

THE HIGH COURT
JUDICIAL REVIEW

2023 IEHC 9
Record No. 2020/737JR

Between:

MONKSTOWN ROAD RESIDENTS' ASSOCIATION,
JAMES BARRY, BAIRBRE STEWART AND CHRISTOPHER CRAIG

Applicants

and

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

Respondents

and

LULANI DALGUISE LIMITED AND DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Notice Parties

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED 19 JANUARY 2023

Contents

INTRODUCTION & THE POSITED POINTS OF LAW	1
THE LAW ON CERTIFICATION OF POINTS OF LAW FOR APPEAL	3
SPPR1	8
EIA SCREENING – Reasons	14
EIA SCREENING – STANDARD OF REVIEW.....	15
The Board’s Decision.....	15
Irrationality/Reasons.....	16
EIA Screening Report	20
EIA Screening - Conclusion.....	25
CONCLUSION TO THIS POINT	26
EXCEPTIONAL PUBLIC IMPORTANCE/APPEAL IN THE PUBLIC INTEREST	26
CONCLUSION.....	27

INTRODUCTION & THE POSITED POINTS OF LAW

1. By judgment delivered 31 May 2022 (“the judgment of 31 May 2022”) I decided to quash the decision of the First Respondent [“the Board”] made by order ABP-306949-20 dated 25 August 2020, under s.4 of the Planning and Development (Housing) and Residential Tenancies Act 2016 [“the 2016 Act”] to grant the First Notice Party [“Lulani”] planning permission for a strategic housing development [“SHD” and “the Proposed Development”] on a site [“the Site”] of approximately 3.66 hectares at Dalguise House, Monkstown Road, Monkstown, Blackrock, County Dublin [the “Quashed Permission”]. I decided to quash it as:

- a. erroneously reliant on SPPR1¹ of the Height Guidelines.
- b. failing to give adequate reasons for its EIA Screening decision as to insignificance of effect on cultural heritage. This related to the fact that the Proposed Development would occupy all or all but all of the curtilage of Dalguise House, a protected structure².
- c. erroneous by reason of the Board's finding that Lulani's EIA Screening Report identified and described adequately the effects of the Proposed Development on the environment and so adopting a report which did not describe those effects adequately and could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required.

2. The Board now seeks a certificate to allow it to appeal the judgment of 31 May 2022. The Applicants ("MRRRA"³) oppose certification. Both made written and oral submissions on the certification issue. Lulani did not participate on the certification issue.

3. The Board's argument essentially canvassed three points of law, of alleged exceptional public importance, in respect of which it alleged an appeal was desirable in the public interest. It alleged error as to the law relating to
- reliance on SPPRs in granting permissions despite material contravention of development plans.
 - the standard of judicial review of EIA Screening.
 - reasons with respect to EIA Screening. This point was not really pursued.

These themes were elaborated in the following points of law proposed in the Board's written submissions. I have reordered them thematically⁴:

SPPR1

1. It was error to conclude that the Board's recitation of SPPR1 amounted to reliance on it *qua* SPPR1 such that the aforesaid recitation rendered the Board Decision unlawful. It is not correct to equate recitation of SPPR1 for the policies stated therein with reliance on SPPR1 for the mandated directive to planning authorities as to the adoption of a variation of a development plan. The context of description of matters which are otherwise legally relevant considerations (being the policies cited therein) cannot render that description legally irrelevant if, by their own force, those matters are legally relevant.

¹ Special Planning Policy Requirement 1.

² Within the meaning of Part IV Planning and Development Act 2000.

³ Which term I use to include all applicants.

⁴ I have made some textual changes without altering meaning.

EIA Screening - Standard of Review

1. Having regard to the appropriate standard of review, the Court was incorrect to conclude that the Board's EIA screening, as to architectural or cultural heritage, was inadequate in law.
2. The Court, erroneously having regard to the appropriate standard of review and/or existing jurisprudence, determined the significance of the likely impact of the Proposed Development on the environment on a first instance basis.
3. The Court was incorrect in law to conclude that a methodology in a document prepared by the developer (insofar as it was held not appropriate as a guide to understanding the predicted likely significant effects on the environment), proves that the Board misunderstood and misapplied the correct test particularly where there was information before the Board on the *de facto* nature of the Proposed Development and all it entailed to the protected structure and the curtilage. In this respect, the Court's conclusion that the Board incorrectly understood "significance" is inconsistent with existing jurisprudence.

EIA Screening – Reasons

4. The Court's identification of the "main issues" on which the "main reasons" were required was inappropriate insofar as it involved the Court determining, without regard to the appropriate standard of review, what the "main issues" were.
5. The Court, in ascribing a lack of reasons to the Board, required of the EIA screening determination an excessive degree of textual output and overt textual treatise (whether called reasons or otherwise).

THE LAW ON CERTIFICATION OF POINTS OF LAW FOR APPEAL

4. **S.50A(7) PDA 2000**⁵ provides that the Court's decision of an application for judicial review

"... shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court".

⁵ Planning And Development Act 2000.

That section may be read as if the references to the Supreme Court were references to the Court of Appeal, to which Court any appeal, if certified, would proceed⁶.

5. There was little, if any, dispute as to the well-established principles of law applicable in an application for a certificate of leave to appeal. The starting point is identified by Barniville J in **CHASE**⁷:

“The clear intention of the Oireachtas in enacting s.50A(7) (and its statutory predecessors) was that, in most cases, the decision of the High Court on an application for leave to seek judicial review in respect of a planning decision or on an application for judicial review of such a decision should be final and should not be the subject of an appeal”.

6. The posited ground of appeal must involve a point, or points, of law⁸.

7. I must assume for the purpose of this application that, as to that point of law, my decision may well be wrong: see **Callaghan**⁹ and **Dublin Cycling**.¹⁰ In this regard, the Court should not concern itself with the merits, strength or weakness of the parties’ arguments on the point or prospects of success on any appeal. The Court should take the intended appellant’s case on the point at its height: see **CHASE**. However, the Board agreed at hearing before me, in my view correctly, that this principle must be understood subject to the caveat that, taken at its height, the point of law must be stateable. Clearly, an unstateable point of law cannot be of exceptional public importance and it cannot be desirable in the public interest that an appeal be heard on an unstateable point of law.\

8. Thereafter, the overarching principles are those identified in s.50A(7) PDA 2000 - that the point of law be of exceptional public importance and that it is desirable in the public interest that an appeal should be taken. On those bases, the principles applicable, though not set in stone¹¹, have been elaborated in the cases and were summarised by MacMenamin J. in **Glancre**.¹² That summary has been approved and glossed in many cases since. I attempt to synthesise the current state of the Glancre principles as follows.¹³ I have indicated where I have drawn some inferences from the principles.

⁶ Simons on Planning Law, 3rd Ed’n (Browne) §12-1703.

⁷ Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála [2022] IEHC 231 (High Court (Judicial Review), Barniville J, 26 April 2022) §32.

⁸ Hereafter, for convenience, I will refer to point of law singular.

⁹ Callaghan v An Bord Pleanála & Element Power [2015] IEHC 493 at §13.

¹⁰ Dublin Cycling Campaign CLG v An Bord Pleanála #2 [2021] IEHC 146 at §29.

¹¹ Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála [2022] IEHC 231 §31.

¹² Glancre Teoranta v An Bord Pleanála and Mayo County Council [2006] IEHC 250.

¹³ Much of what follows is taken also from Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála [2022] IEHC 231 §31 et seq and was there in turn taken from earlier cases – some of which I have footnoted here. I have not excised reference to principles irrelevant in this particular case.

- a. The application for certification of leave to appeal should be made promptly - ideally within the normal appeal period.¹⁴
- b. The jurisdiction to certify must be exercised sparingly. Most applications for a certificate to appeal fail.¹⁵
- c. The point of law must arise out of the decision of the High Court and not merely from discussion or consideration of a point of law during the hearing. A point the court did not decide cannot amount to a point of law of exceptional public importance.
- d. I would add that it seems to me to be a necessary implication of the principle that *“The point of law must arise out of the decision of the High Court”* that the point of law must reflect a correct understanding of the decision of the High Court, read as a whole.
- e. The point of law should be actually determinative of the proceedings, not one which, if answered differently, would leave the result of the case unchanged.¹⁶ The same point can be phrased in terms that a point of law is moot if it raises no dispute the resolution of which in the posited appeal is capable of leading to the reversal or variation of the order made by the High Court.¹⁷
- f. The point of law must be formulated with precision so that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal.¹⁸
- g. It seems to me to be a necessary implication of the principle that the point of law should be determinative that certification should be refused if points of law otherwise certifiable would leave unimpugned one ground upon which certiorari was granted, such that the result of the case will remain unchanged.
- h. The requirement goes substantially further than that a point of law emerges in or from the case. That it be of exceptional public importance is a clear and significant additional requirement.
- i. Normal statutory rules of construction apply. So, inter alia, ‘exceptional’ must be given its normal meaning. That imposes a very high hurdle - the point of law must not just be important, but of unusual or untypical importance.¹⁹

¹⁴ S.A. v. Minister for Justice and Equality (No. 2) [2016] IEHC 646, Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 636 §6(i), Clifford & Sweetman v. An Bord Pleanála [2021] IEHC 645. Stanley v An Bord Pleanála [2022] IEHC 671.

¹⁵ Cleary Compost and Shredding Ltd v. An Bord Pleanála (No 2) [2018] IEHC 347 (High Court, Baker J, 13 June 2018); Dunnes Stores v. An Bord Pleanála [2016] IEHC 263 (High Court, Barrett J.).

¹⁶ See also S.A. v. Minister for Justice and Equality (No. 2) [2016] IEHC 646, Clifford & Sweetman v. An Bord Pleanála [2021] IEHC 645. Stanley v An Bord Pleanála [2022] IEHC 671.

¹⁷ Clonres/Conway v An Bord Pleanála & Crekav Trading [2022] IESCDT 71.

¹⁸ See also S.A. v. Minister for Justice and Equality (No. 2) [2016] IEHC 646, Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 636 §6(i), Clifford & Sweetman v. An Bord Pleanála [2021] IEHC 645. Stanley v An Bord Pleanála [2022] IEHC 671.

¹⁹ Cleary Compost and Shredding Ltd v. An Bord Pleanála (No 2) [2018] IEHC 347 (High Court, Baker J, 13 June 2018); Dunnes Stores v. An Bord Pleanála [2016] IEHC 263 (High Court, Barrett J.).

j. The test is not simply whether the point of law transcends the individual facts of the case. Such an interpretation would fail to apply the word 'exceptional'. Since most points of law are of some importance, the point of law must transcend well beyond the individual facts and the parties in the case.

k. Where leave is refused in an application for judicial review, (i.e. 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 appeal.

l. The requirements of exceptional public importance and that appeal be desirable in the public interest are cumulative. They may overlap but to some extent may require separate consideration.

m. Some affirmative public benefit from an appeal must be identified. This suggests that, to be certified, a point must be such that it is likely to resolve other cases.

n. The law in question must be in a state of uncertainty, evolution or lack of clarity. 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.

o. 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Merely raising an argument on the proposed point of law which the Court has rejected does not mean that the law is uncertain. The uncertainty must arise over and above this, for example, in the daily operation of the law in question.

p. The fact that the point of law raises a novel issue does not necessarily mean that the law is uncertain or evolving. It is not, however, necessary to point to other decisions which conflict with the decision of the High Court on the point of law. However, where the point is novel and the law is evolving, it is likely that the Court will find it of exceptional public importance.

q. The intending appellant must not use the application for leave to appeal as an opportunity merely to reargue the merits which the Court has already decided against that party in its substantive decision. However, it may sometimes be difficult to avoid doing so (or at least giving the impression of doing so) in order to persuade the Court that the law in the area is uncertain or evolving and that the posited point of law is of exceptional public importance.

r. Generally, where, on the posited point of law, the intending appellant has lost in the High Court on the basis of the application of clear and well-established principles to the facts of the case, it will be very difficult to satisfy the cumulative requirements of s.50A(7) of exceptional public importance and that an appeal be desirable in the public interest. Certification is not in principle ruled out in such circumstances but is likely only in exceptional circumstances and is not in any sense the normal or usual position. The closer on

the spectrum the posited point of law is to the application of well-established legal principles to the facts of an individual case, the further it is from exceptional public importance²⁰. Ordinarily, the basis of any appeal must be that the very legal principles relied upon by the High Court judge were incorrect.²¹

s. Conversely, the failure by the Court to apply well-established legal principles to the particular facts of the case may well give rise to a point of law of exceptional public importance, subject to complying with the other principles referred to here.

t. Where the decision which it is sought to appeal was made in the exercise of a wide discretion²², the exercise of which is governed by criteria of fairness and justice, the applicant for a certificate of leave to appeal faces a particularly uphill task

u. Generally, it will not be appropriate to grant leave to appeal in respect of a point of law which has not been properly pleaded²³.

v. A broad range of factors and considerations may bear on whether an appeal is desirable in the public interest. Those factors include, but are not limited to, the nature of the particular development and the potential consequences of significant further delay in final determination of the case by the courts. Factors relevant to whether an appeal is desirable in the public interest may overlap with other criteria, such as whether it is in the public interest to clarify uncertainty or evolution in the law.

w. In this context, the grant of leave should provide some added value to any matters already before the Court of Appeal.²⁴

x. The Court must have regard to the effect of the 33rd Amendment to the Constitution and the Court of Appeal Act 2014 and, in particular, the “constitutional architecture” they created. While a “leapfrog” appeal from the High Court directly to the Supreme Court is possible, appeal to the Court of Appeal remains the more normal route.

y. It seems to me to follow from the principles set out above, which assume that the judgment which it is sought to appeal may well be wrong in point of law, that the mere assertion that such judgment may set an erroneous precedent which may be followed in later decisions of the High Court will not suffice to justify certification. That observation can be made of more or less any judgment wrong in point of law. Certification merely on that basis would be inconsistent with many of the Glancreé principles, including that certification of what is *ex hypothesi* a good appeal on a point of law should nonetheless be “exceptional” and issue “sparingly”. Any implications of these principles for the operation of *stare decisis*

²⁰ BS v. Director of Public Prosecutions [2017] IESC DET 134, Quinn Insurance Limited v. Price Waterhouse Coopers [2017] IESC 73, [2017] 3 IR 812 and Fitzpatrick v. An Bord Pleanála [2018] IESCD 61.

²¹ Halpin v An Bord Pleanála [2020] IEHC 218; Stanley v. An Bord Pleanála (No. 2) [2022] IEHC 671 (High Court (Judicial Review), Phelan J, 28 November 2022).

²² The example given in CHASE was that of a decision whether to remit a quashed decision to the decision-maker for reconsideration.

²³ Ross v. v. An Bord Pleanála (No. 2) [2015] IEHC 484; Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 636 §6(iv).

²⁴ See also S.A. v. Minister for Justice and Equality (No. 2) [2016] IEHC 646, Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 636 §6(i), Clifford & Sweetman v. An Bord Pleanála [2021] IEHC 645, Stanley v An Bord Pleanála [2022] IEHC 671.

as between decisions of the High Court derive from the clear principle of S.50A(7) PDA 2000 that in most cases of error, even as to a point of law, there should be no appeal. While it is in strictness undesirable as a matter of stare decisis that any judgment in error in point of law should survive, in truth this situation is not at all unusual. Many must be the cases in which arguable – even very arguable - appeals do not proceed for one reason or another or very many possible reasons: for example, the case may settle, or the potential appellant may be risk-averse and decide against appeal.

9. Not all the foregoing principles arise for application in the present case. Most, if not all, are particular expressions of the three main principles that:

- the High Court’s decision in most cases is to be final and not appealable - such that the jurisdiction to certify for an appeal should be exercised sparingly.
- the appeal, to be certified, must invoke a point of law of exceptional public importance.
- for the appeal to be certified, it must be desirable in the public interest that the appeal be taken.

10. I will now seek to apply the foregoing principles to the points of law posited in this case. However, before I do so I should observe that, in light of the repeated and detailed consideration and elaboration in the caselaw of the Glancré principles, the Board’s submission that an appeal should be certified on the basis (whether in whole or in part) that *“a judgment by an appellate court would at least give clarity on what are points of law which are of exceptional public importance”* is unconvincing. The Board does not even suggest that the law as to the meaning of *“exceptional public importance”* is unclear or evolving.

SPPR1

11. This issue arises from the Board’s Quashed Decision that the grant of planning permission, though it would materially contravene the relevant development plan as to building height, would be justified having regard, inter alia, to *“Government policies as set out in the National Planning Framework (in particular objectives 13 and 35) and the [Height Guidelines 2018²⁵], in particular Specific Planning Policy Requirement 1 and Specific Planning Policy Requirement 3”*.

12. The judgment of 31 May 2022 decided:

*“I respectfully reject the proposition that the Board may resile from its positively pleaded case and argue a case flatly inconsistent with those pleadings. It cannot argue that it did not apply SPPR1 via S.9(3) of the 2016 Act. In any event I find that I am bound by **Clonres** as on all fours with the present case and binding me to quash the impugned decision on this account. I*

²⁵ Urban Development and Building Height Guidelines for Planning Authorities 2018 published under S.28 PDA 2000.

*therefore find that the Board erroneously relied on SPPR1 of the Height Guidelines and that the Impugned Permission must be quashed on that account”.*²⁶

13. The essence of the posited point of law for appeal is that the Judgment of 31 May 2022 erroneously equated the Board’s recitation of SPPR1 merely to invoke the planning policies stated therein with reliance on SPPR1 per se in the application of S.9(3) of the 2016 Act²⁷. The Board’s written submissions say²⁸:

“The legal point that arises here relates to what it means as a matter of law to unlawfully rely on something and whether the simple reference to a particular legal matter or provision necessarily means its normative content just be taken to have been relied on rather than engaging in a further analysis to determine if factually this is not the case.

In other words, given the facts here, if the legal conclusion is that the Board “relied” on SPPR1 for its normative content (i.e. its directions to a planning authority), then the concept of “reliance” has a legal meaning beyond what the Board says the plain facts ought reveal.”

The first of the foregoing passages I find difficult to understand – though it may be that it would be somewhat clearer if the word “just” were taken as a typo for “must”.

14. Counsel for the Board expressed its central concern as being that doubt had been cast by the judgment of 31 May 2022 whether the Board could rely on SPPRs in invoking its jurisdiction under S.9(6) of the 2016 Act to grant permission in material contravention of the Development Plan or whether the Board was limited only to relying on SPPRs in invoking its jurisdiction under S.9(3) of the 2016 Act. It is suggested that the judgment of 31 May 2022 requires that SPPRs be viewed through the prism of S.9(3) (which it does) to the exclusion of their being viewed through the prism of S.9(6) (which it does not). As will be seen, that central concern fails the requirement that a point of law proposed for certification must arise out of the judgment of 31 May 2022.

15. The Board submits that *“if it is correct that SPPRs embedded in Guidelines can only be looked at through the prism of s.9(3) of the 2016 Act, then it raises the issue as to why this was not made expressly clear in the 2016 Act when it was enacted. This is an issue which has never been determined by an appellate court, but which should be clarified.”*²⁹ Close reading of the first sentence of that submission reveals that its conclusion illogically seeks to undermine its own premise. In substance the submission is simple - that it is not correct *“that SPPRs embedded in Guidelines can only be looked at through the prism of s.9(3) of the 2016 Act”*. The Board’s difficulty is that the judgment does not assert that the proposition the Board seeks to impugn is correct and so the point does not arise from judgment.

²⁶ §253.

²⁷ S.9(3) of the 2016 Act is set out below.

²⁸ §46 & 47.

²⁹ Submissions §51.

16. **S.9(3) and S.9(6) of the 2016 Act**, as relevant, read as follows:

“(3) (a) When making its decision in relation to an application under this section, the Board shall apply, where relevant³⁰, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.

(b) Where specific planning policy requirements differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.

(c) [defines “specific planning policy requirements”]

(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development ... even where the proposed development, or a part of it, contravenes materially the development plan

(b)

(c) Where the proposed strategic housing development would materially contravene the development plan³¹ ... the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.”

17. SPPR1 of the Height Guidelines 2018 provides that in accordance with Government policy to support increased building height and density in locations with good public transport accessibility – particularly town/city cores – planning authorities shall explicitly identify, through their statutory plans, areas where increased building height will be actively pursued for redevelopment, regeneration and infill development to secure the objectives of the National Planning Framework and Regional Spatial and Economic Strategies and shall not provide for blanket numerical limitations on building height.

18. The Quashed Permission stated, inter alia, that under S.9(6) of the 2016 Act and S.37(2)(b)(i), (iii) and (iv) PDA 2000, permission in material contravention of the Development Plan would be justified for reasons and considerations including having regard to Government policies “as set out in”, in particular, SPPR1.

19. As the Judgment of 31 May 2022 records³² in **Clonres**³³ the Board’s impugned permission justified permission in material contravention of the development plan having regard to, inter alia, SPPR1 as one of a number of documents “which state policy³⁴” in favour of greater density and height. Humphreys J held that permission invalid as “SPPR 1 is clearly about development plans and is not in any way³⁵ a basis for material contravention. Thus, it is erroneous in law to rely on it as the

³⁰ Emphasis added.

³¹ Other than in relation to the zoning of the land.

³² §242 et seq.

³³ Clonres clg v An Bord Pleanála [2021] IEHC 303.

³⁴ Emphasis added.

³⁵ Emphasis added.

basis for deciding to permit such a contravention.” I observed³⁶ that “*Humphreys J could not be clearer: SPPR1 is not in any way a basis for material contravention.*” At trial the Board did not suggest that Clonres was in error – indeed the Board submitted that its decision was consistent with **Clonres**. Rather it sought, as a matter of interpretation of its impugned decisions to distinguish the method of its reliance on SPPR1 in the present case from the basis of its reliance thereon in Clonres. There is no uncertainty in the law in this regard as stated by Humphreys J. I agree with MRRR that the fact that the Board sought to appeal Clonres but did not attempt to appeal Clonres as to SPPR1 at least suggests that, at that time, the Board did not consider Humphrey J’s finding to be certifiable for appeal. That the developer in Clonres tried, and failed for mootness, to appeal to the Supreme Court³⁷ the issue whether the Board could rely on SPPR1 when considering whether to grant permission in material contravention of the Development Plan does not advance the Board’s argument.

20. The judgment of 31 May 2022 includes the following:³⁸

- The Quashed Decision had cited S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000 in considering permission justified even though in material contravention of the Development Plan.
- The Applicants had pleaded that the Board misdirected itself in law in that “... *it applied SPPR1 to the proposed decision, when that requirement is, by its terms, only capable of applying to the adoption or variation of a County Development Plan by a local authority.*”³⁹
- The Board had denied⁴⁰ that it so misdirected itself. Significantly, it positively and unequivocally pleaded that it lawfully did apply SPPR1 - and did so on foot of and because it was obliged by s.9(3) to do so.
- The Board had not pleaded that it
 - did not apply SPPR1.
 - applied SPPR1 but pursuant to S.9(6) of the 2016 Act, not S.9(3).
 - did not apply SPPR1 but had merely relied, pursuant to S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000, on the Government Policies identified in SPPR1.
- Accordingly, the Board had not pleaded and it was not open to the Board at trial to argue, as it did in reliance on the words “*as set out in*” in the Quashed Decision, that it had not applied SPPR1 in making the Impugned Permission but had merely referred to it as a shorthand for the policies mentioned in SPPR1, which policies it had applied. Not merely that, but the argument directly contradicted what the Board did plead.

³⁶ §244.

³⁷ [2022] IESCDT 71.

³⁸ §232 et seq.

³⁹ 2nd Amended Statement of Grounds §15.

⁴⁰ Statement of Opposition §82 et seq.

- That the Board had not, in its Impugned Decision, explicitly invoked S.9(3) of the 2016 Act was immaterial: had the shoe been on the other foot, if it had relied on S.9(3) – as it explicitly did in its pleadings – it would have successfully argued that its invocation was clearly implicit in its decision.
- I rejected the proposition that the Board may resile from its positively pleaded case and argue a case flatly inconsistent with those pleadings. It cannot argue that it did not apply SPPR1 via S.9(3) of the 2016 Act.⁴¹

21. Importantly, the judgment of 31 May 2022 records the findings:

- *“..... as a matter of interpretation⁴² of the Impugned Permission in accordance with “XJS” principles⁴³, that the Board did rely on and apply SPPR1 in making its decision - indeed it explicitly did so “in particular”. That means the Board regarded SPPR1 as “relevant” and was obliged by S.9(3) of the 2016 Act to apply it – and to do so pursuant to S.9(3), which is what it pleads it did.”⁴⁴*
- That the Board attempted a distinction between reliance on SPPR1 per se in applying S.9(3) of the 2016 Act and, on the other hand, reliance for purposes of S.9(6) of the 2016 Act (in justifying granting permission despite material contravention of the Development Plan) on the policies recorded in SPPR1 (as opposed to SPPR1 per se). It seemed to me that the text of the Board’s decision in Clonres, read as if by an intelligent layperson, was in all material respects indistinguishable from the text in the present decision. Accordingly, Humphrey J’s decision in Clonres was directly on point and, ceteris paribus, bound me to quash the decision on that account.⁴⁵
- *“Given my interpretation of the impugned decision it follows that, following Clonres, the decision must be quashed on this account also.”⁴⁶*

22. The judgment of 31 May 2022 considered⁴⁷ the decisions in **Pembroke Road**⁴⁸ and **Ballyboden**⁴⁹ as to the relationship between S.9(3) and S.9(6). Importantly for present purposes, I recorded in the judgment of 31 May 2022 the conclusion in Ballyboden that:

- *“S.9(3)(a) has the effect that the application of an SPPR in a given case is not dependent upon misalignment between the SPPR and the Development Plan. Rather, where an SPPR is*

⁴¹ §253.

⁴² Emphasis added.

⁴³ In re XJS Investments Ltd [1986] IR 750 - that planning documents be construed in their ordinary meaning as it would be understood by intelligent and informed members of the public without particular expertise in law or planning.

⁴⁴ §239.

⁴⁵ §245.

⁴⁶ §244.

⁴⁷ §249 et seq.

⁴⁸ Pembroke Road Association v An Bord Pleanála [2021] IEHC 403 at paras.94-96.

⁴⁹ Ballyboden Tidy Towns Group v An Bord Pleanála, et al, incl. Shannon Homes Construction ULC [2022] IEHC 7 (10 January 2022) §202 et seq.

relevant to, it must be applied to, the decision of a planning application: applied whether or not the SPPR and the Development Plan align or misalign.

- *Where an SPPR is relevant, S.9(3) applies whether or not in material contravention of the Development Plan.*
- *While invoking S.9(3)(b) may also require invocation of s.9(6), given the imperative of S.9(3) it would not seem open to the Board to choose to apply S.9(6) instead of⁵⁰ s.9(3).⁵¹*

23. Importantly for present purposes, it will be noted that in the last bullet-point, far from excluding as impermissible the deployment of SPPRs in justification, pursuant to S.9(6), of permission despite material contravention, both the judgment in Ballyboden and the judgment of 31 May 2022 explicitly envisaged that “*invoking S.9(3)(b) may also require invocation of s.9(6)*”. What I did not consider permissible was that an SPPR could be deployed under S.9(6) in support of a material contravention without also and necessarily being deployed under S.9(3) as its relevance for purposes of S.9(6) implied its relevance for purposes of s.9(3). Indeed, counsel for MRRA in the certification application rhetorically asked, what exactly is it about that paragraph of the judgment of 31 May 2022⁵² that the Board disagrees with? I confess to sharing his puzzlement.

24. This is important as the Board’s characterisation of the alleged exceptional public importance of the proposed appeal regarding SPPR1 is that the Board needs to know whether it can rely on SPPRs in invoking S.9(6) to justify the grant of permissions in material contravention of development plans and it asserts that the judgment of 31 May 2022 prohibited or cast doubt on such reliance on SPPRs. As will have readily been seen, the judgment of 31 May 2022 did not cast any such doubt, much less prohibit such reliance. The suggested point of law is based on a clear misinterpretation of the judgment of 31 May 2022 as to the relationship between S.9(3) and S.9(6) and, for the purpose of appealing it, attributes to the judgment a finding as to that relationship which it does not contain. Accordingly, the alleged exceptional public importance for which the Board contends does not arise or emerge from the judgment and so I refuse to certify the suggested point of law for appeal.

25. In addition, the Board initially argued in this application for certification that I was wrong in my conclusion, as a matter of interpretation of its Quashed Permission, that it had applied S.9(3). Indeed, this argument had been made despite the Board’s express plea that it had applied S.9(3). Ultimately, the Board did not pursue any argument that any such error of interpretation of the Quashed Permission could amount to a point of law of exceptional public importance.

⁵⁰ Emphasis added.

⁵¹ §250.

⁵² §249 et seq.

26. Further, and importantly, the Board's case at trial had rested, as recorded above, on the unpleaded proposition, in reliance on the words "*as set out in*" in its decision, that it had not in its Impugned Decision, applied SPPR1 but had merely cited it as a shorthand for the policies mentioned in SPPR1, to which policies it had had regard pursuant to S.9(6). The judgment of 31 May 2022 rejected that argument as unpleaded. It was not suggested that that rejection could be certified for appeal. It follows that the argument must be regarded for present purposes as unpleaded. So, it should not be certified for appeal. One might consider that the end of that matter.

27. But in any event, this is an issue whether my interpretation of the Impugned Permission was correct. I found, contrary to the Board's argument and as a matter of interpretation of the Quashed Permission, that the Board had relied on SPPR1 in applying S.9(6). Dressing up the issue of alleged error of interpretation of the Quashed Decision as a semantic point of law about the meaning of the concept of "reliance" does not avail the Board in seeking certification of an appeal. It remains an alleged error of interpretation of the Quashed Decision. The Board, correctly, did not press an argument that such an error in interpreting the planning permission should be certified for appeal as a point of law of exceptional public importance.

28. I turn to the substance of the Board's point that in citing SPPR1 it was relying on it not qua SPPR1 per se but merely as a shorthand for the policies which inform SPPR1. Even if the Board is correct, I cannot see how the point is of exceptional public importance or that the public interest renders its determination on appeal desirable. From a practical point of view the solution is obvious, simple and undemanding. The Board can very easily alter the text of its future decisions to make its position in this regard clear.

29. For completeness I should say that counsel for the Board very properly drew my attention to the fact that the SHD provisions of the 2016 Act will presently be of historic interest only and that its effective replacement, the LRD Act 2021⁵³ contains no equivalent to S.9(3) of the 2016 Act. Arguably, that consideration diminishes the prospect that a point of law as to the relationship between S.9(3) and S.9(6) could be of exceptional public importance. I prefer not to decide the case on that basis as I accept the Board's observation that a significant residue of SHD planning applications remains to be decided by the Board and may result in further judicial reviews. And a significant residue of judicial reviews in SHD cases remains before the Courts. I am happy to leave a decision on that issue to another case.

EIA SCREENING – REASONS

30. Helpfully and correctly, counsel for the Board did not pursue any argument that an appeal should be certified as to any ground relating to the findings of the Judgment of 31 May 2022 as they

⁵³ Planning and Development (Amendment) (Large-scale Residential Development) Act 2021.

related to the inadequacy of the reasons given by the Board for its decision. The Board takes, as it is entitled to, the view that the law as to reasons was misapplied to the facts in the judgment of 31 May 2022 but accepts that the law itself was stated in terms that do not raise for certification any point of law of exceptional public importance.

31. In this respect, Counsel very properly drew to my attention **Stanley**.⁵⁴ In that case Stack J recorded that *“The law on reasons in the planning context is well settled since the decision of the Supreme Court in **Connolly**”*⁵⁵. She cited **Halpin**⁵⁶ to the effect that *“Where the real thrust of the questions raised arise from the erroneous application of legal principles by the judge, this does not give rise to a point of law for a which a certificate should be granted”* as *“it will not normally be enough for a putative appellant to complain that the High Court did not properly apply established legal principles to the particular facts of the case; rather it seems that the basis of any appeal must be that the very legal principles relied upon by the High Court judge were incorrect.”*

32. Stack J cited Halpin as to a possible exception to the foregoing principle where the misapplication to the facts of well-established principles *“has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met”*. However, counsel for the Board, very fairly, did not suggest that this possible exception applied in the present case.

EIA SCREENING – STANDARD OF REVIEW

The Board’s Decision

33. The Board’s decision as to EIA Screening read, in full, as follows:

“The Board completed an environmental impact assessment screening of the proposed development and considered that the Environmental Impact Assessment Screening Report submitted by the applicant, identifies and describes adequately the direct, indirect, secondary, and cumulative effects of the proposed development on the environment.

Having regard to:

- (a) the nature and scale of the proposed development on an urban site served by public infrastructure,*
- (b) the absence of any significant environmental sensitivities in the area, and*
- (c) the location of the development outside of any sensitive location specified in article 109(3) of the Planning and Development Regulations 2001 (as amended), the Board concluded that, by reason of the nature, scale and location of the subject site, the proposed development*

⁵⁴ Stanley v. An Bord Pleanála (No. 2) [2022] IEHC 671 (High Court (Judicial Review), Phelan J, 28 November 2022).

⁵⁵ Connolly v. An Bord Pleanála [2018] IESC 31; [2018] 2 I.L.R.M. 453 – citing also Christian v. Dublin City Council [2012] IEHC 163 and Mallak v. Minister for Justice, Equality and Law Reform [2012] IESC 59.

⁵⁶ Halpin v An Bord Pleanála [2020] IEHC 218.

would not be likely to have significant effects on the environment. The Board decided, therefore, that an environmental impact assessment report for the proposed development was not necessary in this case.”

Irrationality/Reasons

34. The Board asserts that, as to EIA Screening, the judgment of 31 May 2022 replaces the Board’s view of the significance of effect on cultural heritage with my own view. Factually, this issue related to the fact that the Proposed Development would occupy if not all, at least all but all, of the curtilage of Dalguise House, a protected structure.

35. The Board says that the Board’s view is reviewable only on the high standard of irrationality set by **O’Keeffe**⁵⁷, such that, the Board says, the judgment of 31 May 2022 presents a particular difficulty as to how to determine whether the environmental effects of a development are significant and the degree of deference to be afforded to an expert decision-maker such as the Board as to the issue of significance of effect. The Board says that significance is inherently a qualitative, value-laden judgment and that a very considerable degree of expert, scientific, and even partly subjective, judgment is brought to bear on answering that question – indeed it cites the judgment of 31 May 2022 itself⁵⁸ as correctly to that effect.

36. Generally, in my view, MRRA is correct in submitting that the Board’s error in seeking a certificate in this regard is that misconstrues a decision on adequacy of reasons as one on irrationality or, viewing the same point from another perspective, the Board tries to graft onto the law relating to adequacy of reasons the jurisprudence relating to irrationality. It confuses the standard for review of factual findings with the standard for adequacy of reasons.

37. The Judgment of 31 May 2022 says that *“... in pursuit of reading the EIA Screening as part of the Inspector’s report as a whole, I have found nothing to supplement and much that at very least tends to undermine the finding of no significant effect”*.⁵⁹ The Board’s submissions assert that this *“suggests that the Judgment was at least in part engaged in an assessment of the evidence to see whether it supported the overall conclusion that the proposed development would not have a significant effect, at least in EIA terms”*. Leaving aside the diffidence of the Board’s observation as unlikely to support a point of law of exceptional public importance, it ignores the context. That context was a consideration in the judgment of 31 May 2022 of the content of the Planning Inspector’s report, in his planning assessment, not in his EIA Screening, as to Architectural Heritage. I will return to this issue below. However, for now I refer to §177 of the judgment of 31 May 2022:

⁵⁷ O’Keeffe v An Bord Pleanála [1993] 1 I.R. 39.

⁵⁸ §125 & 129.

⁵⁹ §176.

“It is perfectly possible to understand from his report why the Inspector found the effects of the Proposed Development on Architectural Heritage acceptable. It is also possible to understand from the report why the Inspector found some effects on Architectural Heritage positive. Both are legitimate questions in a planning assessment and in EIA. But neither is the question to be answered in EIA Screening. In EIA Screening the only question is whether the effect of the proposed development will be significant. As to the matter of Cultural Heritage, I am unable to discern the reasons for the Inspector’s view that the effects would be insignificant. Indeed, insofar as rationale is discernible, it tends distinctly to the opposite conclusion.”

The impugned element of the judgment was addressing, not an issue of irrationality or the merits of the Quashed Decision, but an issue on which the Board’s decision was quashed – whether adequate reasons for the conclusion in EIA Screening of no significant effect were given. The tenor of §176 and §177 is not that the decision was irrational or unmeritorious as to significance of effect but is that such reasons could not be found in the Inspector’s report.

38. The Board specifically cites the following passage of the judgment of 31 May 2022 in asserting the error on which it relies:

“..... the Board explicitly considered that the EIA Screening Report submitted by Lulani identified and described the effects of the proposed development on the environment – and did so “adequately”. Given that the whole purpose of the Screening Report is to address the possibility of significant such effects, I read the Board’s decision as encompassing and endorsing the adequacy of the EIA Screening Report’s treatment of significance of effect. I have already explained why this cannot have been adequate. Counsel for the Board says that it was open to the Board to form its own view of significance. That is undoubtedly true but there is no evidence or record that it did - whereas it did endorse the EIA Screening Report.”⁶⁰

39. First, I respectfully observe that this passage does not record or imply that I took my own view of substantive significance of effect in substitution for the Board’s. It is in fact a passage as to the interpretation of the Quashed Permission – and the Board accepts that such issues of interpretation cannot be certified for appeal in this case.

40. Second it is important to place that passage in context. It is preceded by a lengthy description⁶¹ of the law as to the role of the court in judicial review, including as to the presumption of validity, irrationality (including the **O’Keefe** standard) and the duty to give reasons. It also addresses the role of the court as to allegations of inadequacy of EIA. I mention this not to assert that the judgment is correct in those regards but to point out that this treatment of the law is not impugned in any of the posited grounds of appeal.

⁶⁰ §179.

⁶¹ §57 – 70.

41. Third, it is preceded by a consideration of the law as to concept of significance of effect and the relevance of that concept to EIA screening⁶². The Board takes no issue with that consideration.

42. Fourth, the judgment records⁶³ the law to the effect that Annex III of the EIA Directive identifies as a screening criterion “*the environmental sensitivity of geographical areas likely to be affected*” with particular regard, inter alia, to the existing and approved land use; and the absorption capacity of the natural environment, paying particular attention to, inter alia, areas classified or protected under national legislation and landscapes and sites of historical, cultural or archaeological significance and would seem very difficult to conclude that these criteria do not encompass protected structures, including their curtilage. Again, the Board takes no issue with that element of the judgment.

43. Fifth, the judgment records⁶⁴ that “*While one cannot be absolute, that the assessment of significance is primarily a matter for the judgment of the expert Board rather than the Court will be clear: not least, a Court is not an expert. Also, a Court cannot enter the arena of subjective, value-dependent assessment by reference to political, social, economic and cultural contexts. Or, in common-law terms, the court in judicial review is not hearing an appeal on the merits of an impugned decision.*” Again, the Board takes no issue with that view of the law – indeed, in substance it relies on it in asserting that the judgment is in error. But that amounts to an assertion of misapplication of clear and well-established principles – indeed, principles recorded in the judgment itself - to the facts of the case. Error in such an exercise will very rarely constitute a certifiable point of law and does not in this case.

44. Sixth, the next paragraph after §179 records that:

“... the Board’s EIA screening was explicitly based on a finding of “absence of any significant environmental sensitivities in the area”. Counsel for the Board repeated this view – describing the Proposed Development as in an area which has “no particular environmental sensitivities”. Absent reasons explaining this assertion, it seems impossible to understand⁶⁵ of a Site of which all, or almost all, is a Protected Structure consisting of Dalguise House and its curtilage, the designation of which as such is a statutory determination that it is of “special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest”.

45. That passage of the judgment 31 May 2022⁶⁶ continues:

“The Board must make its own determination of environmental sensitivity and is not formally bound by the Planning Authority’s compliance with its obligation as to designation of

⁶² §112 et seq.

⁶³ §120 – 121.

⁶⁴ §127.

⁶⁵ Emphasis added.

⁶⁶ §180.

*protected structures – but such circumstances at least require that the Board articulate its reasons for its finding of “absence of any significant environmental sensitivities in the area”. No such reasons⁶⁷ are given in the Board’s decision and, as my analysis of the Inspector’s report demonstrates, none are apparent in that report. Indeed, it seems to me that the Inspector had explicitly found such sensitivities and the Board gave no reason for disagreeing – as to the significance of which in SHD cases see **Clonres**.”*

46. The next passage of the judgment of 31 May 2022⁶⁸ states that *“The finding of “absence of any significant environmental sensitivities” on a site largely consisting of a protected structure is all the more difficult to understand⁶⁹ given the EIA Directive”* – and there follow passages from the Directive espousing *“protection and promotion of cultural heritage comprising urban historical sites and landscapes,”* and identifying such issues as involving *“The environmental sensitivity of geographical areas”*.

47. These paragraphs very clearly characterise the basis of the judgment as finding, not that the Board was substantively wrong in screening out significant effect on the curtilage or in its appreciation of the concept of significance, nor that the court substituted its own view of significance of effect, on the facts of the case, for the view taken by the Board, but that, in its context, the Board’s conclusion was incomprehensible (in the literal rather than the dramatic sense of that word) absent reasons explaining it. In other words, and as Stack J put it in Stanley, *“... the questions raised turn on the correct approach to determining whether a decision is adequately reasoned, rather than the reasonableness of the decision.”*

48. Seventh, in considering the Board’s arguments, the judgment of 31 May 2022 records⁷⁰ that *“as to the proposition, based on **Weston**⁷¹ that a decision cannot be quashed if there is any evidence to support it, that addresses an irrationality argument not made here”*. Having acknowledged that irrationality was not in the case it seems difficult to read the judgment as substituting my view on the merits, of significance of effect, for the Board’s.

49. The judgment does go on to observe that I had seen no evidence which could support the proposition that the irreversible infilling and loss of a curtilage which merited mandatory entry on the Register of Protected Structures and statutory protection accordingly would, as a matter of EIA Screening, not be likely to have significant effects on the environment and I referred to the decision in **Doorly**⁷². But there is no finding of irrationality, and the consideration of this issue ends as follows:

⁶⁷ Emphasis added.

⁶⁸ §181.

⁶⁹ Emphasis added.

⁷⁰ §188.

⁷¹ *Weston v An Bord Pleanála* [2008] IEHC 71.

⁷² *Doorly v Corrigan* [2022] IECA 6 §184.

“I am very far from saying anything of the sort or that works on protected structures cannot be screened out of a requirement of EIA. It is easy to see such a view resulting in the legislative overkill feared by Sharpston J⁷³. Questions of degree and judgment will arise as to significance of environmental effect. And entry in the NIAH⁷⁴ may in some senses be a “step above” protected status. But the observations of Humphreys J appear to me to provide considerable support for the necessity that EIA screening should address the question of significance of environmental effect on protected structures and provide adequate reasons for deeming them insignificant – at least where works such as the “infilling and loss” of a protected curtilage is concerned.”⁷⁵

The conclusion drawn was that *“the Board failed to give adequate reasons for its EIA Screening decision as to insignificance of effect on Cultural/Architectural Heritage”⁷⁶*

50. On a fair reading, in its context in the judgment of 31 May 2022 as a whole, of the passage⁷⁷ cited by the Board in support of its point of law, that passage refrains from contradicting the Board’s finding of no significant effect on the curtilage of the protected structure. It records the facts of the Proposed Development⁷⁸ and the law of EIA as applicable to the protection and promotion of cultural heritage comprising urban historical sites and landscapes for the purpose of demonstrating that the conclusion of no significant effect called for reasons and no adequate reasons had been given.

EIA Screening Report

51. The judgment of 31 May 2022 also quashed the Impugned Permission on the basis that *“In finding that the EIA Screening Report submitted by Lulani identified and described adequately the effects of the proposed development on the environment the Board adopted a report which did not describe those effects adequately and could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required.”*

52. The Board does not seek to appeal the finding that Lulani’s EIA Screening Report did not identify and describe adequately the effects of the Proposed Development on the environment. This finding related to the Report’s reliance on flawed EPA draft Guidance of 2017 as to the content of an EIAR.⁷⁹ The detail need not detain us here, but the flaws undermined the Report’s analysis as to the significance or insignificance of effect on the curtilage of the protected structure. The judgment of

⁷³ See below.

⁷⁴ The wooded heritage garden in question in Doorly was, significantly, on the record of the Heritage Gardens maintained on the statutory National Inventory of Architectural Heritage (NIAH) and was also a protected structure.

⁷⁵ §191.

⁷⁶ §192.

⁷⁷ §179.

⁷⁸ See figures 1, 2 and 3 of the judgment.

⁷⁹ The Board notes that the 2017 draft has recently been replaced by a finalised version in the same terms as those which I criticised in my judgment. While that is generally interesting and may arise for consideration in another case, I do not see that it advances the Board’s argument in this case.

31 May 2022 also identifies⁸⁰ an error in Lulani’s EIA Screening Report which bears on the capacity of the Report to provide reasons for the Board’s decision. It identifies as “*a central expression of the reasoning of the EIA Screening report*” its statement that “*the change to the setting of Dalguise House will be significant, but in line with emerging policy to densify development in the existing built envelope*”. It observes that “*In short, an effect earlier in the report identified as significant is now identified as not significant and we are not told why.*” The Board does not now seek to directly attack the finding that the EIA Screening Report “*could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required*”.

53. Of course, those errors would not matter unless they informed the Board’s decision. The Board’s argument now is that it did rely on the EIA Screening Report, as its decision expressly records, to the effect that it “*identifies and describes adequately the direct, indirect, secondary, and cumulative effects of the proposed development*”, but did not rely on that report as to the significance of those effects. If correct, that would evade the effect of the finding that the EIA Screening Report was defective in its consideration of significance. However, it is an argument that I made an error of interpretation of the Quashed Decision.

54. Importantly, this is an argument now made which is nowhere to be found in the Board’s pleadings and is directly contradicted by them. Its Statement of Opposition pleads the terms of the Board’s EIA Screening⁸¹ and positively pleads that the EIA Screening was lawful but adds:

“For the avoidance of doubt, the Board will rely on the EIA Screening Report submitted by the first named Notice Party and the EIA Screening in the Inspector’s Report, which was adopted by the Board, and which concludes that the proposed development would not be likely to have significant effects on the environment.”⁸²

55. I refer again to §179 of the judgment of 31 May 2022 which is set out above and records that I read the Quashed Decision as encompassing and endorsing the adequacy of the EIA Screening Report’s treatment of significance of effect and that I had found no evidence or record that Board had in fact formed its own view of significance of effect independently of that report. In other words, as to the Board’s reliance on the EIA Screening Report as to significance of effect, the judgment of 31 May 2022 was:

- interpreting the Board’s decision. Even if, as the Board asserts, the last sentence of the §179 of the judgment of 31 May 2022 represents an error as failing to apply the presumption of validity, the error is one of interpretation of the Board’s decision and any such error of interpretation cannot, as the Board accepted in argument, amount to a point of law of exceptional public importance.

⁸⁰ §143 of the judgment.

⁸¹ Statement of Opposition §27 and §29.

⁸² §29 Emphasis added.

- simply taking the Board at the word of its pleading⁸³. If a point not pleaded cannot provide a point of law for the Board, much less one of exceptional public importance, a fortiori taking the Board at the word of its pleading cannot do so.

56. It bears adding that the interpretation in the judgment of 31 May 2022 of the Board’s decision was based not just on the Board’s direct reference to the EIA Screening Report. The judgment records:

- that the inspector had reported that *“the application of the criteria in Schedule 7 to the proposed sub-threshold development demonstrates that it would not be likely to have significant effects on the environment and that an environmental impact assessment is not required before a grant of permission is considered. This conclusion is consistent with the EIA screening assessment report submitted with the application.”*⁸⁴
- *“As the Inspector had not himself applied the Schedule 7 Criteria⁸⁵ to the Cultural Heritage issue and given his reference to the EIA Screening report, he must have been taken to have adopted it and its Schedule 7 exercise. There is nothing in principle wrong with this, but he takes the EIA Screening report warts and all. And, for the reasons stated above, the adoption of this report could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required.”*⁸⁶
- *“The Board did not explicitly adopt its Inspector’s report in this regard but, as its direction records that the “Board decided to grant permission generally in accordance with the Inspector’s recommendation”, the Inspector’s EIA screening must be taken as the Board’s save to the extent the Board explicitly disagrees.”*⁸⁷

57. My point here is not to assert that my interpretation of the Board’s decision was correct. I presume it at least arguably wrong. My point is to demonstrate that any error was of interpretation of the Board’s decision and so not a point of law of exceptional public importance.

58. The Board’s written submissions assert that *“the Inspector carried out an independent assessment of the cultural heritage issues in Section 12.4 of the Report and this is not referred to in any detail in the Judgment, although the Judgment acknowledges at §149 that the Inspector looked at the issue.”* This is an unstateable proposition in light of §§148 to 176 of the judgment of 31 May 2022.

⁸³ Statement of Opposition §27 and §29.

⁸⁴ §157 – citing p46 of the Inspector’s Report - emphasis added.

⁸⁵ Schedule 7 PDR 2001 states criteria by which the need or otherwise for EIA is to be determined. It is the domestic equivalent Annex III of the EIA Directive to which I have referred above.

⁸⁶ §158.

⁸⁷ §178.

59. Before considering that content of the judgment of 31 May 2022, I should say that §12 of the inspector's report was his planning assessment, not his EIA Screening. However, the judgment of 31 May 2022 records⁸⁸ that his report must be read as a whole and that it had been so read, as to EIA Screening, in the context of consideration of cultural heritage issues elsewhere in the Inspector's report than in its EIA Screening section. However, the gravamen of the judgment of 31 May 2022 in these regards is that the inspectors' planning assessment is directed at questions whether the effect on cultural heritage issues was positive or negative, acceptable or unacceptable - not at questions whether the effect was significant or insignificant for purposes of EIA screening.

60. §159 of the judgment of 31 May 2022 records, citing §12 of the inspector's report, that there is no doubt that he was conscious of the cultural heritage issue objections and of the protected status of Dalguise House and gardens. §160 and following address the inspector's consideration of cultural heritage issues. §169 of the judgment cites elements of §12.4 of the inspector's report verbatim and acknowledges, specifically by reference to §12.4 of his report, that *"the Inspector devotes considerable attention, in his Planning Assessment to Architectural Heritage"*. §12.4.1 of the inspector's report relates to proposed demolition, removal and relocation of structures within the grounds of Dalguise House – issues of some importance in themselves but not central to the issue of occupation of the curtilage of the protected structure by the Proposed Development. The same can be said for proposed works on Dalguise House itself, considered in §12.4.2 of the inspector's report. §169 of the judgment cites significant elements of §12.4.2 as it addresses effect on the curtilage, before concluding that *"This passage inevitably implies that the Proposed Development would have a significant effect on Dalguise House. The Inspector's view of the absence of significant effect turned at least in part on mitigation not adopted by the Board."* §170 and 171 of the judgment cite further significant elements of §12.4 and §12.4.2 of the inspector's report and express opinion thereon as to its significance for EIA screening. §172 cites in extenso the Inspector's more general conclusion on Architectural Heritage⁸⁹ before observing, at §173 as follows:

"I set this conclusion out in full as it reflects the considered and balanced planning assessment of the inspect(or) - perfectly proper even though others vehemently disagree. But importantly, it acknowledges the legitimacy of the concerns of the DAU and the DLRC as to "encroachment on Dalguise House that overpowers the protected structure and detracts from its vista from the northern approach and when viewed in the context of this site" such that mitigatory conditions were required. Notably, the Inspector says, "Any development of this site will have an impact." In the context of what has preceded this observation, it is difficult to resist the conclusion that the Inspector would not have bothered making this point if the impact was not significant. Indeed, his point is not that the impact is insignificant – but that it is positive. That is a planning judgment to which I of course defer - but that an impact will be positive is no answer to the question in EIA Screening whether the impact is significant".

⁸⁸ §159.

⁸⁹ Inspector's report §12.4.5.

61. §174 of the judgment of 31 May 2022 considers §12.9 of the Inspector’s report as to effect on trees in the curtilage as follows:

“As to Trees, the Inspector says the following⁹⁰:

- *The “issue remains that in order to facilitate the development of the site, which contains Dalguise House, substantial site clearance and tree removal is required.” He states, “I have examined the Architectural Impact Assessment and the arborist report and I conclude that there is no doubt that any site clearance will have an irreversible impact on the character of the site.”⁹¹ Indeed, a perusal of figures 1 and 2 above renders this conclusion inescapable.”*
- *“In relation to the impact on the adjoining protected structure. I am of the view that the setting of Dalguise House is one of the few intact examples of its type left in the Dun Laoghaire area.”⁹²*
- *“I note that in this instance for the most part the development is designed to have cognisance of the sensitive and restricted nature of the site. The fact remains however, that the only way to develop the site is by the infilling and loss of the grounds and gardens of Dalguise House. Furthermore the proposal involves the retention of significant amount of trees with additional landscaping proposed where required. The clearing trees from the site to accommodate a residential development will inevitably have an irreversible impact on the setting of the protected structure and a visual impact on the surrounding area. In my opinion the grounds of Dalguise House lend themselves to redevelopment, the sustainable use of a zoned serviced site and also ensure the continued use of protected structures that otherwise may fall into further disrepair.”⁹³*

Yet again the Inspector acknowledges the sensitive quality of the site – whereas the Board’[s] Impugned Decision deemed it devoid of environmental sensitivities.”

62. §174 of the judgment of 31 May 2022 comments on the foregoing:

“As text in the Planning Assessment section of the Inspector’s Report explaining why the Proposed Development is acceptable the foregoing passage is entirely proper. It might well have appeared in an EIA. But looking at it as part of an exercise in considering the report as a whole for purposes of EIA Screening, it is impossible to reconcile with a finding of insignificant effect. Not least, when one remembers that the protected designation establishes the environmental sensitivity of the lands, the following sentences are irreconcilable with a finding of insignificant effect:

- *The only way to develop the site is by the infilling and loss of the grounds and gardens*

⁹⁰ Inspector’s report §12.9

⁹¹ Emphasis added

⁹² For the avoidance of doubt this passage is by the Inspector as recorded in the judgment.

⁹³ Emphases added. For the avoidance of doubt this passage is by the Inspector as recorded in the judgment.

of Dalguise House.

- *The clearing trees from the site to accommodate a residential development will inevitably have an irreversible impact on the setting of the protected structure and a visual impact on the surrounding area.”*

63. While, of course, the Board may disagree with that analysis, I see no stateable factual basis for an assertion that the Judgment of 31 May 2022 failed to consider the inspector’s consideration of the Cultural Heritage issues. Even were it stateable, as essentially a conclusion as to the proper interpretation of the Inspector’s report and the relevance of his planning assessment to EIA Screening, I fail to see that it gives rise, as the Board submits *“to a potential point of law on the extent to which the Court should defer to the Board in an EIA screening context and whether that is still a question which is subject to irrationality /unreasonableness only”*.

64. The Board seeks to appeal on the basis that the Judgment of 31 May 2022 *“gives rise to uncertainty and at least creates a doubt as to whether the O’Keeffe/Wednesbury standard remains good law, at least in an EIA screening stage”*. It bears repeating that there was no finding of irrationality in the Judgment of 31 May 2022 and the Board does not impugn the account of the law of irrationality given in the judgment. The issue under consideration in the judgment was not one of irrationality or of deference to the Board, nor was the law on those issues questioned. As they did not arise in the judgment, the various cases cited by the Board on those issues⁹⁴ are nihil ad rem – though entirely consistent with the view stated in the Judgment of 31 May 2022 as to such issues. The issue addressed in the Judgment of 31 May 2022 was whether the inspector’s consideration of the Cultural Heritage issues in his planning assessment provided reasons for his EIA Screening determination of insignificance of effect on cultural heritage.

65. I fail to see that, even if stateable as a fact, the assertion that the judgment of 31 May 2022 failed to consider the inspector’s consideration of the Cultural Heritage issues constitutes or contributes to any point of law of exceptional public importance or transcends the facts of the case.

EIA Screening - Conclusion

66. If, as I assume for present purposes, the Judgment of 31 May 2022 erred in concluding that the Board relied on the EIA Screening report as to significance of effect, that was an error of interpretation of the Board’s decision. As the Board accepts, an error of interpretation of its decision cannot amount to a certifiable point of law of exceptional public importance.

⁹⁴ §20 et seq of the Board’s written submissions.

67. As the Board no longer (and in my view correctly) asserts that a “reasons” point is certifiable, it follows that its arguably certifiable points of law as to EIA screening must be confined to the allegations that the judgment of 31 May 2022 impermissibly and in breach of the law as to irrationality substituted my own view of significance of effect for the Board’s and also erred in concluding that the Board relied on the EIA Screening report as to significance of effect.

68. Such allegations are clearly based on a misinterpretation of the judgment of 31 May 2022. The Quashed Decision is quashed for inadequacy of reasons, not for irrationality. The alleged point of law does not arise from the judgment and so is not certifiable.

69. Even if, contrary to its proper interpretation, the judgment of 31 May 2022 were viewed as based on the substitution by me of my substantive views of significance of effect on cultural heritage for those of the Board, it is notable that the Board does not impugn the correctness of the statement in the judgment⁹⁵ of the law as to the role of the Court in judicial review. That being so, the Board’s complaint is of the misapplication of clear and well-established principles to the facts of the case and is not certifiable for appeal.

CONCLUSION TO THIS POINT

70. While the foregoing suffices to require refusal of a certificate to appeal, some further comment is appropriate.

EXCEPTIONAL PUBLIC IMPORTANCE/APPEAL IN THE PUBLIC INTEREST

71. Moderation as opposed to hyperbole in submissions is never to be decried. Nonetheless, the Board’s written submissions are notably diffident in their assertion of the exceptionality of the public importance of their proposed points of law and public interest in an appeal. That diffidence is apparent in the following, which I think may fairly be said to typify the Board’s submission based on its misinterpretation of the judgment as including the substitution of the Courts’ view of significance of effect for that of the Board.

*“This suggests that the Court might form its own view of the evidence and whether a potential effect is significant or not. Again, this may not have been the intention of the Judgment but the passages cited could support an argument in a future case that that is precisely what the Court should do in a judicial review concerning EIA screening. Case-law moves incrementally and a passage in one case becomes a building block for a challenge in another case supporting a merits-based approach”.*⁹⁶

⁹⁵ §57 et seq.

⁹⁶ Submissions §30.

“The judgment has the potential to give rise to uncertainty in the law on the duty to give reasons and EIA screening or create an impression that the law has evolved in those areas. Furthermore, the judgment has the potential to be relied on to support potentially far-reach⁹⁷ propositions which may not have been intended by the Court in its Judgment, but which may inexorably flow by implication.”⁹⁸

Counsel for MRRRA, in my view not unfairly, characterised the Board’s assertion of exceptional public importance as being that *“Someone might rely on this case against the Board some day.”*

72. I hope I have demonstrated that the judgment of 31 May 2022, read properly and as a whole cannot, even stateably, be interpreted as feared by the Board and does not have the effect feared by the Board. Indeed, and highly paradoxically, the Board endorses the statements of the law in the judgment on these issues in arguing for certification. An appeal cannot be certified on the basis of the Board’s fear that certain passages of a judgment might later be misinterpreted or miscited shorn of their proper context.

73. I have addressed above the inevitable, but far from unique, effect of S.50A(7) PDA 2000 on the operation of stare decisis. A system in which appeals, even on points of law, are allowed only sparingly and subject to surmounting very high hurdles will necessarily leave arguably incorrect decisions of the High Court to remain uncorrected. But such a system merely adds another to the many sources, other than S.50A(7), of such effects. To deem the possibility of such effects per se certifiable for appeal would eviscerate the statutory criterion of exceptional public importance. As has been observed, most points of law are of some importance but that does not suffice to make them certifiable for appeal.

74. However proper their moderation of tone, the Board’s written submissions fall far short of asserting a point of law of exceptional public importance.

CONCLUSION

75. I share the views of those of my colleagues who have regretted a system in which the same judge who gave the substantive judgment decides whether to certify its appeal. All judges will strain to avoid amour propre as to their judgments. I believe that can, and will generally, be done. I hope I have successfully done so in this case and properly assumed that I may well have been wrong in my substantive decision. But it seems to me that, where certification of appeal is refused, a system in which that is done by a judge other than the author of the judgment would be conducive to readier

⁹⁷ Sic.

⁹⁸ Submissions §62.

acceptance of that outcome by the disappointed would-be appellant. Nonetheless, in the present system, the task falls to me.

76. For the reasons set out above, I decline to certify any point of law for appeal in this case.

DAVID HOLLAND
19/1/23