

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 42
[2020 No. 725 JR]

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING
AND DEVELOPMENT ACT 2000, AS AMENDED**

BETWEEN

CLONRES CLG

APPLICANT

AND

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

RESPONDENTS

AND

CREKAV TRADING GP LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

AND

**THE HIGH COURT
JUDICIAL REVIEW**

[2020 No. 693 JR]

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A AND 50B OF
THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED**

BETWEEN

JOHN CONWAY AND LOUTH ENVIRONMENTAL GROUP

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING GP LIMITED

NOTICE PARTY

(No. 3)

JUDGMENT of Humphreys J. delivered on Friday the 4th day of February, 2022

1. In *Clonres v. An Bord Pleanála (No. 1)* [2018] IEHC 473, [2018] 7 JIC 3130 (Unreported, High Court, 31st July 2018), Barniville J. granted *certiorari* of a permission granted by the board for a housing development on the lands to which the proceedings relate, and remitted the matter back for further consideration.
2. The board refused permission following that remittal, a decision that was successfully judicially reviewed by the notice party in *Crekav Trading GP Ltd. v. An Bord Pleanála* [2020] IEHC 400, [2020] 7 JIC 3108 (Unreported, High Court, Barniville J., 31st July, 2020).
3. In the meantime, a fresh application was made to the board, which was granted.
4. In *Clonres CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7th May, 2021), I granted *certiorari* of the latter board decision in the present two sets of proceedings (the *Clonres* and *Conway* matters) on the basis of domestic law issues, and adjourned a third challenge to the development (*Sweetman v.*

An Bord Pleanála [2020 No. 729 JR]), which was based on EU law grounds which I didn't reach, rather than domestic grounds.

5. The board now applies for leave to appeal to the Court of Appeal under s. 50A of the Planning and Development Act 2000.
6. There was a fairly long delay in making the application. The substantive judgment was given on 7th May, 2021, and I only received the board's written submissions and questions four and a half months later on 24th September, 2021.
7. The matter seems to have been first mentioned to the court on the last Monday of the legal year, 26th July, 2021 although there may have been reference to a possible appeal at some point prior to that.
8. I made the point in *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404, 2016 WJSC-HC 439 (Unreported, High Court, 14th November 2016), that a leave to appeal application should be made promptly and ideally within the normal appeal period of 28 days from the pronouncement of the substantive decision (bearing in mind that dating the time from pronouncement rather than perfection makes sense in this context because, but for the leave to appeal procedure, the order would be perfected as soon as costs are dealt with).
9. The delay did have one positive effect though because it gave an opportunity to find out whether the substantive judgment caused any problems in practice, and there is no evidence or basis whatsoever to demonstrate that having happened in the nearly nine months since the judgment.
10. No issue was raised by the applicants about the board's delay, but if an issue had been made of it I might have had to consider whether there was any real justification for that. The board predictably says the matter needed careful consideration – but everything to do with litigation requires careful consideration. That isn't a basis for not doing things promptly.
11. The problem is not so much this one individual case, but that it is not meaningfully possible to make an exception for any one litigant given that leave to appeal by definition involves an allegation that the points are of exceptional importance and thus require detailed consideration.
12. The notice party here has not itself applied for leave to appeal, but made submissions supportive of the board. Given that the board was complaining about the alleged problems caused by my interpretation of the development plan, I also gave Dublin City Council a further opportunity to comment on the leave to appeal issue, but they decided not to make any submission. While one can't read very much into that, on one view it is possibly consistent with the view that, whatever problems the judgment has allegedly caused, they are not so intolerable to the council as to warrant being mentioned to the court. But maybe even that could be an overstatement.

13. There was also an issue about a lack of proper indemnity by the board in favour of both applicants in the event of an appeal. Sensibly, the board ultimately agreed to a full indemnity in both cases (rather than its original proposal of one set of costs to be shared between the two cases), which was appropriate and necessary given that both applicants had a legitimate right to get involved in any such appeal.
14. That said, while the board agreed to such a full indemnity in the event of an appeal to the Court of Appeal, it did not commit to maintaining that offer in the event of a leapfrog appeal to the Supreme Court. My own view, for what it's worth, is that there would be a lot to be said for doing so if such a procedure were to open up (if I can be forgiven for saying so).
15. I have considered the law in relation to leave to appeal as set out in the parties' submissions. The basic principles are not massively in dispute so I don't need to rehearse the caselaw here.
16. The basic problem with the application is that even if all questions are answered in a sense favourable to the board, the planning permission was also quashed on other grounds, so it is accepted by both the board and the notice party that there will be an order of *certiorari* in any event.
17. The fact that the questions will not make any difference to the order is an inauspicious basis for the application and seems to me to verge into the territory of the advisory opinion: see *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 I.R. 274 *per* Denham J.
18. As the applicant in *Conway* points out at para. 13 of written submissions: "the lack of reality to the points ... is that if the Court of Appeal was to address same this would not involve the grant of any relief". The general approach is that the question on which leave to appeal should be granted should be determinative of the case (see *S.A. v. Minister for Justice, Equality and Law Reform*), and I don't see any sufficient reason to depart from that approach here.

Board's first four questions

19. The board's first four points of law of alleged exceptional public importance are as follows:
 - (i). "In the established test for the interpretation of development plans, is the 'ordinary and reasonably informed (and intelligent) person / member of the public' to be assumed to have (i) no legal training or particular expertise in law and (ii) no particular expertise in town planning? Ought such person be assumed to have (iii) any knowledge of the law relating to planning?"
 - (ii). Is a development plan a statutory instrument within the meaning of section 2 of the Interpretation Act 2005?
 - (iii). If the answer to 2 is yes, do all of the rules applicable to the interpretation of statutory instruments apply, either all of the time or at all, to the interpretation of

development plans, and if such rules apply some of the time only, when do they apply?

(iv). If the answer to 3 is that the rules of interpretation applicable to statutory instruments do apply some or all of the time to the interpretation of development plans, do these rules of interpretation override the established test referred to in no. 1 and/or how do they otherwise interact with the established test for the interpretation of development plans?"

20. The problem for the board is that it is essentially appealing *obiter* comments. The *ratio* of the point at issue here is set out at paras. 37 and 38 of the substantive judgment and is in effect as follows: "where the Z15 zoning is speaking of an existing use or "existing functional open space" it is talking about existing uses in the sense that Simons J. is referring to in *Redmond v. An Bord Pleanála*, namely a previously established use which ensures for the benefit of the land until such time as a planning permission for a new use is granted. Even the non-expert reader could appreciate that point."

21. Two points are noteworthy:

(i). the applicants succeed on the most conventional view of the jurisprudential framework viewed from the point of view of the non-expert reader; and

(ii). the decision is consistent with and expressly follows other caselaw, specifically the judgment of Simons J. in *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, 10th March, 2020).

22. Thus, there is literally nothing to see here in terms of the conventional jurisprudence on the criteria for leave to appeal. It is true that I did go on to address what I called "alternative grounds" (para. 36 of the substantive judgment), but they aren't the *ratio* because the point was decided on the first ground. The points at para. 35(ii). to (iv). of the substantive judgment are simply *obiter*. The fourth point is expressly identified as such, but that also applies to the second and third points. As these matters are simply *obiter*, leave to appeal is inappropriate.

The board's fifth question

23. The board's fifth question is as follows: "[b]earing in mind the answers to the foregoing questions, what is the correct interpretation of the references to "existing use" in the description of the Z15 zoning in the Dublin City Development Plan?"

24. The reference to "bearing in mind the answers to the foregoing questions" is misplaced and even possibly slightly tendentious. The point was answered in the substantive judgment by reference to conventional matters and previous jurisprudence that did not require the court to "bear in mind" the questions now formulated by the board. Even if the board's first four questions were answered differently, that does not impact on my application of conventional law and jurisprudence in interpreting the development plan.

25. Thus the main problem here is that no uncertainty is demonstrated and there are no conflicting decisions. Independently of that, the question as to what the meaning of a particular clause in a particular development plan adopted at a particular time is inherently a local and limited one, even if the development plan applies to the Capital City. The local nature of the question militates against it being a question of public importance or exceptional public importance, as does the fact that life of any given development plan is inherently time-limited and ephemeral.
26. The present case is about the Dublin City Development Plan 2016 to 2022 which will come to an end later this year. I am informed that we are well into the process of adopting the replacement Dublin City Development Plan 2022 to 2028 and that the public consultation on the development plan is already underway. Consultation commenced on 29th November, 2021 and will end on 18th February, 2022 with the new plan formally adopted later in 2022. That leads to a further point, which is that if Dublin City Council is not happy about my interpretation, it's not that difficult to change it.
27. The developer's concern for the unfortunate difficulties created for councils in preparing development plans as a result of the judgment (para. 34 of written submissions) is, I'm afraid, a little bit of an exaggeration. Firstly there's no reason to think that councils generally are unhappy about the idea of interpreting words in a plan by reference to the statute under which the plan is made. If I'm wrong about that and if councils are that concerned about the judgment, they know what to do. If any council does not like the idea that terms in the development plan should be read in the sense of the enabling Act, that is just an interpretative presumption, so all the council has to do is to exclude that by way of a provision in the plan. If they want to give any particular term a special meaning, all they have to do is to define it. If Dublin City Council in particular think that the Z15 zoning should be construed in a different way to that set out in the substantive judgment, it is not a major exercise for them to clarify the wording. Indeed I'm inclined to think that the wording could well benefit from clarification anyway seeing as it is less than totally explicit on a number of key matters, as I tried to suggest at para. 40 of the substantive judgment. That might be of benefit to all stakeholders in the process, not just the court. But ultimately that's a matter for them, as is their entitlement to reverse my interpretation of the plan simply by changing it.

Order

28. All that said, while I don't think that the present application meets the criteria for leave to appeal under s. 50A of the 2000 Act, I would accept that the first four questions have a degree of public importance. I wouldn't see the same dimension to the fifth question for the reasons stated.
29. In such a context, if the Supreme Court were to consider, notwithstanding the *obiter* character of the points the board is concerned about in the substantive judgment and the moot nature of any appeal, and presumably assuming that in such a context the board maintains its offer of a full indemnity for both sets of proceedings, that the first four questions could be worthy of clarification, then one could respectfully see some benefit in that, if I can be allowed to say so. My primary reservation about special bespoke rules for

interpretation of planning documents is that it is an *ad hoc* approach to law that situates individual subject areas in their own silo rather than seeking an approach that is coherent across different subject areas as seen from the overall perspective of the legal system as a whole. My secondary reservation is that an assumption of lack of relevant knowledge on the part of the interpreter doesn't make a lot of sense anyway, especially given all of the societal and legal changes in recent decades and other matters referred to in the substantive judgment. Nor does it reflect reality – in reality planning decisions like decisions in other specialised areas are addressed to an audience with quite some degree of familiarity with the system concerned (a point Barniville J. made in the procurement context in *Transcore v. National Road Authority* [2018] IEHC 569, [2018] 10 JIC 1701 (Unreported, High Court, 17th October, 2018), at para. 191: “Finally, the court must focus on the “industry” concerned in which the professionals and persons involved are not lawyers but participants in that industry”). But on either or both points, the Supreme Court is the only court that can definitively resolve the matter because only that court can review how its own decision in *In Re XJS Investments Ltd.* [1986] I.R. 750 sits in a modern and joined-up legal framework and in a modern society, and whether any clarification, nuancing or even evolution is appropriate, especially given some of the glosses that the decision has attracted since.

30. In all the circumstances the order will be:
- (i). that the application for leave to appeal be dismissed; and
 - (ii). that the matter be listed on Monday 14th February, 2022 to finalise costs.