeal would require the presence of significant factors connected with the interests of justice and would also require a careful analysis of whether any prejudice might be caused.

4.10 Against the backdrop of those principles, it seems to me that it is fair to characterise the central thrust of the case made by the applicants before the High Court, and identified in the grant of leave, as relating to the extent to which there is an obligation on the Board to assess the environmental impacts of what one might loosely call the balance of the masterplan as part of its obligation to carry out an EIA. It is correct to state that both parties called the opinion of Advocate General Gulmann in aid for the purposes of their argument before the High Court. However, it does seem to be the case that the precise import and impact of the law set out in that opinion was very much in dispute. It is also true that the argument addressed on behalf of the applicants in the High Court suggested that there was an obligation on the Board to carry out what might be called a full EIA of the entire masterplan save only to the extent that there might be some limitations on the practicability of carrying out such an exercise in respect of some aspects of the balance of the masterplan precisely because the conditions which might prevail in the future, if and when the full masterplan might be implemented, were necessarily uncertain.

4.11 But in my view, in the context of an issue such as the Court currently has to resolve, it can fairly be said that the greater will at least normally include the lesser. Arguing for a fall-back position which suggests the possibility of an obligation to assess environmental impacts which falls short of the primary case made by the applicants, but which exceeds the assessment carried out by the Board, is not really to make a new case but rather is to recognise that the level of assessment required may be argued to fall at different points on a spectrum. The real position is whether the assessment required was more onerous than that actually carried out. In addition, I do not see that any prejudice would be caused to the Board if the Court were permitted to explore, in the context of this appeal, the precise extent of the obligations on the Board to consider the potential impacts of the remainder of the masterplan. That would remain so even if the Court were ultimately persuaded that the extent of those obligations fell short of the high watermark urged on behalf of the applicants.

4.12 In those circumstances, I would hold that the applicants should be entitled, on this appeal, to argue both for the position adopted in the High Court, and repeated on the hearing which leads to this judgment, that there is an obligation to carry out a full EIA on the entire masterplan subject only to the limits of practicality, and also to argue for any lesser obligation as a fall-back position. It would obviously follow that the Court would be entitled to consider, in the light of the conclusion actually reached in relation to the precise obligation of the Board, whether the assessment actually conducted in this case fell short of the obligation thus identified.

4.13 On the other hand, it seems absolutely clear that there was no challenge brought to the actual decision of the Board itself except in the sense that that decision was

challenged on the basis of the process leading up to it in the form of what was said to have been an inadequate EIA. Nor can the grant of leave be considered as encompassing any such challenge. I would also, therefore, hold that the applicants should not be permitted to raise any ground on appeal which seeks to suggest that the decision itself was invalid, save in the limited sense that it might be said that the decision would require to be quashed because of the inadequacy of the EIA conducted.

4.14 I would propose that the applicants be required to formulate their grounds of appeal in a way which has regard to those limitations and which ensures that all of the issues sought to be advanced come within the limitations identified. Those limitations are that the grounds of appeal must be directly connected with a contention that the EIA conducted fell short of the obligations on the Board in European and national law insofar as those obligations relate to the assessment which requires to be carried out in respect of the balance of a masterplan. With those limitations in mind, it is next necessary to consider the question of whether there should, at this stage, be a reference to the CJEU.

5. Should there be a Reference?

5.1 The obligation of this Court under the jurisprudence which follows on from Case 283/81 CILFIT [1982] ECR 3415 is clear. A court of final appeal within the national legal order, such as this Court, is required to refer a question of EU law to the CJEU if the resolution of the question concerned is necessary to resolve the case before it and if the issue of European law arising is not *acte clair* . It is also clear from the jurisprudence of the CJEU that it is a matter for the national court to determine the stage in its proceedings at which it may be appropriate to make a reference.

5.2 In that context it should be noted that the "Information Note on references from national courts for a preliminary ruling" of the CJEU (Document C 2011/160/01), gives the following guidance under the heading "The stage at which to submit a question for a preliminary ruling";-

> "18. A national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.
>
> 19. It is, however, desirable that a decision to seek a preliminary ruling should be taken when the national proceedings have reached a stage at which the national court is able to define the factual and legal context of the question, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard."

5.2 While it ultimately will become a question of judgment in the circumstances of any individual case, in my view a court should lean against making a reference where there is a real risk that the result of the reference may become redundant. The making of a reference leads to additional expense for parties and further delay in the final resolution of proceedings. To embark on such an exercise unless it is fairly clear that the results of the reference are likely to be really necessary to the final resolution of the proceedings is, therefore, something which courts should avoid.

5.3 It follows that a key consideration, which should be taken into account by a court which is asked to make a reference at some stage prior to a point close to the finalisation of the proceedings concerned, will be to consider whether there is a real

possibility that the question of whether it is truly necessary to make a reference so as to finally resolve the proceedings may be clearer at a later stage in the process. Put another way, even if there might appear to be a possible question which might potentially be referred, considerations may remain as to the likelihood either of it becoming clear that the question does not have to be referred at all or it becoming clear that the formulation of the question might require to be adjusted in the light of further developments in the case.

5.4 It seems to me that the question of making a reference at this stage presents all of the difficulties which I have just identified. The parties agreed before the High Court that European law was as identified in the opinion of Advocate General Gulmann. In that sense it might be said that there is not an issue of European law. However, as was pointed out by counsel in the course of argument, it is clear that it may well require a decision of the CJEU itself (rather than an opinion of an Advocate General) to bring the level of clarity to an issue of European law so as to render it *acte clair* . In that regard, it is important to bear in mind that, in CILFIT, the CJEU stated that one of the circumstances in which the obligation to refer would not arise is where "previous decisions of the Court" have already dealt with the point of law in question. But even if it is not clear, in that sense, as to whether Advocate General Gulmann's opinion represents the law today and even if, as the Advocate General himself suggested in the passage cited earlier in this judgment, it might be possible to bring greater clarity to the precise nature of the obligations identified in that opinion in the circumstances of another case, it by no means follows that it is possible to say, at this stage, either that an issue of European law will truly arise which requires to be referred or, importantly, even if such an issue does arise, how the questions required to seek helpful guidance from the CJEU ought to be formulated. In that context it must always be kept in mind that the function of the preliminary reference procedure is to obtain clarification of issues of European law rather than a determination as to how that law is to be applied in the particular circumstances of an individual case. The judgments of the CJEU are full of references to the fact that, in particular circumstances, it remains for the referring court to carry out an assessment of the circumstances of the case in question in the light of the guidance on legal issues provided by the CJEU in its judgment.

5.5 It seems highly likely that the final resolution of this appeal will, at a minimum, require the application of principles of European law to the circumstances of this case and in particular to the manner in which the Board assessed the potential impacts of the remainder of the masterplan for Apple's data centre. But such an assessment does not, necessarily and in and of itself, lead to a question of European law but rather may simply involve the application of clear principles of European law to the circumstances of this case.

5.6 It is not, in my view, clear at present that there is necessarily an issue of European law, as opposed to a question of the application of clear principles of European law to the circumstances of this case, which needs to be resolved in order to reach a proper determination of the issues which arise in this case. I would, therefore, hold that there should not be a preliminary reference at this point.

5.7 However, in so saying, I would also make clear that I would be open to possibly being persuaded, when the full appeal has been conducted, that there remains a question which truly is an issue of European law which requires to be referred as opposed to there simply being issues of the application of clear European law to the circumstances of this case. It should remain open, therefore, to any of the parties to suggest that there requires to be a reference to the CJEU in the course of the full hearing of this appeal.

6. Conclusions

6.1 It should be emphasised that this judgment is only concerned with two preliminary aspects of this appeal. As noted earlier the Court is currently considering the scope of the appeal which the applicants are entitled to pursue together with the question of whether there should be, at this stage, a reference to the CJEU.

6.2 For the reasons analysed earlier in this judgment, I am of the view that the applicants should be permitted to argue both for the position adopted in the High Court, and repeated on the hearing which leads to this judgment, that there is an obligation to carry out a full EIA on the entire masterplan subject only to the limits of practicality and also to argue for any lesser obligation as a fall-back position. It would obviously follow that the Court would be entitled to consider, in the light of the conclusion actually reached in relation to the precise obligation of the Board, whether the assessment actually conducted in this case fell short of the obligation thus identified.

6.3 I would suggest that the matter be put in for early further case management and that the applicants should consider whether, and if so in what way, it might be necessary to adjust the grounds of appeal so as to ensure that all such grounds come within the parameters just identified.

6.4 In addition, and again for the reasons analysed earlier in this judgment, I am not satisfied that it would be appropriate, at this stage, to refer any issues of European law to the CJEU. That position is without prejudice to the possibility that it may, after a full hearing, become clear that there remain issues of European law which are both necessary to resolve so as to properly determine this appeal but which also are not *acte clair* . I would suggest that the Court, therefore, should reserve the question of whether there should be a reference until after a full hearing of all of the issues which arise on the appeal.

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