THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 671

[Record No. 2020/239JR]

BETWEEN:

BRENDAN STANLEY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

JOHN MCGUIRK AND DUBLIN CITY COUNCIL

NOTICE PARTIES

RULING OF Ms. Justice Siobhán Phelan, delivered on the 28th day of November, 2022

INTRODUCTION

1. This is my ruling on the Applicant's application for a certificate for leave to appeal the judgment of the 28th of March, 2022 where I refused an application by way of judicial review (the "judgment") in this matter. I received written submissions from the parties in respect of this application and heard oral argument on the 8th day of July, 2022.

BACKGROUND

2. By way of context for this application, it is recalled that in this case, the Applicant made request for a s. 5 declaration to Dublin City Council and subsequently referred the matter to

the Respondent [hereinafter "the Board"]. The evidence that was before the Board was the information submitted by the Applicant's Architect as well as the planning authority file. There were no third-party submissions or reports submitted by other parties. It is also clear from the Inspector's Report the matters to which the Inspector had regard including the report from the Council's Planning Officer, the planning history of the site and enforcement investigations, a recent referral to the Board from February, 2014 as well as the previous refusal of retention permission in May 2012. Accordingly, the file in this case was relatively small and did not require a wide-ranging trawl of documents to identify the matters which informed the Board's impugned decision.

STATUTORY PROVISION

3. This application is governed by the terms of s. 50A(7) the Planning and Development Act 2000 (the "2000 Act") which provides:

> *"(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the 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."*

4. The clear intention of the Oireachtas in enacting s.50A(7) of the Planning and Development Act 2000 (the "2000 Act") is that the decision of the High Court is generally intended to be final (see *Callaghan v An Bord Pleanála* [2015] IEHC 493). This is because one of the objectives of the 2000 Act is to facilitate certainty (see *Irish Asphalt Ltd. v An Bord Pleanála* [1996] 2 IR 179).

5. As the questions raised turn on the correct approach to determining whether a decision is adequately reasoned, rather than the reasonableness of the decision (which was also a ground of challenge pursued in the proceedings), it is useful to consider where the law stands in the wake of the seminal decision of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 [hereinafter referred to as "*Connelly"*].

THE LAW ON REASONS

6. The law on reasons in the planning context is well settled since the decision of the Supreme Court in *Connelly*. The case before me was argued on the basis that *Connelly* properly identified the test to be applied. The clear principle identified in *Connelly* is that it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents, from the context of the decision, or in some other fashion. This is subject to the requirement that the reasons must actually be ascertainable and capable of being determined. In that regard, context is important, and the nature of the inquiry will depend on the decision-making process. As the Supreme Court stated in *Connelly* (p. 778):

> *"a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."*

7. From the decision in *Connelly* it is apparent that the test is satisfied if it is sufficiently clear from a reasonable inquiry that the matters contended actually form part of the reasoning (as acknowledged at para. 29 of the Applicant's submissions). The test is met where the reasons can be identified, following a reasonable inquiry. Such an inquiry includes both the Inspector's Report as well as the materials and documents referred to in that Report as *Connelly* establishes that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion provided that the reasons are ascertainable.

8. It follows from *Connelly* that where the reasoning is not expressly stated in the Board decision, or indeed the Inspector's Report, it can be inferred or implied so long as it is ascertainable elsewhere on reasonable enquiry. It is clear that where the reasons are not included in the text of the decision itself and are "*inferred*", "*implied*" or indeed "*extrapolated*" (to repeat words used in my judgment and the subject of some focus in submissions on behalf

of the Applicant in support of this application), they must be capable of being readily determined.

9. At para. 9.8 of his judgment, Clarke CJ for the Supreme Court in *Connelly* refers to the reasons for the Board's development consent decision in that case as being capable of being found in the Inspector's report and the documents either expressly or by necessary "*implication*". It is accordingly clear that reasons may be implied where they are not found in the material, provided that they are readily identifiable as the reasons for the decision.

10. It is also clear after *Connelly* that any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. The Court expressly stated (para. 9.2) that the "*reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning*". If the search required were to be excessive then the reasons could not be said to be reasonably clear.

11. The decision in *Connelly* itself is consistent with the judgments in *Christian v. Dublin City Council* [2012] IEHC 163 and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59 and whatever about the application, the principled approach in law to determining the adequacy of reasons is now well settled.

JUDGMENT OF 28TH MARCH, 2022

12. These judicial review proceedings concerned a challenge to a refusal to grant a declaration that a development was exempt development because it did not involve a material change in use. In summary, my judgment noted (para. 45), that the Applicant accepted that there had been a change of use but argued that it was not material. It was also accepted that the Board's Inspector had identified the correct test for identifying a material change of use. However, the Applicant contended that the test was not properly applied in the absence of any specific or '*granular'* reasoning as to what factors were considered and as a consequence was unreasonable.

13. As apparent from my judgment (para. 53) I concluded that there is a correlation between the reasons advanced and assessing the reasonableness of a decision. In assessing the reasonableness of the decision in this case, it is proper to consider the reasons stated for the decision and the reasons given should be sufficient for this purpose. In that regard, I referred (para. 49) to the dictum of Simons J. in *Board of Management of St. Audeon's National School v An Bord Pleanála* [2021] IEHC 453,at para. 32, that the threshold to be met by an applicant for judicial review who seeks to pursue a challenge on grounds of lack of reasons and unreasonableness is "*extremely high and is almost never met in practice*".

14. At para. 64, I concluded, following *Connelly v An Bord Pleanála* as well as High Court jurisprudence on reasons, that the duty on the Board is to provide its reasons with sufficient particularity to permit the identification of the legal test, its application, the result of the application and the reasons therefor. In this case, I concluded (para. 68) that the proper application of the test to determine whether a change of use is "*material*" necessarily requires an identification of (i) the actual change in use; (ii) the effects, impacts or consequences in planning terms arise from the said change, i.e. how it gives rise to an impact and, (iii) the scale of those impacts and if they give rise to concerns, i.e. what the impact is.

15. I then held (para. 72 *et seq*.) that these matters were properly identifiable in the decision, the Inspector's Report and the material before the Board, as disclosed on the file in evidence before me.

16. Accordingly, following *Connelly*, it is clear from the terms of my judgment that I proceeded on the basis that the scrutiny of reasons does not stop with the Board Order or Decision.

17. I was satisfied that the reasons for the decision were identified in the material before the Board because of the use of mirror language in the Inspector's Report where reference is made to "*traffic, servicing and car parking*" to that contained in reports comprised in the planning history and referred to in the Inspector's Report, albeit without reproducing the more expansive reasoning of those earlier documents. I sought to explain this at paras. 78 and 81 when I stated:

"The material before the respondent shows that substantive and evidence-based concerns were raised in 2012 as to the implications for traffic, servicing and car parking along busy and relatively narrow road and the amenity of neighbouring properties when an application for retention permission for a change in use to permit car sales from the site was refused. What was meant by these concerns was explained in the Roads and Traffic Planning Division Report which forms part of the planning file. The reference to "servicing" in that report was clearly linked to the lack of onsite parking or off-site parking in the vicinity of the site. One might extrapolate from this that the inspector and the respondent in its turn took the view that it was "evident" that these concerns would also be raised by the change in use to a commercial self-storage unit. In the further planning report prepared in respect of this earlier retention application, the impact on residential amenity in a predominantly residential area of the car sales use were also considered…..

18. It was clear from the wording of the Inspector's Report that it was informed by the Roads and Traffic Planning Division Report, adopting the phrasing and reasoning of same. This, in turn, informed and forms part of the reasoning of the Board's decision, as explained by me at paras. 78 & 81 of my judgment where I said:

…The inspector's report further identifies the planning history (including the refusal of the 2012 retention application). The specific planning concerns identified by the inspector mirror almost verbatim those which led to the previous retention application being refused. The fact that the inspector adopts the same language as used to describe the concerns on the previous retention application makes it clear that the respondent considered that similar concerns arose on this new application because of the number of people driving to and from the site. The nature of the previous concerns are clear. They arose in relation to the servicing of the site for parking, traffic issues associated with access to and from the site by clients and the impact on the residential amenity of the area."

19. While the reasons for the decision might have been better articulated they were sufficiently clear to a reasonable observer carrying out a reasonable enquiry and with access to the planning file. I found, at para. 83, that:

"…it was evident to the inspector and the respondent that issues material to matters of planning concern arise from the new use in terms of impact on traffic, parking and residential amenity by virtue of the number of persons with rights of access to the site. In my view, the reasons for the decision could and should have been better stated but are sufficiently clear to a reasonable observer carrying out a reasonable enquiry and with access to the planning file. In my view the decision does not fail for lack of reasons."

20. Having found that the reasons for the decision were sufficiently clear to a reasonable observer carrying out a reasonable enquiry, I held that the decision does not fail for lack of reasons. The reasons being apparent, I held it was not unreasonable to conclude that the change of use was sufficiently material as to require an application for planning permission.

APPLICATION FOR A CERTIFICATE

21. The Applicant's written submissions urge there are four questions which warrant a certificate for leave to appeal, asserting (para. 38) that the court's judgment "*throws the law on reasons into considerable uncertainty*" and that the court was engaged in '*presumption*' and '*conjecture*'. The four questions identified were as follows:

(i) In circumstances where a Court finds that reasons are not expressly stated, is a court entitled to conclude that all material before the decision maker actually formed part of the reasoning of the Board?
(ii) If not, what criteria are to be applied to determine if the material actually formed part of the reasoning of the Board?
(iii) If so, what, if any, duty is there to give express reasons and considerations for decisions, if same can be made out from the material before the Court?
(iv) In a challenge to a decision based on a lack of stated reasons, can a Court look at the information before the Board and extrapolate, presume and/or infer that the Board considered same and reached certain conclusions where these conclusions are nowhere recorded or apparent?

22. During the oral hearing, the Applicant's counsel indicated that should a certificate be granted, he would seek leave to re-frame the proposed questions. The terms of his proposed reformulation were not further outlined and this decision cannot be based upon questions not framed.

23. The questions posed by the Applicant do not arise on any reading of my judgment. It is plain that the Applicant considers that I identified the reasons for the decision on the basis of the material before the Board but without taking the additional step of being satisfied that the reasons which were located in this material were readily ascertainable and capable of being determined as the reasons for the decision. While the Applicant quotes selective extracts from my judgment, the judgment taken in its entirety, does not and cannot bear the meaning or implication contended for by the Applicant. Rather, it is an orthodox and regular application as settled law as set out by the Supreme Court in *Connelly*.

APPLICABLE PRINCIPLES ON CERTIFICATE APPLICATION

24. The principles to be applied in an application for a certificate for leave to appeal are long established, although the manner of their application to this case is in dispute as between the parties. The parties agree that the leading authority is *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250 [hereinafter "*Glancré"*]. In *Glancré*, MacMenamin J. set out the following principles:

> *"i) 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.*
> *ii) The jurisdiction to certify such as case must be exercised sparingly.*
> *iii) 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.*
> *iv) …. [Not relevant – addresses refusal of leave to apply for Judicial Review] v) 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.*

vi) 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.

vii) 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'.

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

ix) '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.

x) 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."

25. In *Dunnes Stores v An Bord Pleanála* [2015] IEHC 387, McGovern J. reduced the *Glancré* principles to four essential principles to be applied as follows:

i. Firstly, the decision must involve a point of exceptional public importance;
ii. Secondly, it must be desirable in the public interest that an appeal shall be taken;
iii. Thirdly, there must be an uncertainty as to the law and;
iv. Fourthly, the importance of the point must be public in nature and transcend the individual facts and parties of any given case.

26. As the High Court noted in *Glancré*, the requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional public importance being a clear and significant additional requirement. The Court also noted in *Glancré* that the word '*exceptional'* must be given its ordinary meaning.

27. In addition, arising in the analogous context of the comparable provisions of s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, *in SA v. Minister for Justice and Equality (No.2)* the High Court identified important additional considerations as follows:

I. Firstly, the application for leave to appeal should be made promptly and ideally within the normal appeal period;

II. Secondly, 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;

III. Thirdly, the grant of leave should provide some added value to any matters already before the Court of Appeal;

IV. Fourthly, the question must be formulated with precision in a manner that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal.

28. These principles have been adopted in the planning context in the decision of Humphreys J. in *Clifford & Sweetman v. An Bord Pleanála* [2021] IEHC 645.

29. A particularly important issue for me to consider on an application for a certificate is therefore whether there is uncertainty in the law. Where the law is clear and the jurisprudence is clear, the intending appellant has, *ipso facto*, lost on the basis of an application of clear and established legal principles to the facts of the case. Accordingly, no uncertainty can arise (see *Arklow Holidays Ltd v. An Bord Pleanála* [2008] IEHC 2).

30. In *Ógalas Limited v. An Bord Pleanála* [2015] IEHC 205 Baker J. stressed the requirement that there be uncertainty in the law coupled with a point of exceptional public importance and stated at para. 4 that:-

> *"it is not sufficient for an applicant for a certificate to show that a point of law emerges in or from a case, but an applicant must show that the point is one of exceptional public importance and must be one in respect of which there is a degree of legal uncertainty, more than one referable to the individual facts in a case. There must be a public interest in requiring that the point of law be clarified for the common good, but to an extent, if there exists uncertainty in the law, and because clarity and certainty in the common law is a desirable end in itself, and important for the administration of justice, if it can be shown the law is uncertain the public interest suggests an appeal is warranted."*

31. In *Shillelagh Quarries Ltd v. An Bord Pleanála* [2020] IEHC 22, Barniville J. stated (para. 28) that, in considering the points or questions put forward as amounting to points of law of exceptional public importance, the task of the court is not to assess the merits of the arguments which may be made by the parties in respect of those points, or the strength or prospects of any appeal based upon them, rather it is primarily to consider whether the law with respect to the particular point advanced is unclear or uncertain. In that case, Barniville J. distinguished between a point of public importance and one of exceptional public importance and held that, in considering whether a point of law is of "*exceptional public importance*", an important task for the court is to determine whether the law in question, to which the point of law relates, is in a state of uncertainty or is evolving. If the law is not uncertain, then the court will generally conclude that the point of law raised is not of "*exceptional public importance*".

32. 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 observed by the High Court (Simons J.) in *Halpin v An Bord Pleanála* [2020] IEHC 218 in the context of a s.50A(7) certificate application:

> *"…The case law of the Supreme Court indicates that 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."*

33. As Simons J. held in that same judgment, the mere fact that, at a high level of generality, it may be said that the general principles are well established does not mean that the way in which the principles are applied does not potentially also give rise to an issue of law which would meet the threshold. He added that this would be a question of degree and judgment but the overall approach should be:

> *"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."*

APPLICATION OF PRINCIPLES

34. Turning to the proposed questions, I am satisfied that none of the four proposed questions meets the statutory threshold in s. 50A(7) of the 2000 Act. The law on reasons in planning cases is settled since the Supreme Court decision in *Connelly* and has been widely applied in numerous decisions of the High Court since it was handed down (including *Damer v. An Bord Pleanála* [2019] IEHC 505 and *Balscadden Road Residents Association v. An Bord Pleanála* [2020] IEHC 586).

35. It is clear from the terms of my judgment that I sought to apply the decision in *Connelly* in this case. My judgment cannot and should not be understood in the manner contended in the questions framed in the application for a certificate. I applied the *ratio* developed in careful and clear terms in *Connelly* to decide whether on a reasonable enquiry, a reasonable observer could be satisfied that the reasons which were located in this material were readily ascertainable and capable of being determined as the reasons for the decision. While I found that the reasons were not expressly stated, at no stage did I conclude that all material before the decision maker formed part of the reasons. Applying *Connelly* I held that the reasons for the decision were capable of being discerned from the material before the Board. The Applicant's second question, which asks what criteria are to be applied to determine if the material actually formed part of the reasoning of the Board is misplaced. Applying *Connelly*, I determined that the reasons for the Board's decision could be discerned from the material upon reasonable enquiry but this is not to say that the material itself amounts to the reasoning. In answer to the third question posited by the Applicant, the duty to give reasons has been clearly determined by *Connelly* which holds that the reasons can be ascertained on reasonable enquiry. If the reasons are capable of being ascertained on reasonable enquiry, it follows that they need not be expressed on the face of the decision and the law as to the extent of the obligation to give reasons has been clarified by the decision of the Supreme Court in *Connelly* in this regard. As to the fourth question, it is a mischaracterization of my judgment and the manner in which I identify the reasons for the decision challenged to suggest that I extrapolated, presumed or inferred that the Board considered same, where those conclusions were nowhere recorded or apparent. Applying *Connelly*, my judgment identified the material before the Board from which the reasons for the decision could be identified and identified those reasons.

36. It has not been suggested that *Connelly* no longer represents the law as to reasons, although it is suggested in oral submissions that the question of "*where the line should be*

drawn?" arises and that clarification is required. The application of the principles established in *Connelly* is evidence specific, facts specific and material specific. Where the line is drawn therefore falls to be determined on a case-by-case basis in accordance with the principles identified in *Connelly.*

37. It is my view that there is no reason to re-open that now settled and recently confirmed jurisprudence as the law is entirely clear. As Clarke J. stated in *Arklow Holidays*, where the general principles have been the subject of an authoritative ruling, then it would only be in a wholly exceptional case that it would be possible to take the view that the application of those general principles to the facts of an individual case could involve a point of law of exceptional public importance. I am satisfied that there is nothing exceptional about this case.

38. Where I am wrong in the decision I made, where the principles are clear and the law is settled, this alone does not give rise to a point of law of exceptional public importance. In considering this application I have attempted to stand back from my judgment and assess it from a perspective that it may have been incorrect (as per the judgments in *Callaghan v. An Bord Pleanála* [2015] IEHC 493and *Dublin Cycling Campaign CLG v an Bord Pleanála (No.2)* [2021] IEHC 146), but even if it is incorrect, as it may well be, the purpose of a certificate application is confined to determining whether there is a point of law that warrants certification.

39. I am further satisfied that the precedential value of my judgment is limited in that it represents a single instance of an application of the principles identified in *Connelly* to the particular facts and circumstances of this case. Those facts and circumstances included that the file in this instance was not voluminous and contained very relevant planning history in which mirror language to the language used by the Inspector in this case was used leading to the unavoidable conclusion that documents comprised in the planning history informed the decision and provide the reasoning for the decision.

40. I am mindful in considering this application that while a direct appeal to the Supreme Court under the '*leapfrog'* provisions of Article 34.5.4° is potentially open to the Applicant, an appeal to the Court of Appeal should remain the more normal route for appeals from the High Court where a point of law of exceptional public importance arises. I am satisfied that the decision does not contain a point of law which transcends the case itself to meet the requirements of exceptional public importance and public interest. The Applicant's case here

was not based on any novel principles, and nor does any novel principle or point of law emerge from the judgment itself.

41. Where the general principles have been a subject of an authoritative ruling from the Supreme Court as occurred in *Connelly*, then it would only be in a wholly exceptional case that it would be possible to take the view that the application of those general principles to the facts of an individual case could involve a point of law of exceptional public importance. It is not possible to characterise this case, which is concluded on an application of established principles to the particular facts disclosed in the evidence before me, as in any way exceptional. I am satisfied that the judgment does not involve a point of law of exceptional public importance.

CONCLUSION

42. The jurisdiction to certify a case should be exercised sparingly. In terms of the questions of law identified by the Applicant in making this application for a certificate for leave to appeal, I do not consider that they properly arise from my judgment. To my mind the questions framed are answered in *Connelly* from which it is clear that the reasons for a decision may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. Accordingly, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision but it must be sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. Accepting that I may have erred in my application of these principles, even so, the decision does not involve a point of law of exceptional public importance.

43. As my decision in this matter involved the application of general principles which are well established and in respect of which no uncertainty or need for clarification arises, the statutory test in s.50A(7) of the 2000 Act has not been met.