THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 105 J.R.]

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING ACT FOR THE PLANNING AND DEVELOPMENT ACTS, 2000 – 2017

BETWEEN

MCCAUGHEY HOMES LIMITED

APPLICANT

AND

LOUTH COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 20th day of April, 2018.

1. This is a judgment in which the applicant seeks, pursuant to s. 50A(7) of the Planning and Development Acts 2000 to 2017, leave to appeal this Court's determination to the Court of Appeal, in respect of this Court's judgment delivered on the 20th October, 2017, in respect of an application for judicial review.

2. In that judgment the Court held that the property vesting date provided for by the Water Services (No 2) Act 2013 was the 8th April, 2015, further that the Court was of the view that the respondent's order of the 19th January, 2017, was made in accordance with s. 48(3C) of the Planning and Development Acts 2000 to 2017, as inserted by s. 29 of the Urban Regeneration and Housing Act 2015. The Court further found, that the appropriate statutory construction of the legislation made it clear that the applicant had a liability to both Louth County Council and to Irish Water in respect of the financial contribution payable under Condition 13 but because of the action of the council, the court directed that the amendment to Condition 13 is only in respect of the 30 unsold houses.

3. Section 50A(7) of the Planning and Development Act, 2000, as amended 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."

4. The provisions in respect of the Supreme Court now relate to the Court of Appeal.

5. The jurisprudence of the requirements of s. 50A(7) are well known and in particular are contained in the decision of Mac Menamin J. in *Glancré v. An Bord Pleanála* [2006] IEHC 250, High Court decision dated the 13th July, 2006. These are the principles upon which the court should approach an application for a certificate for leave to appeal as summarised by Mac Menamin J. and have been followed consistently in many cases. He said at pp. 4 and 5 :-

> "I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
>
> 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.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 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.
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> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).
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> 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.
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> 6. The requirements regarding "exceptional public importance"and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).
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> 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".
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> 8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
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> 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.
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> 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."

6. In *Ógalas Ltd. (Trading as Homestore and More) v. An Bord Pleanála and Ors* [2015] IEHC 205 Baker J. at para. 4 held:-

"McMenamin J. summarised the law applicable to a grant of certificate in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 and I will not repeat the ten criteria outlined by him at pp. 4 and 5 of his judgment but accept his proposition 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."

Points of Law

7. The applicant identified six points of law of exceptional public importance:-

> (i) Whether, as to a development comprising "…houses and one or more of those houses have not been sold…" within the meaning of s. 48(3A) of the Act, the provisions of a development contribution scheme as they relate to infrastructure relating to functions transferred to Irish Water survived the adoption by the planning authority of a new scheme to replace the first mentioned scheme;
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> (ii) Whether a planning authority may, as to development comprising "houses and one or more of those houses have not been sold" levy a development contribution other than in precise accordance with express terms of its then current scheme;
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> (iii) Whether the express terms of a scheme are exhaustive
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> > (a) of the quantum of the development contributions payable hereunder;
> >
> > (b) of the quantum of the development contributions payable in respect of all classes of public infrastructure and facilities specified in s. 48(17) of the Act including infrastructure relating to functions to Irish Water;
>
> (iv) Whether an amendment under s. 48(3C) of the Act, of a planning permission condition as to liability for development contributions may require payment of any monies not specified by the planning authorities then current scheme;
>
> (v) Whether a planning authority is entitled to identify a fixed sum, unilaterally where money is receivable under s. 48 of the Act are vested in Irish Water;
>
> (vi) Whether a planning authority is entitled to refuse a certificate of compliance with a planning permission condition as to liability for development contributions (a certificate) on grounds that failure to pay a sum not specified by the planning authorities' then-current scheme.

8. Counsel on behalf of the applicant, Mr. Holland S.C., made written submissions and asserted that the points of law identified at (i) to (vi) above flow from the judgment of the court.

9. He submitted that the basis for the determination of a contribution condition was set out in a scheme (s. 48(2)(A) of the Act) where the basis changes and where that changes reduces the contribution; the change applies to the condition (section 48(3A) of the Act). The Court's decision was that the 2016 scheme changed 3/5ths of the 2004 Scheme as it relates to Condition 13, but 2/5ths of the 2004 scheme still applies. The decision requires a finding that some class provision of the 2004 scheme survived the adoption of the 2016 scheme but not others. It requires one of two findings:-

> (a) Condition 13 is read with reference to both the 2004 scheme and the 2016 scheme;
>
> or
>
> (ii) The 2016 scheme amended the 2004 scheme.

In the judgment, the Court upheld the respondent's order amending Condition 13. That order quantified the amount allegedly due to Irish Water by reference to the amount earmarked for water services in an unamended Condition 13 immediately prior to its amendment; that is to say by reference to the 2004 scheme as indexed immediately prior to the 20th January, 2017. Other parts of condition 13 are read by reference to the 2016 scheme which makes no reference to water services or Irish Water. The judgment accepts that the amended condition 13 is not fully in accordance with either of the 2004 and 2016 Schemes but combines elements of each. Section 48(3C) permits the respondent to amend Condition 13 to reflect the 2016 Scheme because it reduced the contribution payable. The 2016 Scheme provides only for a contribution of €5,400 per house. The amended Condition 13 contribution exceeded that amount. By upholding the amended Condition 13, the judgment found that the terms of the scheme are not exhaustive of the quantum of a contribution condition. The 2016 Scheme does not provide for the contributions for water services infrastructure but it says that the contribution is for public infrastructure including certain classes. However, the unamended Condition 13 expressly provides for contributions for water services and the judgment of the Court implicitly but necessarily finds that the express terms of the scheme are not exhaustive of the classes of public infrastructure and can be the subject of a contribution condition.

10. He further submitted that the 2016 Scheme stipulates the contribution of €5,400 per house. The amended Condition 13 adds that €5,400 to a pre-existing liability (this Court's emphasis) to Irish Water. He submitted that that liability is not provided for in the 2016 scheme.

11. In upholding the order amending Condition 13, the judgment addresses how monies vested in Irish Water are measured. Article 4(1) of Water Services (No 2) Act 2013 (Property Vesting Day)(No 3)Order 2015 (S.I. No. 112 of 2015) provides that certain monies to be received in accordance with s. 48 are vested in Irish Water. The court upheld the quantification of those sums as they were immediately prior to the amendment of Condition 13. He submitted that the judgment required the findings that such quantification is done without reference to s. 48(3A) of the Act, which provides that the development contribution condition changes in certain circumstances, which circumstances apply to the present case. He further submitted, that the judgment does not explicitly address whether and when a planning authority may refuse to certify compliance. The court's omission is tacit approbation of the respondent's

refusal to so certify because the applicant did not pay an amount not specified in the then-current scheme.

Uncertainty in the Law
12. The applicant submitted that for each and all of the six points of law there is uncertainty in the law, because the court could have logically and reasonably come to another different, even apposite view of the law. He quoted from Costello J. in *Callaghan v. An Bord Pleanála* [2015] IEHC 493, "another view of the law is possible", he further submitted that the uncertainty has a bearing on "the daily operation of the law in question".

13. He submitted that from the scheme current, the grant of permission is the only statutory and necessary basis for the determination of a development contribution, planning condition. A resultant condition applies for the duration of the permission save in very narrow circumstances set out in s. 48(3A)(b) of the Act. Counsel quoted as follows:-

> "… and the basis for the determination of the contribution under subsection 1 has changed… and one of more of those houses have not been sold, the planning authority shall apply that change to the conditions to the permission where to do so would reduce the amount of the contribution payable."

Counsel further submitted that the permitted change to the condition may only be to apply that change made to the basis for the determination of the contribution as between the new scheme and the old. It is submitted, that no change to the old scheme itself is permitted and the old scheme remains the basis for the conditions, save to the extent of that claim on the basis of determination of that contribution.

14. He submitted that notwithstanding the transfer of functions to the Irish Water, the Act does not permit the levying of two contributions, one to the respondent and one to Irish Water, or a contribution based in part on one scheme and in part on another. The Act does not reflect the transfer of functions from local authorities to Irish Water. He also quoted from s. 48(17)(c) of the Act as follows:-

> "In this section … public infrastructure and facilities means … the provisions of … sewers, waste water and water treatment facility service connections, water mains."

15. The Court found that "the 2016 Scheme changed the basis for the determination of contribution payable only in the sense that three classes of public infrastructure, road improvements, surface water and community recreation and amenity." Counsel argued that there was a fundamental error in the judgment that the 2016 Scheme really amended or only partly replaced the 2004 Scheme and that rather the 2016 Scheme did not change the basis for the determination of contribution payable as to infrastructure related to the functions transferred to Irish Water and those provisions of the 2004 Scheme survived the adoption of the 2016 Scheme and the amended Condition 13 may derive from both the 2004 Scheme and the 2016 Scheme.

16. As to whether a scheme is exhaustive of the power to levy contribution, counsel quoted s. 48(1) of the Act:-

> "A planning authority may, when granting a permission under section 34, include conditions forrequiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of planning authority and it is intended will be provided, or that it is intended will be provided, by or on behalf of the local authority (regardless of other sources of funding for the infrastructure and facilities)."

Section 48(17) of the Act states:-

> "Public infrastructure and facilities" means—
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> (a) the acquisition of land,
>
> (b) the provision of open spaces, recreational and community facilities and amenities and landscaping works,
>
> (c) the provision of roads, car parks, car parking places, sewers, waste water and water treatment facilities, drains and water mains, and flood relief work".

Article 5 of the 2016 Scheme provided for contributions to be paid in respect of different classes of public infrastructure and facilities, Class 1, being Infrastructure (including roads and surface water), with a costs per unit of €4,200 and Amenity, at €1,200 per unit, being a total of €5,400. The Court decided that the €4,200 does not include all of the classes of public infrastructure identified in s. 14(17)(c) and for a contribution to Irish Water infrastructure in addition to that levied by the scheme.

17. These submissions appear to deal with the six points which the applicant seeks to appeal to the Court of Appeal, whilst the applicant then seeks to quote from the Seanád Éireann debate in relation to the Urban Regeneration and Housing Bill 2015. The Court is of the view that these do not advance the six points which the applicant seeks to appeal to the Court of Appeal.

18. In oral submissions counsel referred the Court to a document entitled "Construction 2020" which was an exhibit to an affidavit of the applicant's solicitor Mr. Dermot Murphy. This affidavit was not before the Court in the determination of the original case and it is clear in this first view, that point of law did not arise out of the decision of the High Court. It is also the view of the Court however, that the document referred to does not assist the Court in identifying any relevant points of law for certification to the Court of Appeal.

19. Also exhibited by Mr. Murphy's affidavit is the opinion of a planner Mr. Sadler, a director of the planning consultancy McGill Planning Ltd. Again, this opinion was not before the Court when determining the appropriate statutory construction of the legislation which was contained in the judgment of the Court and therefore, this point of law does not arise out of the decision of the High Court.

20. The Court has had an opportunity of considering the opinion of Mr. Sadler dated 19th December, 2017. He makes the following point:-

> "The number of residential units nationally with extant permissions that were either not commenced or were commenced but not completed at the start of Quarter 4 2015 was 12,500 units."

21. The opinion of Mr. Sadler however does not clarify any issue from the point of view of this Court.

The Respondent's Submissions
22. Counsel on behalf of the respondent Mr. Rory Mulcahy S.C. reiterated the jurisprudence of a reference to the Court of Appeal in referring to *Glancré v. An Bord Pleanála* [2006] IEHC 250 .

23. He then dealt with the points advanced for certification:-

(i) No uncertainty
24. He submitted that the applicant in its submissions has engaged in the exercise deprecated by Cregan J. in *Buckley v. An Bord Pleanála* [2015] IEHC 590 and has sought to re-argue the proceedings for the purpose of seeking to impute uncertainty into the law where there is none:-

> "10. …However, to a considerable extent, all of these submissions are a re-arguing of matters already decided by me in my first judgment. They are, in effect, an attempt to elaborate upon arguments which they made during the course of the hearing or, to engage with my judgment and to argue why, in their view, the judgment is incorrect. Whilst that might be understandable in an application for a stay pending an appeal in a different type of case - where an appellant must establish that there are *bone fide* grounds of appeal - it does not assist the applicants in circumstances where they need to address the statutory requirements - that there should be a point of law of exceptional public importance - and the manner in which that section has been interpreted by the courts."

25. Counsel submits that the approach taken by the applicant in its submissions is simply to re-argue (or argue for the first time) each of the points identified, assert that therefore a different view of the law is possible and concludes that this establishes uncertainty in the law which requires to be resolved. Counsel submits, were such an approach permissible, it would render redundant the limitation on the right of appeal interpreted in s. 50A(7). In any case it wasn't dismissed on the basis that it was frivolous and vexatious.

26. Uncertainty cannot simply be imputed to the law by identifying alternative advances to any given proposition, the uncertainty must be shown to arrive beyond the particular arguments advanced in a case in the everyday operation of the law. Counsel noted, that the applicant seeks to rely on an additional affidavit and he submitted that the applicant has not been able to identify any difficulty in the day to day operation of those schemes, of new development contribution schemes or any other case in which the same or similar issues fall to be determined or still any decision which conflicts with the judicial judgment delivered in this case such as to create uncertainty.

(ii) Points Do Not Arise from the Judgment
27. Counsel submitted, that it was evident from the wording of s. 50A(7) and the applicable case law that no point of law can fall for certification unless it arises from the judgment the subject of the proposed appeal. In the present case, the applicant has made little or no attempt to confine the points identified to those which form the basis of the court's decision was addressed to particular factual circumstances. In particular the order made was made in circumstances where – as determined by the court – specifics sums have been conditioned to be paid by way of development contribution in respect of water and sewage infrastructure. Those sums have already been vested in Irish Water prior to any amendment being made to the allowed development contribution scheme. He submitted that the points identified by the applicant are not addressed to that factual situation but rather read like a consultative case on the operation of section 48(3A).

(iii) Points Not Argued or on which Leave was not Granted
28. A number of the points identified by the applicant were not raised in the argument or in the pleadings, still less were they addressed in the Court's judgment. Counsel submitted that it was the evidence on the wording of s. 50A(7) and the applicable case law that no point of law can fall for certification unless it arises from the judgment the subject of the proposed appeal. Further he submitted that it was not sufficient for the applicant to identify purported consequences in reports.

Point 1
29. The applicant contends that the first point of law as to whether these provisions in the development contribution scheme survived the adoption of a new scheme arise from the court's judgment at paras. 38-41. Those paragraphs merely set out the respondent's responses to contentions advanced by the applicant. The first question posited by the applicant is not one which was argued to any real extent at the hearing and do not arise from the terms of the judgment which is a prerequisite for compliance with para. 5 of the *Glencré* criteria.

Points 2, 3, 4 and 5.
30. Counsel submitted that there was an overlap and interconnection between the questions of law advanced by the applicant at points 2, 3, 4 and 5. These points appear to be predicated on the underlying assumptions that the judgment concluded that the respondent had levied the relevant contribution in accordance with the respondent's current development contribution scheme.

31. Such a finding was not made in the Court's judgment and accordingly these points do not arise from the court's judgment, *Ross v. An Bord Pleanála* [2015] IEHC 484 Noonan J. stated :-

> "13. This statement appears to proceed on the basis of assumed facts never argued or established and yet underpins the point of law that is said to arise from the judgment. I cannot envisage how an appellate court could be asked to determine a point of law based on facts never canvassed or decided."

32. Counsel for the respondent, submitted that it appeared that these four questions are postulated on the misinterpretation of the Court's findings. In the proceedings the applicant contended that he had no liability in respect of that part of the financial contributions payable under Condition 13 attributable to public water on sewage infrastructure and facilities and had complied with its planning permission despite the fact they never paid any development contribution in respect of water and sewage infrastructure benefiting the development. The court concluded that by virtue of s. 12 Water Services (No 2) Act 2013, financial contributions payable under Condition 13 of the Planning Condition in respect of water and sewage infrastructure had vested in Irish Water on the 8th April, 2015 and that the applicant had a liability to Irish Water in respect of same. He submitted that s. 12 was clear in its terms and that there was no uncertainty as to its meaning. The Court also found that the appropriate statutory construction of the legislative provisions made it clear that the applicant had a liability to both the respondent and Irish Water in respect of the financial contributions borne out under planning Condition 13. Accordingly, the points of law identified at 2, 3, 4 and 5 are not contained in and do not arise out of the court's decision but rather rests on the applicant's mis-characterization as the court's decision in this case.

Point 6
33. Counsel for the respondent submits that the sixth point identified by the applicant is not a stand-alone point at all, there was no dispute between the parties that the respondent was entitled to withhold certificates of compliance if the applicant had not satisfied

the terms of relevant planning permission. Since the Court has found that the respondent was correct in determining that the sums invested in Irish Water remain due, no question arises as to the respondent's entitlement to withhold the certificates.

The Decision of the Court

34. The Court is not satisfied that any of the points posited by the applicant raised points of law in accordance with the jurisprudence.

35. The Court notes that the jurisdiction to certify such a case must be exercised sparingly and whilst issues have been argued before this Court, it is the view of the Court that the points of law raised are not of exceptional public importance.

36. The Court is also satisfied that the law in question is not in a state of uncertainty nor has any decisions of the High Court or any other court being cited to this Court in respect of this issue.

37. The Court has already decided that the affidavit of Mr. Dermot Murphy containing various documents was not before the court and therefore, does not arise from the decision of the Court.

38. A further requirement of the jurisprudence is a desirability in the public interest that an appeal should be taken. In relation to the points which the Court accepts are not argued before the Court, it is clear that they do not arise from the judgment and it is clearly not desirable in the public interest that an appeal should be taken.

39. In accordance with. The decision in *Callaghan v. An Bord Pleanala* [2015] IEHC 493, wherein Costello J. states at para. 14:-

> "It seems to me the fact that a point of law is novel does not of itself answer the question whether or not the law on this point is certain or uncertain. The fact that the point is novel and the issue was raised in the case for the first time logically does not mean that there is no uncertainty in the law. There must always be a first case when a point is raised. However, equally logically (as was accepted by Counsel for the applicant), the law may be clear even though there is no decided authority on the point."

40. The Court further notes that some of the points raised in this case for the first time were raised in the submissions in relation to the application for a certificate and not at the hearing of the judicial review.

41. This case involves a very simple identification of the interpretation of the law having regard to the establishment of Irish Water and in all the circumstances the Court is of the view that the applicant has failed to establish and satisfy that the requirement of s. 50A(7) regarding "exceptionally public importance" and "desirable in the public interest", cumulative requirements, and leads this Court to a conclusion that a certificate for leave to appeal must be refused.