THE HIGH COURT

[2024] IEHC 542

[Record No. 2022/1107JR]

BETWEEN

GRAYMOUNT HOUSE ACTION GROUP, DARRAGH RICHARDSON AND AOIFE GRIMES

APPLICANTS

AND

AN BORD PLEANÁLA, FINGAL COUNTY COUNCIL, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

TRAFALGAR CAPITAL LIMITED

NOTICE PARTY

JUDGMENT of Mr Justice Barr delivered electronically on the 13th day of September 2024.

Introduction.

1. This is an application for leave to appeal a judgment delivered by this Court on 31 May 2024, with neutral citation [2024] IEHC 327 (hereinafter "the substantive judgment"), to the Court of Appeal. The substantive judgment upheld the decision of An Bord Pleanála ("ABP") to grant planning permission to the first respondent for a

32 unit apartment development to be carried out at Dungriffin Road, Howth, County Dublin.

2. The chronology of relevant dates in this case can be set out as follows: -

07 September 2021	Fingal County Council gave intention to grant planning permission to the notice party for the development at Dungriffin Road.
04 October 2021	The applicants appealed the decision of the County Council to ABP.
21 October 2022	ABP decision granting planning permission for the development.
15 December 2022	Applicants first moved their application for leave to proceed by way of judicial review challenging the decision of ABP.
20 March 2023	After a number of adjournments to allow the applicants to amend their statement of grounds, the applicants were granted leave to proceed by way of judicial review.
09-12 April 2024	Application for judicial review heard in the High Court.
31 May 2024	Judgment delivered in the High Court.

The law.

3. The law to be applied to an application for leave to appeal a judgment of this sort is well settled and need not be set out in full. Section 50A(7) of the Planning and Development Act 2000, as amended, states:

> "(7) 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]."

4. In *Glancré Teoranta v ABP* [2006] IEHC 250, McMenamin J set out the principles to be applied to such applications, at para. 7: -

"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 (*Kenny*).

5. The point of law must arise out of <u>the decision</u> of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).

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**.**

5. These principles have been endorsed and applied on a number of occasions since that judgment: see *Arklow Holdings v ABP* [2008] IEHC 2; *O'Brien v ABP* [2018] IEHC 389; *North East Pylon Pressure Campaign Limited v ABP* [2018] IEHC 3; *Dublin Cycling Campaign v ABP (No.2)* [2021] IEHC 146; and *An Taisce v ABP* [2021] IEHC 422.

6. In *Monkstown Road Residents Association v ABP* [2023] IEHC 9, Holland J discussed at para. 8 of his judgment further considerations to be applied by the court in considering an application for leave to appeal. In particular, Holland J noted that the threshold to obtain a grant of leave to appeal, is very high, and that most applications will fail. In reaching its determination herein, the court has had regard to the principles set out in the caselaw cited above.

Discussion.

7. The applicant submits that there are four points of law of exceptional public importance in the substantive judgment of the court and that it is desirable in the public interest that an appeal should be taken on them to the Court of Appeal. The court will deal with each of the proposed points of law in turn.

Question 1 and Question 2.

8. *"Does the test for interpretation of a development plan laid down in Ballyboden, and approved in Sherwin, mean that a provision of the development plan is either an aspirational one (where all questions are within the discretion of the Board, or a legal one (subject to full review); or does it mean that the court must identify the legal limits of the provision, and the matters that are aspirational, and determine whether the Board has (a) exceeded the legal limits imposed by the plan and (b) before going on to consider whether, for matters within those legal limits and within its discretion, the Board has acted reasonably?*

9. The applicant submits that this question arises in the substantive judgment relating to the decision of ABP on density and guidelines; historic buildings; removal of trees; and the EIA issue.

10. In essence, the applicant submits that this Court erred in approaching the issue by reference to para. 112 in *Jennings v ABP* [2023] IEHC 14, as approved by the Supreme Court in *Sherwin v ABP* [2024] IESC 13. The applicant submits that in applying the test simply along the lines set out in para. 112 in *Jennings*, the court has collapsed the test that should be applied, into a single question as to whether the provision in the development plan, or guidelines, was aspirational in its terms, and, if

so, the only question was whether the decisionmaker acted irrationally in the legal sense.

11. It was submitted that this approach ignores the test set out at para. 108 in the *Jennings* judgment, which indicated a five-step test. The applicant submitted that the correct test, which ought to have been applied by both ABP and this Court, was that ABP should have interpreted the limits of the development plan and determined if the proposed development was outside those limits. If it was concluded that the proposed development was outside the limits set down in the development plan, the Board could still grant permission, but would have to set out clearly that it had reached a decision that the application was outside the limits set down in the development plan and state clearly why it was appropriate to grant the permission notwithstanding that it fell outside those limits.

12. It was submitted that if the Board came to the conclusion that the proposed development was outside the guidelines or the development plan, it could still grant permission for the development, but that had a much higher threshold of reasons, explaining why they had decided to grant permission for the development. It was submitted that this approach was set out at paras. 108-112 of *Jennings* and it was this approach which was expressly approved by the Supreme Court in the *Sherwin* case at para. 105.

13. It was submitted that the issue as to whether this Court was correct in its approach, wherein it had taken para. 112 in *Jennings* as being the applicable ratio in the case and in particular as setting down the relevant test for the standard of judicial review, was a question of exceptional public importance on which it was desirable in the public interest that an appeal be taken.

14. The applicant submitted that this erroneous approach, which had been adopted by ABP, and had been repeated by the court in its substantive judgment, had been replicated in respect of the decision on the following areas: density; removal of trees; historic buildings; and the EIA requirement.

15. The applicant submitted that a second question flowed from the first question. It related to the adequacy of reasons given by ABP in its decision. It was submitted that there was a tension in the caselaw between various judgments that had been handed down by Holland J and Humphreys J in relation to the level of reasons required. It was submitted that it was established at law, that the decisionmaker had to engage with the submissions of the parties in a real and meaningful way, in order for the reasons given, to be deemed adequate.

16. The applicant's second question concerned the standard of reasons that were required in the circumstances of this case. The applicant's second proposed question was in the following terms:

> *"In providing reasons, is it sufficient for the Board to show that it has identified the general issues and documents relevant to its decision making and consider them; or does the requirement for reasons require that the Board must show that it has identified the specific, applicable provisions of the relevant development plan and guidelines, engaged with them in light of the submissions made, interpreted them correctly, and applied them in accordance with the law?"*

17. It was submitted on behalf of the applicants that there was a tension between certain High Court judgments as to whether only giving the main reasons on the main issues, would suffice. It was submitted that it was in the public interest that this dichotomy of approach, should be resolved by the Court of Appeal.

18. In response to the submissions on these two questions, it was submitted on behalf of the first respondent, who is the sole proposed respondent to the appeal, that the law is well settled on the legal obligation on a decisionmaker to have regard to a development plan and the guidelines. It was submitted that the applicants were trying to create a false conflict between judgments, because there was a difference between giving general reasons for a decision, and the level of reasons required when concrete submissions had been made by the parties. It was submitted that in the second scenario, there was a requirement to engage with the submissions in a meaningful way, and in particular, to say clearly why certain submissions were not being accepted. However, it was submitted that this did not arise in the areas of complaint raised by the applicants in this case.

19. I accept the submissions made by the respondent on this issue. The legal requirement placed on a planning authority, or on the Board on appeal, is to have regard to the development plan and/or to the relevant guidelines. The law on this issue is well settled. It was applied by the court in its substantive judgment.

20. It is equally well settled that there are different types of provisions in both development plans and guidelines. Some impose hard limits, whereas others are more aspirational in nature. This is all set out in the substantive judgment.

21. Where the provisions of the development plan and the guidelines are aspirational in nature, the obligation to have regard to them involves the decisionmaker applying a planning judgment, flexibility and planning expertise, to the evaluation of the particular issue under consideration.

22. The law is very clearly set out in the *Jennings* case, as endorsed by the Supreme Court in the *Sherwin* case; that in the aspirational type of provision, the

decision of the expert decisionmaker in the exercise of his or her planning judgment, can only be interfered with if it is irrational in the legal sense.

23. That was made clear by the principles laid down at para. 112 of *Jennings*, which summarised the preceding paragraphs; and which statement of the law was explicitly endorsed by the Supreme Court in the *Sherwin* case. The court does not accept that there is any uncertainty in the law, much less any point of law of exceptional public importance raised in this question.

24. The substantive judgment merely applied well settled principles of interpretation in relation to development plans and guidelines. It applied the well-established legal test as to when it can intervene in a decision of an expert decisionmaker, when they make a decision on a proposed development, when considering an aspirational provision in the development plan, or guidelines.

25. In each of the areas, being density, preservation of trees, retention of historic buildings and the EIA issue, the first respondent had to consider the matters within the broad framework of the relevant provisions in the development plan, in the guidelines and in the Directive. For the reasons set out in the judgment, the court found that they had had regard to the relevant matters and had reached a rational decision in each case.

26. There is little to be gained by trying to make the process of reaching a decision more complicated than it need be. The obligation on a planning authority, and on appeal, on the Board, is to consider whether the proposed development, as contained in the planning application, is consistent with proper planning in the area. In doing that, the decisionmaker must have regard to the provisions of the development plan, the guidelines and the Directive.

27. Where these provisions are aspirational in nature, the decisionmaker must apply his or her planning judgment and expertise in arriving at their decision. The list of questions set out at para. 108 of *Jennings*, is not a rigid list that must be ticked off in each case. That is made clear by the terms of para. 108 itself. The imposition of a requirement for a five-step decision making process, is neither mandated by the terms of the judgment in that case, nor is it mandated by logic or common sense. The court is satisfied that there is no point of law of exceptional public importance raised in question one proposed by the applicants.

28. In relation to the second question, the applicants want to argue that the adequacy of reasons mandated, is subject to some legal uncertainty, due to an alleged conflict of approaches between Humphreys J and Holland J as to the level of reasons required in planning decisions.

29. The court does not accept that there is uncertainty in the law in relation to the obligation to give reasons. That has been long established in the caselaw: see *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, *Balz v An Bord Pleanála* [2020] 1 ILRM 367, *Connelly v an Bord Pleanála* [2018] IESC 36 and *Christian v Dublin City Council* [2012] 2 IR 506.

30. The law in this area was exhaustively analysed by Humphreys J in *O'Donnell v ABP* [2023] IEHC 381, wherein, having considered a large number of authorities, he came to the conclusion that the obligation was to provide the main reasons on the main issues. That approach has been adopted in numerous subsequent decisions of the High Court. This Court accepted that statement of the law in reaching its decision in the substantive judgment.

31. There will always be differences of emphasis, or phraseology, between one judge and another. That does not give arise to a true conflict, or divergence, as to the

applicable law, on which it is desirable in the public interest that the point be resolved by way of an appeal.

32. I accept the submission made by the respondent that the applicants have tried to conflate the obligation to give reasons, with the obligation to adequately address submissions made by a party in the course of the hearing before the decisionmaker. In the latter scenario, there is an obligation on the decisionmaker to address in his or her decision, the submissions made in the course of the hearing, and in particular, those made by the losing party. However, in the present case, the decisionmakers were not, for the most part, dealing with concrete submissions or objections made by the applicants, but were giving reasons why they had reached a particular decision; which, for the most part, came within the exercise of their planning judgment in the context of the consideration of an aspirational provision in the development plan or guidelines.

33. In these circumstances, the law is clear that the obligation to give reasons was simply to give the main reasons on the main issues. The court is satisfied that the decisionmaker had done that in this case. There is no basis on which the second question as to the level of reasoning required, could be said to give rise to a point of law of exceptional public importance, or to one on which it is desirable in the public interest to have an appeal. I refuse to certify the grounds raised in questions 1 or 2 submitted on behalf of the applicants.

Question 3.

34. The third question raised by the applicants was in the following terms:

> *"Where a variation to a development plan revises figures stated in the parent plan, and states that those revised figures are calculated to a particular date,*

but the plan comes into force on a later date, should those revised figures be taken to be calculated from the date stated, or from the date on which the variation came into force?"

35. The applicants submit that where data in a proposed variation to a development plan, is drawn up as of a particular date, and in consequence thereof, a limit is put into the development plan by way of a variation of the plan, that limit applies not from the date of adoption of the variation of the development plan, but from the date of collection of the data; which in the present case, was some nine months prior to the date of adoption of the variation of the development plan.

36. The applicants accept that this is a point of law that does not appear to have arisen before. It is submitted that the absence of authority, indicates that the point is a novel one. In this regard, the applicant relies on the decision in the High Court in *Callaghan v ABP* [2015] IEHC 493, as affirmed by the Court of Appeal at [2016] IECA 398. In particular, the applicant relies on para. 14 of the judgment of Costello J (as she then was), wherein it was stated that the fact that a point of law was novel, did not, of itself, answer the question whether or not the law on the point was certain or uncertain. The court held that the fact that the point was novel, and that the issue had been raised in the case for the first time, logically did not mean that there was no uncertainty in the law. The court stated that there must always be a first case when a point is raised. However, equally logically, the law may be clear, even though there was no decided authority on the point.

37. Thus, the fact that a point is novel, does not mean that the law is unclear on it. It may be that the law is unclear; but it could equally be that nobody raised the point before, because they did not regard it as being a good point.

38. In this case, I am afraid that the point raised is in the latter category. There are three good reasons why the date of variation has to be the date on which the variation was formally adopted. First, s.13(11) of the Planning and Development Act 2000, as amended, provides that the date on which a variation to a development plan takes effect, is the date upon which the variation is made.

39. Secondly, in the title page to the variation to the development plan in this case, it was stated "Variation No.2 of the Fingal Development Plan 2017-2023 is effective from 19th June 2020".

40. Thirdly, I accept the respondent's submission that if one was to adopt the applicant's argument, it would mean that, notwithstanding the date of adoption of a variation and the statement as to the date on which it becomes effective; the variation would become effective as and from different dates, dependent upon the date to which data was collected; this would cause great uncertainty as to when a variation actually became effective in a practical sense.

41. Furthermore, if the local authority had wanted to provide that a particular provision within the variation, was to be effective from a date different to that on which the variation as a whole was to be effective, they could have said that clearly. They did not do so.

42. The court is satisfied that there is no substance in this ground of appeal, nor does it raise a point of law of exceptional public importance. In addition, the issue raised, lacks the degree of generality required to make it in the public interest that an appeal on it be allowed.

Question 4.

43. The final point of law in respect of which it was submitted that an appeal should be allowed, was stated in the following terms:

> *"Where standard condition one of the planning permission (requirement to build in accordance with the plans and particulars submitted) is relied on by the court as the basis for an enforceable obligation, is the court obliged to identify the specific document, paragraphs and plans providing the basis for that obligation?"*

44. The applicant's main submission under this heading is that it is not sufficient for reliance to be placed on condition one to the planning permission, which is in the usual form, because it was not clear from the documentation submitted by the developer in the course of the planning application, that a firm commitment had been given to provide public access to the playground; meaning that the obligation to provide such access may not come within the parameters of condition one.

45. While the applicants conceded that this may be an enforcement issue, it was submitted that it came within the decision in *Camiveo v Dunnes Stores* [2019] IECA 138, where it was held that a specific commitment had to be provided for in the planning application documentation, in order for it to be properly within the parameters of condition one. It was submitted that this requirement had been identified in the *Camiveo* case and in the earlier case of *Lanigan v Barry* [2016] IR 656.

46. It was submitted that in the *Camiveo* case the commitment had been given both in a letter and in a map; whereas, in the present case there was only a commitment given within the written documentation. There was no map. It was

submitted that the court had not identified the specific commitment given in the planning application documentation.

47. It was submitted that the issue raised under this ground, raised an issue that would arise in all cases where condition one was relied upon. It was submitted that the substantive judgment in this case had set a lower threshold, than that in the *Lanigan* and *Camiveo* cases; thereby giving rise to uncertainty in this area of the law; on which basis it was desirable that the question should be resolved by way of an appeal.

48. On behalf of the respondent, it was submitted that it was well settled that condition one in the usual form, was sufficient to render enforceable, the commitments given by a developer to do certain things, as stated in the documents submitted as part of his application. In the present case, it was submitted that sufficient commitments had been given by the developer at paras. 7.42-7.48 of the planning statement lodged on his behalf. Further reference to the provision of public open space and access thereto, had been contained in the architectural design statement, which had been submitted with the planning application. It was submitted that in these circumstances, a clear commitment had been given and this was covered by condition one in its usual form.

49. The principles governing the circumstances in which particular contents of the documentation submitted by a developer as part of his planning application, can give rise to an enforceable obligation based on condition one in its usual form, are well settled. These were set down by Clarke J (as he then was) in *Lanigan v Barry*, where it was held that the language used in the documentation submitted as part of the planning application, might contain language that might properly be construed as amounting to a clear commitment that particular limits of one sort, or another, would

be complied with. Once this was done, such commitments could be rendered enforceable under condition one, in its usual form.

50. The key question in determining whether a commitment given in planning application documents was sufficiently specific, as to be enforceable by means of condition one, was whether the language used gave rise to a clear commitment to do a particular thing. In the present case, the court applied these principles to the facts of the case. It found that condition one secured a right of enforcement against the developer in relation to the commitments given concerning the provision of public open space; in particular, in the form of a playground, and the right of the public to have access thereto.

51. In the present case, the court applied these well settled principles to the issue of the provision of public open space in the development, and the securing of access thereto. Insofar as the applicant may not like that conclusion, it does not raise a point of law of exceptional public importance, nor does it raise issues that could be said to be of sufficiently wide application, as to make it in the public interest that an appeal be taken. The court refuses to certify this ground of appeal.

Determination.

52. For the reasons set out herein, the court is not satisfied that the applicants have raised points of law of any exceptional public importance, such that it could be said to be in the public interest that an appeal be allowed on any of the grounds put forward.

53. At the end of the day, this was an application for planning permission for a relatively modest development. It did not raise any particularly difficult questions for the planning authority, who allowed the development; as did the Board on appeal.

54. The applicants, being unhappy with those decisions, brought a judicial review application, wherein they raised approximately nine grounds of challenge to the decision of ABP. Applying settled legal principles, this Court rejected those grounds of challenge.

55. The applicants then sought to argue that an appeal should be allowed, because there were four points of law of exceptional public importance raised in the judgment, on which it was in the public interest that an appeal be brought. The substantive decision handed down by this Court, was not complex. It did not decide any usual or difficult points of law. It merely applied settled law to a straightforward set of facts.

56. Notwithstanding the alarming number of authorities handed into the court, being eighty at first instance and a further eight authorities in the application for leave to appeal, this remains a relatively simple case, which does not deal with any points of law of exceptional public importance. Accordingly, I refuse leave to the applicants to appeal in this case.

57. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs.

58. The matter will be listed for mention by way of hybrid hearing at 10.30 hours on 22 October 2024 for the purpose of making final orders.