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THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 291 J.R]
[2005 No. 52 COM]

IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENTS) ACT, 1963 – 1995

BETWEEN

ARKLOW HOLIDAYS LTD

APPLICANTS

AND
AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
WICKLOW COUNTY COUNCIL, ARKOW URBAN DISTRICT COUNCIL, SEABANK AND DISTRICT RESIDENTS ASSOCIATION, ARKLOW ACTION GROUP, WICKLOW PLANNING ALLICANCE, AN TAISCE, ARKLOW CARAVAN PARK RESIDENTS ASSOCIATION, COAST WATCH EUROPE, P.J. HYNES AND BRENDAN HYNES

NOTICE PARTIES

Judgment of Mr. Justice Clarke delivered the 11th day of January, 2008

1. Introduction

1.1 Disputes between the applicants ("Arklow Holidays") and various other parties concerning the grant of a planning permission for a waste water treatment plant to service the Arklow area have been ongoing for a very considerable period of time. The procedural history of those disputes is set out in a judgment which I delivered in this matter on the 5th of October, 2007 ("the substantive judgment"). That judgment was the latest in a series of judgments in this and connected matters, details of which can be found in the review of the procedural history of the relevant disputes as set out in the substantive judgment. For the reasons set out in that judgment I came to the view that Arklow Holidays were precluded, by virtue of the rule in *Henderson v. Henderson* [1843] 3 Hare 100, from pursuing any of the issues in respect of which leave to challenge the planning permission at the heart of these proceedings had been granted. On that basis the orders sought were refused.

1.2 Arklow Holidays now seeks a certificate to enable it to appeal the substantive judgment to the Supreme Court. Without such a certificate Arklow Holidays is, of course, precluded by the provisions of s. 50(4)(f) of the Planning and Development Act, 2000 ("The 2000 Act"), from bringing such an appeal. This judgment is directed towards the question of whether such a certificate should be given in this case. As at the hearing which led to the substantive judgment, Arklow Holidays was opposed in its application by the first named respondent ("the Board") and the second named notice party ("Arklow Council"). None of the other parties participated at this stage. It should also be noted that the application of the rule in *Henderson v. Henderson* to this case was raised principally by Arklow Council. The Board, while agreeing with the principles advanced by Arklow Council and their application to this case, did not feel that it was an appropriate party to raise the matter, as the Board had not itself been a party to a previous challenge to the original notification of grant of planning permission by Wicklow County Council. On that basis the Board was not a party to the previous proceedings in which it was said that the points now sought to be relied on could have and should have been raised. Having taken that position the Board played a limited role in the certificate application confining itself, in the main, to observations about the issues which could, in principle, form the proper basis of a certficate. It is appropriate to turn first to the issues which Arklow Holidays suggests ought to be certified.

2. The Proposed Issues

2.1 In its written legal submissions on this application, Arklow Holidays suggest that a certificate of leave to appeal to the Supreme Court should be given on two points, that is to say:-

> "1. Whether and to what extent the rule in *Henderson v. Henderson* can be relied upon to defeat a first and timely challenge by way of judicial review to a decision of the Board in circumstances where the substantive point at issue could have been, but were not raised, in different proceedings, brought by the applicant against the Planning Authority.
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> 2. If the rule in *Henderson v. Henderson* is *prima facie* applicable in the circumstances outlined in para. 1 above to what extent is the court, in the exercise of its discretion, obliged and/or entitled to have regard to
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> (a) the fact that the substantive issues raised in the proceedings are of considerable public importance an potentially of wide ranging applications; and
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> (b) the conduct of other parties to the proceedings and, in particular, whether they caused or contributed to the substantive issues not being raised and/or determined in the earlier proceedings".

2.2 The key issue is, therefore, as to whether the question as to the application of the rule in *Henderson v. Henderson* in planning matters is a point of law which meets the criteria set out in s. 50 of the 2000 Act, that is that it is 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 on that point.

2.3 Against that background it is appropriate to turn to the legal principles by reference to which such a certificate should be granted or refused.

3. The Law

3.1 As it happens a previous application for a certificate has been made in these proceedings. At the leave stage Arklow Holidays succeeded in part, in that leave to seek judicial review was obtained on some but not all of the grounds advanced. In relation to certain of the grounds in respect of which leave was refused an appeal certificate was sought. For the reasons set out in *Arklow Holidays Ltd v. An Bord Pleanala* [2006] IEHC 102, I was not persuaded that it was appropriate to give the certificate sought. I summarised the legal basis on which a consideration of certification is based, between paras 2.2 and 2.5 of that judgment in the following terms:-

> "2.2 It is clear from the decisions of the Supreme Court in *KSK v. An Bord Pleanála* [1994] 2 I.R. 128, *Irish Asphalt v. An Bord Pleanála* [1996] 2 I.R. 179, and *Irish Hardware Association v. South Dublin County Council and Others* [2001] 2 I.L.R.M. 291, together with numerous decisions of this Court, that the policy behind the section is that there should be a

greater degree of certainty and expedition in the determination of planning judicial reviews.

2.3 In a number of decisions of this court the requirements of the section have been analysed in some detail and it is clear that a number of tests must be met:-

(i) There must be an uncertainty as to the law in respect of a point which has to be of exceptional importance; see for example *Lancefort v. An Bord Pleanála* [1998] 2 I.R. 511.

(ii) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case. *Kenny v. An Bord Pleanála (No. 2)* [2001] 2 I.R. 704. It is the case that every point of law arising in every case is a point of law of importance. *Fallon v. An Bord Pleanála* [1992] 2 I.R. 308. That, of itself, is insufficient for the point of law concerned to be properly described as of "exceptional public importance".

(iii) The requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. See *Kenny (No. 2)*. On that basis, even if it can argued that the law in a particular area is uncertain, the court may not, on the basis, inter alia, of time or costs, consider that it is appropriate to certify the case for the Supreme Court. *Arklow Holidays Limited v. Wicklow County Council and Others* (Unreported, High Court, Murphy J., 4th February, 2004).

2.4 This latter case involved a judgment in an application in proceedings relating to the same development as that with which I am concerned and involved an application for a certificate in respect of a refusal to give leave to seek judicial review in relation to the original decision of the planning authority in respect of this development. The proceedings with which I am concerned relate to the decision of the Board in the same planning process.

2.5 It is also clear that the point of law concerned must arise from the decision: see *Ashbourne Holdings Ltd v. An Bord Pleanála* (Unreported, High Court, Kearns J. 19th June, 2001), *Kenny (No. 2) and Begley and Clarke v. An Bord Pleanála* (Unreported, High Court, O Caoimh J., 23rd May, 2003)".

3.2 A comprehensive distillation of the principles to be derived from the significant body of case law in this area can also be found in the judgment of MacMenamin J. in *Glancre Teoranta v. An Bord Pleanala* [2006] IEHC 205 in the following terms:-

"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.

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 (Kenny).

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 (Raiu).

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."

3.3 I do not understand there to be any significant dispute as to the applicability of the above principles. However, there are certain issues concerning the application of those principles to the facts of this case, and certain other general issues which arose in course of argument which it will be necessary to address in the context of applying those principles to the certification question which I now have to determine. I now turn to the application of those principles to the facts of this case.

4. Application to the Facts of this Case

4.1 I should firstly note that one issue appeared to arise on the written submissions filed on behalf of Arklow Holidays which was not pursued at the hearing before me. In order to understand that issue it is important to emphasise that, for the reasons which I set out at para. 7.3 of the substantive decision, I came to the view that it was not appropriate to determine the substantive issues in respect of which leave had been given. In its written submissions, Arklow Holidays appeared to suggest that those issues, having been before the court although not determined, could be the subject of an appropriate certificate. This proposition was opposed, in particular, by Counsel on behalf of the Board. However the point was not, in my view quite properly, pursued at the hearing. It is clear from the provisions of s. 50 of the 2000 Act, to which I have referred, that the point of law to be certified must arise out of the

"decision" of the court. An issue concerning a point which the court did not have to consider in its judgment because it did not, by reason of findings, whether of fact or of law, on other issues, arise, cannot be said to be derived from the decision of the court. Subject to the caveat which I expressed in *Harding v. Cork County Council* [2006] IEHC 450 at paras. 2.2 – 2.4 (which have no application in this case) it does not seem to me that a point which the court did not decide in its judgment could possibly form the basis of a proper certificate to appeal.

4.2 In that regard Counsel for the Board adopted a passage from p. 641 of the 2nd Ed. of *Simons* on "*Planning and Development Law*" in the following terms:-

> "First, in determining whether or not to grant leave to appeal, regard must be had to the decision itself, and not to the merits of the arguments which resulted in that decision. This would appear to suggest that the High Court should not attempt to predict what the outcome of the appeal might be; instead, it should take the appellant's case at its height and consider whether or not the point of law is of exceptional public importance.
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> Secondly, it is the decision of the High Court which must give rise to the point of law. Thus, if the decision of the High Court was based on narrow grounds (in particular, on factual grounds) it may be that no point of law can properly be isolated. To put the matter another way, it is not permissible to allow an appeal on a moot or on theoretical points of law which might have arisen for discussion or consideration during the Hearing, but which did not go the actual determination or decision of the High Court. The point of law must be "of" or in some way "contained in" the decision or determination of the first instance, and must at the same time transcend the case itself to meet the requirements of exceptional public importance and public interest".

4.3 I agree that both of the propositions identified in that passage correctly state the law. Firstly, this court's view as to the strength or weakness of the argument in favour of the intending appellants point of view on the issue concerned, is not relevant in determining whether it is an important point of law or not. Subject to the caveat that no certificate could be given where the law is clear and the intending appellant has, therefore, lost on the basis of an application of clear and established legal principles to the facts of his case, I agree that the court should not attempt to consider what the chances of the intending appellant on appeal might be.

4.4 As I have already pointed out, the second point made in the passage which I have cited also conforms with the existing jurisprudence.

4.5 However, it seems to me that the first of the points made in *Simons* is of some relevance to this case. The question which is sought to be referred is, in essence, as to the applicability of the rule in *Henderson v. Henderson* to planning cases. Obviously, for the reasons which I have set out in the substantive judgment, I have come to the view that it is so applicable and largely applies in the same way as it would in any other public law challenge. However the whole basis on any appeal is that this court may be wrong and I have to assess the grant or refusal of a certificate in this case on the basis that I may be wrong unless, perhaps, it might be said that the law was so clear that there would be no legitimate basis for requiring a ruling from the Supreme Court on this matter.

4.6 It does not appear to me that I could hold that the law on the point in issue in this case is clear. It must be recalled that the question of the applicability of the rule in *Henderson v. Henderson* to this case was raised by counsel on behalf of Arklow Council at the leave stage. As pointed out both in the leave judgment and in the substantive judgment, I was not satisfied at the leave stage that the application of the rule to a two stage process involving, at least to some extent, different parties, was clear cut. It was for that very reason that I was not satisfied that the possible application of the rule in *Henderson v. Henderson* was sufficient to deprive Arklow Holidays of leave to seek judicial review on points which would otherwise be regarded as giving substantial grounds for its challenge. I was not, therefore, satisfied that the law was clear. While I have come to my own view, as expressed in the substantive judgment, as to the applicability of the rule *in Henderson v. Henderson* to successive challenges in what might substantively be regarded as the same planning process, that does not take away from the fact that I was, at the leave stage, not persuaded that the matter was clear. In those circumstances it does not appear to me that I could appropriately determine that the law was now so clear as to preclude a certification on that ground alone.

4.7 So far as the importance of the ground itself is concerned I am persuaded by the argument of counsel for Arklow Holidays that the application of the rule *in Henderson v. Henderson* in planning cases not only transcends the facts of this individual case (which is fairly obvious) but also is of exceptional public importance. If the view which I have come to is correct, then any party who challenges a decision of a planning authority must do so in the knowledge that a failure to raise any point in that challenge may preclude that party (no matter how meritorious the point might be) from raising the point in any subsequent challenge to a decision of the Board in relation to the same planning application, subject only to being able to satisfy the court that some discretionary factor exists which ought lean against precluding such a second challenge. There are obviously sound reasons of policy why it might be said that such a restriction should exist. However that does not mean that the application of the rule would not amount to a significant restriction on what might otherwise be regarded as a right of access to the courts, and in those circumstances it seems to me that the point sought to be raised is one of exceptional public importance, sufficient to meet the first leg of the test.

4.8 It will be recalled that one of the points raised on behalf of Arklow Holidays at the application for a certificate in respect of the leave decision was determined to be a point of exceptional public importance. However for the reasons which I set out in that judgment I determined that it was not in the public interest that the issue should be certified in that case. A similar argument is raised on behalf of Arklow Council to this application and it is, therefore, necessary to turn to the question of whether it is in the public interest to certify the different point of law now raised at this stage.

5. Is a Certificate in the Public Interest

5.1 My reasons for declining a certificate on that basis in respect of the leave application were set out at para. 5.3 of the relevant judgment in the following terms:-

> "However, in the light of the authorities to which I have been referred, it seems to me that I must ask a further question which is as to whether it is, nonetheless, in the public interest to grant the certificate sought. I have come to the view that it is not. The public interest, in an issue such as this, needs to take into account the nature of the development proposed and the potential consequences of a significant further delay in the matter being finally disposed of before the courts. While it is undoubtedly the case that issues and questions concerning the public nature of the project involved are not necessarily decisive (it would be wrong to say that the public importance of the project concerned must necessarily outweigh all other considerations in the case), such factors are, nonetheless, in my view, matters which have to be taken into account by the court in assessing whether it is in the public interest to grant the certificate. Having regard, on the one hand, to the importance of the issue raised by counsel on behalf of Arklow and, on the other hand, to

> the importance of the project and the consequences of the likely delay that would be incurred, I have come to the view that it would not be in the public interest to grant a certificate notwithstanding my finding that the point of law raised by counsel on behalf of Arklow is a point of law of exceptional public importance".

5.2 In a subsequent decision in this case [2006] IEHC 280 (which concerned whether the refusal to grant a certificate could, in itself, be the subject of a certificate)

I explained further my reasoning, at para. 2.7 in the following terms:-

> "Nothing in the certification judgment should be taken as indicating a view as to the merits or otherwise of the project in dispute or that such merits were or could be a factor in the exercise of the courts discretion. However what the judgment does say is that an early resolution of legal questions concerning all projects is an important aspect of the statutory regime and, in my view, such a policy applies with particular force in respect of major public infrastructural projects. In those circumstances, without taking any view as to the merits or otherwise of the project itself, I took into account the undoubted major public infrastructural nature of the project involved in this case and the importance of bringing finality to the questions concerning the validity of it, as a factor to be properly taken into account and weighted against, on the facts of this case, the position of Arklow which sought to rely on what I described as a technical argument and one in respect of which Arklow had suffered no prejudice".

5.3 Counsel for Arklow Council, not surprisingly, suggests that the same circumstances apply, if anything with greater force, at this stage and that a similar result so far as the point now raised is concerned should occur. Counsel for Arklow Holidays seeks to suggest two bases upon which I should not reach a similar conclusion at this stage.

5.4 Counsel for Arklow Holidays places a reliance on a point made by the author of *Simons* at paras. 11-376/7 of the 2nd Ed. which suggests that the issue of the importance of major infrastructural projects cuts both ways, in that such projects have the potential to have a major effect on the environment. I accept that that point is well made. However it is not clear to me that that point could have been of any great weight in respect of the previous application in this case. In that context it is also important to refer to a comment made by the author of Simons at para. 11-377 where the description of the point sought to be certified at the leave stage as "technical" is considered. The author notes that the point (which concerned an allegation that certain procedures relating to plans had not been properly carried out in the course of bringing the original planning application to the planning authority in this case) was described in the relevant judgment as "technical". The fact that the point could, as was pointed out in the judgment, arise in a significant number of cases, seemed to the author to render it anomalous to regard the point as a technical one. I am afraid I cannot agree. Whether a point is properly described as technical or otherwise does not depend on whether it would arise in one or many cases. Nor, it should be said, does the fact that a point may be a technical one prevent it from providing a legitimate basis for judicial review if it be a good point. It is, of course, the case that whether a point (technical or otherwise) be a good point or a bad point is a matter for the Supreme Court to determine on appeal if a certificate is granted. Describing a point as "technical" does not express any view as to whether it might or might not be a good point.

5.5 However, it seems to me that the term "technical" describes a point which could have had no possible bearing on the merits of the process under review other than formal compliance. There was, at the stage of the leave application, no evidence that any party had suffered any prejudice whatsoever as a result of the alleged non-compliance. It was not only that Arklow Holidays conceded that they had suffered no prejudice (and indeed they could not have done otherwise than to so concede having regard to their active participation in the process) but also no other party had come forward who indicated that their involvement in the process had been in any way impaired. There will, of course, be many cases where it will not be possible to say for certain what would have happened had a technical failure to comply with proper process not occurred. A party may be able to establish that by reason of such a failure (for example in relation to advertising, notices, time periods or the like) such party was deprived of an appropriate opportunity to involve themselves in the process, or to participate properly in that process. It may be unlikely, on the facts of any individual case, that the involvement of such a party would have made any difference but nonetheless such an eventuality cannot be ruled out. Such a failure could not, therefore, in my view, be regarded as technical. Some cases involving a procedural failure retain at least the possibility that there may have been a resultant interference with the proper scrutiny of the project concerned. After all the process as set out in the legislation and the regulations is presumably designed for the purpose of facilitating fair and reasonable involvement (including public involvement) in the scrutiny of the planning application concerned. Where the process is not properly complied with then it should not be assumed that the relevant failure does not or did not matter. However where, on the facts of an individual case, there is no evidential basis for concluding that there was, in fact, any lack of scrutiny, the failure may properly be described as "technical". As I have pointed out, it does not follow that the point concerned may not, nevertheless, be decisive in the proceedings. The fact that it is technical in the sense in which I have used the term can, however, in my view, in an appropriate case, be set against the importance of bringing finality of the decision making process in relation to major projects where, precisely because there has been no established failure to properly scrutinise the project itself, it may not be in the public interest to permit further delay so as to allow the Supreme Court to determine the "technical" point concerned.

5.6 An example will suffice. The planning regulations require that where a second planning application in respect of the same premises is made within a short period after an earlier application, the relevant planning notice needs to be distinctively coloured so as to draw to the attention of parties who may be interested, the fact that there may be a new (and potentially different) application under consideration. In an ex-tempore ruling in a separate case I quashed a planning permission granted where the evidence suggested that the second notice did not conform with the colouring requirements of the regulations. On one view such a point might be regarded as "technical". On the other hand the whole purpose of the "technical" requirement concerned is that third parties may be alerted to the existence of a new planning application and may involve themselves in that process if they so desire. What effect their involvement might have had is not relevant. On the facts of that case, there was a party who was said to have been misled by the absence of an appropriately coloured notice.

5.7 It is only where the "technical" failure could not, on the facts of an individual case, have affected anything substantive in the planning process that, in my view, a point could legitimately be described as "technical" in the true sense of the word.

5.8 While it is, therefore, of course, true to say that a major infrastructural project requires proper scrutiny, all the more because of the potential environmental effects of such a project, it also needs to be taken into account that the point relied upon by Arklow Holidays in respect of the certification application at the leave stage, even if it were found to be a good point, could not have led to any additional scrutiny of the project itself. It might be said that there could, theoretically, have been other parties, not before the court, who might have been misled by a technical failure to comply with the regulations. While there is a sense in which that is true, a court can only deal with the facts before it. The possibility remains that there may be technical failures in the very many planning applications which never come before the courts at all because no one seeks to challenge them. It is the case that there was, in these proceedings, no party before the court who maintained that it had been, in any way, prevented from seeking to fully involve

itself in the planning process in any manner whatsoever, by what was alleged to be a technical failure in the planning process. In those circumstances, there was no basis for suggesting that there was any failure of scrutiny of the project resulting from the alleged technical failure. In those circumstances, while agreeing with the general proposition put forward by counsel for Arklow, adopting the relevant passages from *Simons*, to the effect that the court must also have proper regard to the importance of ensuring that projects which have the potential to have a major impact on the environment are properly scrutinised, nothing in that argument persuades me that the balance, on the facts of the application for a certificate in respect of the leave application, was not properly determined.

5.9 However, counsel for Arklow Holidays also makes the point that the circumstances on this certification application are quite different. The point now sought to be certified is far from a technicality. If I am wrong in the view which I have taken concerning the application of the rule in *Henderson v. Henderson* then it is clear that the court will have to go on to consider a number of substantive points which would involve subjecting significant aspects of the process which led to the planning permission in this case to scrutiny. Some of those points are such that, if they be correct, it is at least possible that had the process been properly conducted, the planning permission (or, perhaps, in relation to some of the points, the permission in its existing form) might not, at least in theory, have been given. In those circumstances it seems to me that both sides of the balance identified in the previous certification application at the leave stage have changed. The requirement that projects which have the potential to have a significant environmental impact be subjected to close scrutiny is, on this application, of some significance, precisely because the point raised is not technical.

5.10 I have considerable sympathy not only for Arklow Council but also for the population whose needs are to be serviced by the proposed project. There have been protracted delays which have been encountered in the planning process and its associated legal challenges. I have already commented (as have a number of colleagues) on the fact that in many cases (and this seems to be one of them) the so called "tightening up" of the provisions concerning leave and certification for appeal introduced for the purposes of expedition have, in fact, had the opposite effect. Notwithstanding that unfortunate state of affairs it seems to me that the point raised is one of exceptional public importance and that it is in the public interest that it be certified and I propose so to do.

5.11 I should also deal with an issue raised by counsel on behalf of the Board who argued that many of underlying points which will have to be determined in the event that the Supreme Court decides that the rule in *Henderson v. Henderson* does not prevent a substantive consideration of this case, are points which are no longer of general application, because of changes in the law both at domestic and EU level in the period since the planning application in this case commenced. Whether that situation actually pertained was contested by counsel on behalf of Arklow Holidays. However the issue does not seem to me to be relevant. As was, in my view correctly, argued by counsel for the Board, the only point which the court can certify as a point of exceptional public importance, is a point decided in the judgment sought to be appealed. Either the point concerned meets the statutory criteria for a certificate or it does not. If it does, then a certificate should be granted irrespective of the importance or otherwise of additional points which might come into play in the event that the appeal is successful. It is obviously the case that, in the event that Arklow Holidays successfully persuades the Supreme Court that the rule in *Henderson v. Henderson* does not apply to some or all of the issues raised in this case, it will be necessary for a number of additional issues to be determined. It does not, however, matter whether those issues are ones of exceptional public importance. The fact that those points might, in the event of a successful appeal, fall to be determined, would stem from the fact that the Supreme Court took a different view of the application of the rule in *Henderson v. Henderson* than I did. It is that question which is of exceptional public importance and in respect of which it is in the public interest to grant a certificate. The importance or otherwise of the points which might come into play in the event of a successful appeal are not, therefore, relevant to the certification issue.

5.12 Finally some question was raised as to the appropriateness of the inclusion of the points made in the second paragraph of the issue sought to be submitted. I fully agree that the issues raised in that second paragraph would not, of themselves, warrant a certificate. However those points seem to me, properly considered, to form an integral part of what is really one overall issue, which is as to the applicability of the rule in *Henderson v. Henderson* in planning cases including, if it be applicable in general terms, the principles which apply to the exercise of any discretion.

5.13 In those circumstances I propose granting a certificate in the terms sought.