THE HIGH COURT

PLANNING AND ENVIRONMENT

IN THE MATTER OF SECTION 50, 50A, 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000

[2025] IEHC 43

Record No.: 2023/ 748 JR

BETWEEN/

GOCE LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL AND SHANE WILLIAMSON AND EVA WILLIAMSON AND DENIS HEALY AND MICHAEL O'MAHONY AND LUCY O'MAHONY AND MARK GINN AND BILLY BERMINGHAM AND JACKIE BERMINGHAM

NOTICE PARTIES

JUDGMENT of Ms. Justice Emily Farrell delivered the 31st day of January 2025

Introduction

1. These proceedings relate to an application for planning permission for sixteen residential units and associated works on a site at Kilnagleary, Carrigaline, Co. Cork. Planning

permission had been granted to the Applicant by Cork County Council but was refused on appeal by An Bord Pleanála. On 25th September 2024 the principal judgment was delivered, in which I held that An Bord Pleanála had misinterpreted Objective ZU18-10 of the Development Plan and that this error went to jurisdiction.

2. The Board interpreted Objective ZU18-10 as permitting development only in respect of development of the type listed as Appropriate Uses but did not consider whether the proposed development was supportive of, or would threaten, the vitality or integrity of employment uses of the area. Objective ZU18-10 stated that "*Development that does not support or threatens the vitality or integrity of the employment uses of these areas shall not be permitted*". A list of Appropriate Uses is also included. That list is not stated to be exhaustive.

3. Secondly, I found that the Board's reasons were insufficient to comply with its obligation to provide adequate reasons for its decision on the appeal, including in this case its departure from the recommendation of its Inspector. The Board found that the proposed development was contrary to the proper planning and sustainable development of the area solely by reason of the contravention of Objective ZU18-10. The Board did not find that contravention to be material.

4. The Respondent asks this court to certify that the following two points are points of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal on each point.

   (a) Having regard to the requirements of the 2000 Act, and in particular section 10, can a development plan zoning objective allow for residential development without an express statement that development of that type is regarded as appropriate on lands subject to that zoning objective?

   (b) If land is not zoned for a particular use can the Board conclude on that basis alone that a proposed development would therefore be contrary to proper planning and sustainable development and refuse permission for that reason alone?

5. An affidavit was sworn for the purposes of this application, by Pierce Dillon on behalf of the Board. A number of documents are exhibited to this affidavit, all but one of which were already before the court when the substantive application was heard and determined. A colour draft map of 2024, prepared by Cork County Council identifying lands for the purposes of the Residential Zoned Land Tax has been exhibited for the first time. The Applicant objects to additional materials being placed before the court at this time. For the reasons set out herein, I have not considered it necessary to decide the Applicant's application to exclude the new evidence and I have considered the contents thereof *de bene esse*. The introduction of fresh evidence may be appropriate to explain why a certificate should be granted in a given case.

6. The test for the certification of an appeal is set out in section 50A(7) of the Planning and Development Act 2000, subject to the reference to the Supreme Court being read as the Court of Appeal, by virtue of section 74 of the Court of Appeal Act, 2014. The interpretation of the test was not in issue between the parties. Section 50A(7) provides:

> "*The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the 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.*"

7. This test has been interpreted in numerous judgments of the Superior Courts since *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, including in *Monkstown Road Residents Association v. An Bord Pleanála* [2023] IEHC 9 and *Sherwin v. An Bord Pleanála (No. 2)* [2023] IEHC 232.

8. The principles set out in *Glancré Teoranta* are as follows:

> "*1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.*
>
> *2. The jurisdiction to certify such a case must be exercised sparingly.*

3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.

4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court....

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

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

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.

8. Normal statutory rules of construction apply which mean inter alia that 'exceptional' must be given its normal meaning.

9. 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

9. A detailed discussion of the relevant principles is not required, particularly as they are not in issue in this application. However, the following points bear repeating:

(a) The High Court may decide to refuse leave to appeal even in cases where the first limb of the test had been met: *Arklow Holidays Ltd v. An Bord Pleanála* [2006] IEHC 102; [2007] 4 I.R. 112.

(b) The point of law should be determinative - certification should be refused if point(s) of law otherwise certifiable would leave unimpugned one ground upon which *certiorari* was granted, such that the result of the case will remain unchanged: *Monkstown Road* (para. 8(g)).

(c) Except insofar as the point of law must be stateable, the strengths or merits of the potential appeal are not relevant to the question whether or not a point of law should be certified: *Monkstown* (para.7).

(d) the judgment must involve points of law which 'transcend the boundaries' of the case, but exceptionality must also be established: *Glancré Teoranta; Monkstown Road* (para. 8(j)).

(e) The Board is in a better position than a private individual or entity to know whether a particular point is of systemic importance: *Sherwin v. An Bord Pleanála (No. 2)* (para. 5).

(f) 'Uncertainty' cannot be 'imputed' to the law simply by raising a question as to the point of law. 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. (*Monkstown Road* (para. 8(o)).

(g) The application for a certificate for leave to appeal must not be used to 'recalibrate' the case in response to the judgment: *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 636.

10. Holland J. identified the following as the main principles, at para. 9 of Monkstown Road:

"• *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*."

The First Point

11. The Board seeks a certificate in respect of the question "*Having regard to the requirements of the 2000 Act, and in particular section 10, can a development plan zoning objective allow for residential development without an express statement that development of that type is regarded as appropriate on lands subject to that zoning objective*."

12. The Board submits (at para. 4 of its submissions filed in support of this application) that the answer to this question is 'No'. In oral submissions, counsel resiled slightly from the unequivocally negative answer given in the written submissions, stating that the Board was "*not quite saying it never could be done - but if land is not in some way identified for residential development in a plan one has to pay very close attention to that given that the Act has a particular structure in place …"*

13. The issue before the court, as specified in the Statement of Grounds and Statement of Opposition and the submissions, related to the wording of the applicable development plan; no submissions were made as to whether or not development plans could include zoning objectives which allow for residential development without expressly referring to residential development. In particular, it was not contended previously that the Act, or specifically section 10, did not permit a development plan to include such a zoning objective.

14. The concern has been expressed on behalf of the Board that "*the judgment does not accord with the requirements of the statutory scheme in relation to how the zoning of land for residential use is to be implemented in development plans, and that this could pose difficulties for the Board in determining planning appeals, in particular in the interpretation of zoning and development plans generally*." The affidavit does not explain why the arguments advanced for the purposes of the substantive hearing did not include any argument relating to the statutory scheme in relation to the zoning of land for residential purposes.

15. The point sought to be certified, and the concerns expressed by the Board are wider than the arguments which were advanced at the hearing. The Board seeks certification in respect

of the limits of the power of a planning authority to zone lands for residential use and the point or question posed is framed in a manner which would have application to other planning authorities. However, the case as presented, and considered and decided by me, related solely to the interpretation of a particular objective in the Cork County Development Plan 2022-2028, Objective ZU18-10. The case was argued and decided by reference to the terms of that Plan. The statutory scheme was not relied upon to argue that the Objective could not bear the interpretation relied upon by the Applicant. This is evident from the Statement of Grounds, the Board's Statement of Opposition and from the written and oral submissions made in respect of the substantive application.

16. In summarising the Board's position on Core Grounds 1 and 2 in the Statement of the Case, it was stated:

"*The Board's Decision is not invalid as alleged. The Applicant's complaints are based on a misinterpretation of the Development Plan. The Board did not err in law as alleged. The Board correctly recorded the text of land use zoning objective ZU 18-10 of the Development Plan (at page 2 of the Board Order) and correctly concluded: that residential use is not listed as an appropriate use for the same; and that the proposed development would contravene the same. The Board did not misinterpret the meaning of "existing uses" in the Development Plan or adopt an unduly narrow interpretation of "existing uses" as alleged. The Applicant's assertions in this regard are premised on a misinterpretation of a sentence contained in §18.3.10 of the Development Plan*."

17. The Board seeks to argue for the first time that an objective with the effect contended for by the Applicant, and as interpreted in the judgment which it seeks to appeal, would be inconsistent with the statutory scheme. The question which was before me was what Objective ZU 18-10 meant – no question was raised prior to this certificate application as to the limitations on planning authorities in setting zoning objectives arising from the statutory scheme.

18. The distinction between the case as made and determined, and the point for which the Board seeks certification cannot be described as a shift in emphasis in the arguments advanced previously, nor has the Board sought to hone or develop an argument which it had already made. When asked whether, and if so where, this point had been raised at all in the

substantive proceedings, counsel stated "*If there were something that I could point to I would point you to it - I don't believe there is something there*".

19. I am satisfied that the point sought to be certified is a new argument; it is one which could have been advanced but was not advanced by the Board. Whilst an affidavit was sworn for the purposes of the certificate application, it does not disclose any reason or explanation for not relying on the point for which certification is sought.

20. Save insofar as I identified the well traversed principles applicable to the interpretation of development plans generally, the principal judgment did not set out any other general principles relating to the interpretation of development plans, nor were the applicable principles in issue before me. Whilst the Board now expresses the opinion that that judgment creates uncertainty in the law as to the interpretation of development plans generally and does so particularly in relation to the zoning of land for residential use, those matters were not in issue before me, nor were they considered.

21. Hyland J. observed in *Maguire T/A Frank Pratt & Sons (No. 2)* [2023] IEHC 209 at para.27: "*[c]learly the mere fact that an applicant for leave disagrees with a conclusion in the judgment cannot be relied upon to characterise the state of the law as being uncertain*". It is difficult to see how a judgment, which did not consider whether a particular zoning objective, or type of zoning objective, is consistent with the 2000 Act, could be regarded as having created uncertainty as to the types of zoning objectives which planning authorities are permitted to establish within the statutory framework.

22. As Holland J. held in *Monkstown Road* "*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.*" (para. 8(c)). The hearing did not include involve any submission or discussion relating to this point.

23. The Supreme Court has stated that it "*does not generally entertain claims that have not been pleaded and save in the most unusual of circumstances it does not decide cases that have not been argued in the Courts below.*": *Concerned Residents of Treascon and*

Clondoolusk v. An Bord Pleanála & Ors [2024] IESC 28 (para.56). At para.59 of *Treascon* Murray J. stated:

> "*I would remind counsel intending to seek leave to appeal that they should* not *seek leave in respect of issues that were neither pleaded nor decided by the Court whose decision it is sought to appeal, just as I would remind their opponents that it is open to any respondent to seek a preliminary hearing as to whether in fact a particular ground is properly before the Court at all*."

24. The Applicant submits that the point sought to be certified cannot arise from the judgment as it was neither pleaded nor argued at the substantive hearing. In addition to *Treascon*, the Applicant relies on the judgment of Henchy J. in *Movie News Ltd v. Galway County Council*, unreported, Supreme Court, 15th July 1977, [1977] WJSC-SC 1112, in which it was held that to allow the appellant argue a ground which had not been argued before the High Court-

> "*would in effect be deciding this* ***new*** *point as of first instance. However, save for matters specifically committed to it by the Constitution or by statute, this Court has only an appellate jurisdiction. It should not - except for exceptional reasons which do not exist in this case - under the guise of an appeal, enter on the trial of a matter as of first instance and thereby deprive the party aggrieved with its decision of the constitutional right of appeal which he would have if that matter had been decided in the High Court.*"

25. This *dictum* was cited by O'Donnell J. (as he then was) in *Lough Swilly Shellfish Growers are Co-Op Society Ltd v. Bradley* [2013] IESC 16, [2013] 1 IR 227 (para. 11).

26. Whilst the issues in the case are framed by the Statement of Grounds, the Statement of Opposition is also an important document. It was open to the Board to have pleaded and argued, as they now wish to argue, that a development plan zoning objective cannot permit residential development unless it is stated expressly that residential development is regarded as appropriate on land subject to the particular zoning objective.

27. As Ó Dhálaigh C.J. stated in *State (Quinn) v. Ryan* [1965] IR 70, 120 "*a point not argued is a point not decided*".

28. It is clear from *Lough Swilly*, *Fitzpatrick v. An Bord Pleanála* [2018] IESC 60 and *AIB v. Ennis* [2021] IESC 12, [2021] 3 IR 733 that there is not a bar on a litigant raising an argument before an appeal court which was not raised in the court below. As emphasised in *Ennis*, the justice of the case has to be the overarching consideration.

29. O'Donnell J. noted, in *Lough Swilly*, that it was common that the Supreme Court would receive a much more elaborate and detailed argument than had been advanced in the High Court. The established jurisprudence to admit fresh evidence was also acknowledged and it was held that there was a spectrum of cases in which a new argument was sought to be advanced on appeal. He stated:

> *"[27] …while it is normally both desirable and helpful that the court has the benefit of the considered views of the High Court Judge in any particular point which is the subject matter of an appeal, that desirable objective cannot be said to be an absolute prerequisite to a valid appeal. In a case where a number of points are argued but the High Court considers that the case can be disposed of on only one, the Supreme Court may, if it considers necessary, consider the points which were argued, even if not decided, in the High Court: see the observations of Murray J. in* Dunnes Stores Ireland Company v. Ryan *[2002] 2 I.R. 60… Accordingly a certain sensible flexibility is exercised by the court depending on the demands of the case, and a similar approach could be considered when a point is sought to be argued which was not advanced in the High Court though closely connected to points which were argued, and which would not have any implication for the evidence adduced in the High Court.*
>
> *[28] What the Constitution requires is an appeal which permits the Supreme Court to consider whether the result in the High Court is correct. The precise format and procedure of any such appeal is not dictated by the Constitution. While that object is often and best achieved by a careful analysis of the argument in the High Court and the High Court's adjudication of said argument, it does not follow that the constitutional appeal must always be limited to that process.*

30. In *Fitzpatrick v An Bord Pleanála* [2018] IESC 60, it was held that the fact that a point had not been raised in the court below is not an absolute barrier to it being maintained on appeal but that there are significant limitations on the extent to which latitude can or should be given, for the very reasons addressed in *Lough Swilly*. The change in constitutional

architecture by the establishment of the Court of Appeal, and possibility of a leapfrog appeal to the Supreme Court under Article 34.5.4°, since judgment was delivered in *Lough Swilly* is significant. That said, the more normal appeal from a decision of the High Court in a planning case is to the Court of Appeal.

31. Clarke C.J. held the overall position is that an appeal should ordinarily be confined both to the issues identified in the grant of leave to appeal as meeting the constitutional threshold, and to the grounds or issues raised in the court or courts below. However, he stated "*there should not be a completely inflexible attitude to allowing some evolution in the issues permitted to be raised by reference to those raised in the court or courts below (as per Lough Swilly) or by reference to the terms of the grant of leave, (as in McDonagh).*" (para.4.7)

32. While an overly rigid approach to the question of whether a point was raised in exactly the same way in a court or courts below was held neither to be sensible nor to accord with reasonable fairness, the Clarke C.J. held, relying on *Lough Swilly* and *McDonagh*, that:

> "*4.8 … a court should not allow latitude to pursue a different or adjusted case on appeal or allow grounds to be advanced which are not encompassed in the grant of leave where there would be a real risk of prejudice or unfairness to the party who is respondent to the appeal in question. Furthermore, the orderly conduct of litigation requires parties to put forward their full case at trial. An overly permissive attitude to allowing cases to be significantly adjusted on appeal will only encourage laxity in the full exploration of all issues by the parties before the trial court. Looking at the system of litigation as a whole, such laxity is likely to contribute to injustice in many cases and thus is highly undesirable. As has been said in the past, a trial is not a dress rehearsal.*
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> *4.9 It follows that the proper approach of the Court is to consider the case made below and the terms on which leave was granted for the purposes of determining the issues which are properly before the Court. Clearly those issues can be pursued on appeal. Furthermore, questions which can reasonably be considered to represent little more than an evolution of the case made at trial or identified in the grant of leave can be permitted to be pursued provided that they do not give rise to any risk of prejudice. Allowing any more substantive change in the case made on appeal would*

require the presence of significant factors connected with the interests of justice and would also require a careful analysis of whether any prejudice might be caused.

33. In *Fitzpatrick,* the applicants were permitted to argue a narrower point as a backup point to that which had been argued and determined in the court below. In this case, the point for which the Board seeks a certificate is significantly wider than that argued before me, and is a point of general application, which did not form part of the case as decided by me.

34. In *Ennis,* Clarke C.J. held that the right to litigate is not unlimited but must be exercised in a manner consistent with the Constitution, statute law, the Rules of the Superior Courts and caselaw, which prescribe the procedures by which legal disputes are to be determined by the courts. He held:

"*Parties, be they plaintiffs or defendants, are obliged to set out their case fully at trial. There must be finality to litigation. There is to be no "holding back" arguments or evidence for an appeal. (Ambrose v. Shevlin [2015] IESC 10, at paras. 4.12–4.13). Subject to right of appeal, as outlined in the Constitution and statute, these objectives in the administration of justice are to be effected in cases brought and conducted in the appropriate jurisdiction. Both the RSC and case law set out how these principles and aims should be balanced in various categories of cases. These principles apply to all litigants, whether a party is represented or unrepresented*."

35. As is clear from *Lough Swilly*, *Fitzpatrick* and *Ennis,* appeal courts are not prevented from considering new arguments or evidence, simply because they were not raised in a court of first instance. The question which I am required to answer is whether it is desirable in the public interest that a point which was not argued before this court nor determined in the principal judgment should be appealed to the Court of Appeal.

36. It is clear from the authorities that despite there not being an absolute bar on a point being argued on appeal which was not decided by the court below, ordinarily it is undesirable that an appeal would be brought on a point which had not been pleaded or determined in the court below, nor is it desirable that parties would hold back (intentionally or otherwise) a point which they might later seek to argue on appeal. No explanation has been given for not raising the point sought to be certified before judgment was delivered.

37. The Oireachtas has determined that in general, a decision of the High Court on the validity of a decision of the Board is final, and the authorities clearly demonstrate that the power to grant a certificate for leave to appeal should be exercised sparingly.

38. The issue which was argued in the proceedings, and decided by me, related solely to the wording of the Development Plan, in particular objective ZU18-10. No argument was advanced to the effect that the Act required the term residential to be used expressly if residential development may be permitted (i.e. is not precluded) within lands governed by a particular land use zoning. The Board disputed the interpretation which the Applicant put forward, and which I accepted, relying on various extracts of the applicable Development Plan. It was not contended, prior to the certificate application, that if the objective is interpreted in the manner proposed by the Applicant, the objective would effectively be *ultra vires* the planning authority. At the hearing, it was accepted by the Board that the essence of its decision was the finding that "*Residential use is not listed as an appropriate use on such zoned lands in the said development plan. The proposed development would therefore, contravene Objective ZU18 – 10 and be contrary to, proper planning and sustainable development of the area*.". It was not stated in the Opposition papers, written submissions, or in oral argument, that the interpretation which was contended for by the Applicant would be incompatible with the 2000 Act.

39. Although this is not a case which would require additional or significant additional evidence to enable the new argument be advanced on appeal, the point which the Board wants certified cannot be described as a refinement of the argument made in the High Court, nor simply a change in emphasis. I do not consider that it is desirable in the public interest that the High Court would invoke the power to certify a point for appeal, which power is to be used sparingly, to certify a point which had not been relied upon or determined by it. As Clarke C.J. held in *Ennis*:

> "*There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take tactical advantage* (per Clarke J. in Ambrose v. Shevlin [2015] IESC 10, at paras. 4.11–4.13,pp. 9–10)."

40. The Board submits that an appeal on the first point would enhance the practical operation of the planning system, in reliance on *Sweetman v. An Bord Pleanála* [2021] IEHC 662, in particular paras. 28 -29. Whilst that is a factor which may appropriately be considered in considering the desirability of an appeal being brought on a point of law arising from a judgment of the High Court, it does not outweigh the undesirability of permitting the Board to rely on an argument which was not pleaded or relied upon at first instance in this case.

41. In my view, the fact that a point of law might transcend the boundaries of a case, does not increase the desirability of granting a certificate on a point which had not been pleaded, argued or decided at first instance. The Board has submitted that the judgment creates a lack of clarity in relation to the interpretation of zoning for residential use in development plans generally. Whilst that is clearly a point which transcends the case, the case as argued was limited to the interpretation of a single objective in a specific Development Plan, the Cork County Development Plan 2022-2028.

42. Certifying a point for appeal which was not determined at first instance is not consistent with the intention of the Oireachtas, that the judgment of the High Court be final in most cases, as expressed in section 50A(7) of the 2000 Act. If, as the Board contends, my judgment is incorrect, and that Objective ZU18-10 as interpreted in the principal judgment is incompatible with the statutory scheme, that is a matter which can be argued in an appropriate case should this issue arise. It remains open to the Board to apply to the Supreme Court for leave to appeal if it considers that the constitutional criteria are met.

43. It seems to follow from the authorities including *Monkstown Road*, which assume that the judgment which is sought to be appealed may be wrong on point of law, that the mere assertion that a judgment might be considered to set an erroneous precedent does not justify the grant of a certificate. That observation can be made of many judgments which a party contends are wrong on a point of law.

44. As I have found that it would not be desirable in the public interest that an appeal would be brought to the Court of Appeal, and as the two-part test for the grant of a certificate is cumulative, it is not necessary to decide whether the point sought to be certified is one of

exceptional public importance. I observe, however, that the Board's contention that it is a point of exceptional public importance is undermined somewhat by its failure to argue the point in the proceedings.

The Second Point

45. The Board also seeks certification of the following point:

> "*If land is not zoned for a particular use can the Board conclude on that basis alone that a proposed development would therefore be contrary to proper planning and sustainable development and refuse permission for that reason alone?*"

46. The second point which the Board contends should be certified is predicated on Objective ZU18-10 precluding residential development.

47. I found that zoning objective ZU18-10 provides for development which supports and does not undermine the integrity and vitality of existing employment uses and that uses which fail to achieve that aim of supporting employment, or which undermine the integrity or vitality of existing employment uses, shall not be permitted. I held that inclusion in the list of Appropriate Uses is not necessary for a proposed development to conform with Objective ZU18-10 and Section 18.3.10 of the Development Plan; residential development was not excluded by reason of it not being referred to in the list of Appropriate Uses. On that basis, I held that the Board had failed to have regard to the Development Plan as correctly interpreted and that this error went to jurisdiction. The Board was required to exercise planning judgement in determining whether the proposed development supported, or threatened or undermined, employment use in order to decide whether or not the proposed development contravened Objective ZU18-10. For the reasons set out above, I do not consider that the conditions necessary for the grant of a certificate for leave to appeal have been met in respect of the first point.

48. The second point for which the Board seeks a certificate is based on the premise that the Development Plan does not allow for residential use on lands zoned Existing Mixed/General Business/Industrial Uses (MGB). I have found that this premise is incorrect and that a certificate should not be granted in respect of that finding. As Humphreys J. held in *Nagle View Turbine Aware Group v. An Bord Pleanála* [2025] IEHC 3 "*The point*

should not be launched in the abstract but should actually arise on the facts. Thus the point of law must reflect a correct understanding of the decision of the High Court (Monkstown Road Residents Association *[2023] IEHC 9 (Unreported, High Court, Holland J., 19th January 2023) at §9(d)).*" Therefore, I do not consider that the point of law for which a certificate is sought is one of exceptional public importance, nor is it desirable in the public interest that an effective moot would be the subject of an appeal to the Court of Appeal.

49. Furthermore, in general, if the question sought to be certified relates to the erroneous application by the High Court of established principles, the conditions for the grant of a certificate under section 50A(7) are not met: *Stanley v. An Bord Pleanála* [2022] IEHC 671; *Halpin v An Bord Pleanála* [2020] IEHC 218. In *Halpin*, Simons J. stated:

> "*For the reasons set out by the Supreme Court in* B.S. v. Director of Public Prosecutions *[2017] IESCDET 134;* Buckley v. An Bord Pleanála *[2018] IESCDET 45; and* Heather Hill Management Company clg v. An Bord Pleanála *[2020] IESCDET 39, the application of well-established principles will rarely give rise to a point of law of "general importance" (nor, by analogy, to a point of law of exceptional public importance")*."

50. He referred to the determination of the Supreme Court in *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61, in which it was stated:

> "*6. However, it must also be acknowledged, as this Court pointed out in its recent decisions in* B.S. *and* PWC *that issues of principle can operate at differing levels of generality. The mere fact that there may not be a dispute as to the overall broad principles applicable to a case does not mean that there may not still potentially be issues of importance concerning the way in which those general principles are to apply in a particular category of case although, of course, as has been pointed out, the closer one comes to the application of such more detailed matters of principle to the facts of an individual case the further one gets away from there being an issue of general public importance or, indeed, an issue of European law which would require a reference to the Court of Justice.*"

51. Conscious of the fact that determinations of the Supreme Court are not to be relied upon as precedent, I consider that they provide useful guidance as to the nature of a point of law

which is of general public importance. This *dictum* from *Fitzpatrick* further illustrates the need for a point of law to be based on a correct factual premise.

52. As the Supreme Court stated in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134:

> *"... it can rarely be the case that the application of well established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.*
>
> *However, having said that, the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts of an individual case, the less it will be possible to say that any issue of general public importance arises. There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case 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."*

53. I sought to apply the well-established principles regarding the adequacy of reasons having regard, in particular, to the judgments of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 IRLM 453 and *Balz v. An Bord Pleanála* [2019] IESC 90; [2020] 1 ILRM 367 and *Sherwin v. An Bord Pleanála* [2024] IESC 13. I found that the Board had not provided adequate reasons for finding that the planning application was inconsistent with proper planning and development of the area as it had relied on the

contravention of Objective ZU18-10. The Board had jurisdiction to grant permission even if it had found that there would be a material contravention of the Development Plan. Section 37(2)(b) was not engaged as the planning authority had granted the permission sought. I found that, because not every contravention of an objective in a development plan renders a proposed development contrary to proper planning and sustainable development, it is necessary for the Board to explain why it considered that it did so in this case.

54. As appears from the principal judgment, I considered the absence of a finding that the contravention of Objective ZU18-10 amounted to a material contravention to be significant. In all the circumstances, I am not satisfied that the judgment has the potential to influence true matters of principle rather than the application of the well-established principles to the facts of an individual case.

55. The finding that the Board had not provided adequate reasons for its decision was a separate and distinct finding to that relating to the interpretation of the Development Plan. It provided a second ground on which I considered it appropriate to grant an order of *certiorari*. If the Board were to succeed on the second point, it would not lead to the setting aside of the order of *certiorari*.

56. Having synthesised the *Glancré* principles with the more recent authorities in *Monkstown Road*, Holland J. held that:

> "*(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. 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*."
>
> …
>
> *(h) 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.*"

57. In making this finding, Holland J. relied on the judgments of Humphreys J. in *SA v Minister for Justice* [2016] IEHC 646 and *Clifford & Sweetman v.* An Bord Pleanála [2021] IEHC 645 and Phelan J. in *Stanley v. ABP*. As Humphreys J. stated in *SA v. Minister for Justice*:

> "*The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged*."

58. This is also clear from *Cork Harbour Alliance for a Safe Environment v An Bord Pleanála* [2022] IEHC 231 (para. 32 (13)).

59. Having decided that it is not appropriate to grant a certificate in respect of the first point, the second point must be assessed in isolation. To consider the second point otherwise would be to disregard the requirement that an appeal on a point of law must be desirable in the public interest. Section 50A(11)(a) (first inserted by section 13, Planning and Development (Strategic Infrastructure) Act 2006) provides that the Court of Appeal shall "*have jurisdiction to determine only the point of law certified by the Court under subsection (7) (and to make only such order in the proceedings as follows from such determination)*" Even if an appellant were not limited to arguing the points which have been certified under section 50A(7), I am satisfied that each point must be considered separately.

60. Whilst the Board correctly submits that if the two points for which it seeks a certificate were answered differently by the Court of Appeal, the result of the case would change, I am satisfied that if only the second point were answered differently, the result of the case would not change. If the principal judgment were reversed in relation to the Board's reasons, the finding that it had misinterpreted the development plan remains. That is an error which goes to jurisdiction: *Sherwin v. An Bord Pleanála* [2024] IESC 13 per Woulfe J. (para. 96). For this reason, I do not consider that the conditions are met for certification of the second point.

Conclusion

61. As was first stated MacMenamin J. in *Glancré Teoranta* the jurisdiction to certify a point of law should be exercised sparingly.

62. As the two-part for the grant of a certificate is cumulative, a certificate should be refused unless there is a point of law of exceptional public importance arising from the judgment

and it is desirable in the public interest that an appeal would be brought to the Court of Appeal on that point. While there may be overlap between the factors relevant to each requirement, they are cumulative and require separate consideration: *Cork Harbour Alliance for a Safe Environment v An Bord Pleanála* [2022] IEHC 231 (para. 32(3)).

63. The first point of law identified by the Board does not arise from the principal judgment. The Board conceded that it could not point to any plea or argument made in which the question whether, having regard to the requirements of the 2000 Act, and in particular section 10, a development plan zoning objective can allow for residential development without an express statement that such development is regarded as appropriate on lands subject to that zoning objective. This point was neither pleaded, argued nor decided. The principal judgment was based on the wording of the particular objective in the specific Development Plan and the argument sought to be advanced is an entirely new argument. I am satisfied that, whilst there is not a bar on an appellate court entertaining an argument which was not made at first instance, it is not desirable in the public interest that a certificate should be granted to enable the Board rely on a new case on appeal. The point sought to be advanced could have been advanced by the Board, and no explanation has been given for not doing so.

64. The second point which the Board contends arises from the principal judgment and is one of exceptional public importance and that it is desirable in the public interest should be appealed to the Court of Appeal, is predicated on Objective ZU18-10 precluding residential development. I have found that not to be the case, and for the reasons set out herein, I refuse to grant a certificate to appeal that point.

65. In deciding the issue of the adequacy of the reasons provided by the Board for its decision, I sought to apply the well-established principles regarding the adequacy of reasons. The Board had decided that as there was a contravention of Objective ZU18-10, not found to be material, the proposed development was contrary to proper planning and sustainable development of the area. If I applied the well-established principles incorrectly as the Board contends, I am not satisfied that the principal judgment has the potential to influence true matters of principle rather than the application of the well-established principles to the facts of an individual case. Therefore, I find that the point sought to be certified is not a point of law of exceptional public importance which arises from the judgment

66. The second point does not have the potential to be determinative of the proceedings as I have found that the Board had misinterpreted the relevant provision of the Development Plan. This is an error of law which goes to jurisdiction. The test for the grant of a certificate to appeal that finding is not met. Therefore, it is not desirable in the public interest that there would be an appeal on the second point of law, as a successful appeal on that point would not lead to the vacating of the order of *certiorari*.

67. In conclusion, I have decided that it is not desirable in the public interest that an appeal should be brought to the Court of Appeal in respect of either of the points sought to be certified. Accordingly, the cumulative requirements contained in s.50A(7) of the 2000 Act have not been satisfied by the Board. I, therefore, refuse to grant leave to appeal.

68. As this judgment is being delivered electronically, I will list the matter for mention at 11 a.m. on 17th February 2025 to address the final orders to be made in the proceedings.

Emily Farrell