

**THE HIGH COURT
JUDICIAL REVIEW**

[2018 No. 849 JR]

**IN THE MATTER OF SECTIONS 5 AND 10 OF THE PLANNING AND DEVELOPMENT ACT,
2000 AS SUBSTITUTED BY THE PLANNING AND DEVELOPMENT (AMENDMENT) ACT,
2002 AND THE PLANNING AND DEVELOPMENT (STRATEGIC INFRASTRUCTURE) ACT,
2006**

BETWEEN

CORNELIUS A. DENNEHY AND SUZANNE DENNEHY

APPLICANTS

AND

**AN BORD PLEANÁLA, MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

DONAL COFFEY

NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 18th day of September, 2020

Introduction

1. On 19 May 2020, this Court delivered a judgment (the principal judgment) in the above named proceedings in which it granted an Order of *certiorari* quashing the decision of the first named respondent (the Board) of 30 August 2018. This decision was to the effect that the erection of a gate by the applicant was not exempted development and thus required planning permission. The Board now seeks a certificate for leave to appeal this decision pursuant to s. 50A(7) of the Planning and Development Act, 2000 (the Act of 2000).
2. I will not set out in any detail the terms of the principal judgment, but the following passage sets out the context for this application: -
 - "1. The central issue in these judicial review proceedings is whether a gate placed by the applicants on their land is or is not an 'exempted development' for the purposes of planning legislation. This may seem an easy issue to resolve but when the purpose of the gate is to prevent members of the public having access to a lakeshore where a local boat club has its premises, it quickly becomes clear that matters are somewhat more complex. The placing of the gate in question has led to two Circuit Court actions and two decisions of the first named respondent (the Board), both of which have been the subject of judicial review proceedings. It is the second decision of the Board that is the subject of these proceedings. More importantly, the placing of the gate has led to the applicants and their family being subject to violence and intimidation, and to their property being wantonly damaged."
3. In reaching its decision of 30 August 2018, the Board found that the gate in question was not an exempted development. As I stated in the principal judgment: -
 - "36. The Board decided that the erection of the gate was a '*development*' for the purposes of s. 3 of the Act of 2000. The next matter which the Board had to

consider was whether this development was an 'exempted development'. This is determined by the provisions of Article 6 of the 2001 Regulations. Article 6(1) provides: -

'Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act...'

The erection of the gate did come within the scope of class 9, Part 1 of Schedule 2 and, thus, would have been an exempted development but for the provisions of Article 9 which states: -

'(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act -

(a) if the carrying out of such development would -

...

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any... lakeshore... or other place of natural beauty or recreational utility,

(xi) obstruct any public right of way,"

Statutory Provision

4. Section 50A(7) of the Act of 2000 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 [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]."

Principles to be applied

5. There are a number of authorities which set out the principles which a court should apply when leave is being sought to appeal. The first of these authorities is *Arklow Holidays Limited v. An Bord Pleanála & the Attorney General & ors* [2006] IEHC 102. In the course of his judgment, Clarke J. (as he then was) stated: -

"2.3 In a number of decisions of this court the requirements of the section have been analysed in some detail and it is clear that a number of tests must be met:-

- (i) There must be an uncertainty as to the law in respect of a point which has to be of exceptional importance; see for example *Lancefort v. An Bord Pleanála* [1998] 2 I.R. 511.
- (ii) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case...

(iii) The requirement that the court be satisfied 'that it is desirable in the public interest that an appeal should be taken to the Supreme Court' is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. See *Kenny (No. 2)*. ..."

6. These principles were amplified further in *Glancre Teoranta v. An Bord Pleanála & anor* [2006] IEHC 250. In this case, MacMenamin J., having referred to earlier authorities, stated: -

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

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. ...
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."

7. In considering these principles, Costello J. stated in *John Callaghan v. An Bord Pleanála, Ireland & the Attorney General & ors* [2015] IEHC 493: -

"10. It is, of course, clear that the intention of the Oireachtas was that in the majority of cases judicial review of decisions made under the planning code would be determined finally by the High Court and there would, in most cases, be no appeal. This is the reason why the jurisdiction to grant a certificate to appeal should be

exercised sparingly. But this in no way detracts from the fact that in appropriate cases, if the court is otherwise satisfied that the point raised is of exceptional public importance and that it is in the best interest of the public that the appeal be taken then a certificate should properly be granted.”

Points of Law

8. The Board seek to have the following points of law certified for appeal pursuant to s. 50A(7) of the Act of 2000: -

- (i) Is Article 9(1)(a)(x) of the Planning and Development Regulations to be interpreted as applying in circumstances where the Board is satisfied, as a matter of fact, that the development consists of the fencing or enclosure of any land habitually open to or used by the public during the ten years proceeding such fencing or enclosure for recreational purposes or as a means of access to any lakeshore or other place of natural beauty or recreational utility or must it be interpreted as being limited to circumstances where it is established that the use in question is lawful use?
- (ii) Is An Bord Pleanála required to take into account of (sic) evidence that may be relevant to the determination of the issues before it but which is not provided to the Board as part of the submissions made as part of the public consultation process undertaken in accordance with the Planning and Development Act, 2000, as amended?

Consideration of Application

9. In considering this application, I will apply the well-established principles to each of the points of law which the Board seeks to have certified.

10. The substance of the first question is whether Article 9(1)(a)(x) must be interpreted “*as being limited to circumstances where it is established that the use in question is lawful use*”. This is expanded in the Board’s written submissions to the Court where it says at para. 10: -

“...As argued by the Board in the substantive proceedings, Article 9(1)(a)(x) of the 2001 Regulations is not, by its express terms, limited to lawful users and appears to be directed more towards the fact of use rather than requiring the Board to make a determination as to the status of that user.”

11. The Board appears to be submitting that all that has to be established is that there is a “*use*” and it matters not that such “*use*” is lawful or unlawful. Firstly, no such submission was made in the course of the hearing of the application. Secondly, such a proposition is untenable. If unlawful means were permissible for the establishment of a “*use*” or, for that matter, a right of way, such could readily be established by deliberate and persistent trespass, wanton destruction of private property and threats of personal violence. The law is there to protect people from such, not to benefit those who engage in or perpetrate such activity.

12. In respect of the interpretation of Article 9(1)(a)(x), I see no uncertainty in the law that requires to be clarified "*so as to enable the courts to administer that law not only in the instant, but in future such cases*". I do not think that it is "*desirable in the public interest*" that in considering whether or not the appropriate use has been established for Article 9(1)(a)(x) that the Board should consider a "*use*" which is illegal. I am, therefore, satisfied that there is no basis for certifying this question.
13. The second question concerns whether the Board was required to take into account the decision of the Circuit Court when such decision was "*not provided to the Board as part of the submissions made as part of the public consultation process undertaken in accordance with the Planning and Development Act, 2000, as amended*". In my view, the premise of this question is not correct. In the first judicial review proceedings, the judgment of the Circuit Court was, apparently, exhibited. In his various submissions to the Board, the applicant made repeated references to the Circuit Court proceedings as, indeed, did the applicants' Solicitor.
14. In the course of the hearing of the application before the Court, a submission was made that the hearings in the Circuit Court were dealing with a different issue than that which the Board was dealing with. This submission could only be made in circumstances where the Board was fully aware of the issue before the Circuit Court and the determination of the Circuit Court. In the course of the principal judgment, I stated: -
- "49. The applicants stated that the Board had in its possession, following the first judicial review proceedings, the judgment of the Circuit Court Judge. In its Statement of Opposition, the Board states: -
- 'It is denied that the decision of the Board was made without due regard to the decision of Court (sic) of competent jurisdiction...'"
- In light of the foregoing, I cannot see how the Board can rely upon s. 127(4)(b) of the Act of 2000 which precludes the Board from considering "*any documents, particulars or other information submitted by an appellant or person making the referral other than the documents, particulars or other information which accompanied the appeal or referral*".
15. By reason of the foregoing, I am satisfied that the second question has identified no uncertainty in the law nor any point of law of "*exceptional importance*". I will, therefore, refuse to certify this question on a point of law.

Conclusion

16. By reason of the foregoing, I will not grant the certificate for leave to appeal pursuant to s. 50A(7) of the Act of 2000.
17. The parties have fourteen days within which to make submissions on costs and any other orders that may be required.