THE HIGH COURT

JUDICIAL REVIEW

[2021] IEHC 146

[2020 No. 248 J.R.]

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

AND

IN THE MATTR OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT, 2016

BETWEEN

DUBLIN CYCLING CAMPAIGN CLG

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DUBLIN CITY COUNCIL AND OXLEY HOLDINGS LIMITED

NOTICE PARTIES

JUDGMENT (No. 2) of Mr. Justice Denis McDonald delivered on 25th February, 2021

The Application before the Court

1. This judgment addresses the application made by Oxley Holdings Limited (the second named notice party) pursuant to s. 50A(7) of the Planning and Development Act, 2000 ("*the 2000 Act*") for leave to appeal to the Court of Appeal in respect of a point of law which Oxley maintains arises out of the judgment ([2020] IEHC 587) given by me in these proceedings on 19th November, 2020. For the reasons outlined in that judgment, I granted an order of certiorari quashing the decision of the respondent ("*the Board*") made on 5th February, 2020 to grant planning permission pursuant to s. 9(4) of the Planning and Development (Housing) and Residential Tenancies Act, 2016 ("*the 2016 Act*") for the construction of a development comprising 741 "*build-to-rent*" apartments, retail space and associated works on lands to the rear of Connolly Station, Dublin 1. The application for leave to appeal is opposed by the applicant. However, the applicant makes the case, in the alternative, that, if I am minded to grant a certificate for leave to appeal in respect of the issue identified by Oxley, I should reformulate the question in the manner suggested by the applicant (as described below).

2. The relevant legal principles governing an application of this kind are addressed in more detail below. At this point, it is sufficient to note that, having regard to the provisions of s. 50A(7) of the 2000 Act, if any questions are to be certified for the purposes of an appeal to the Court of Appeal, the court must be satisfied as to two matters:-

   (a) In the first place, the court must be satisfied that its decision involves a point of law of exceptional public importance; and

   (b) secondly, the court must be of the view that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

The question proposed by Oxley

3. Oxley proposes that the following point of law arises out of my November judgment and meets the statutory criteria set out in s. 50A(7):-

"Whether, in reckoning the quantum of "other uses" for the purposes of the definition of "strategic housing development" in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, "other uses" may include a use for which planning permission is neither sought nor granted."

The Point proposed by the Applicant in the event that the Court is satisfied that the Statutory Criteria are met

4. While the applicant strongly opposes the application made by Oxley, the applicant proposes that, if the court is satisfied that the statutory criteria are met, fairness requires that the question posed for consideration by the Court of Appeal should be reformulated as follows:-

"Whether the Honourable Court was correct to find:

(a) that the Board did not grant planning permission for the development of the Car Park, and,

(b) that the Car Park constituted "other uses" for the purposes of the Planning and Development (Housing) and Residential Tenancies Act 2016?"

Relevant Background

5. In order to understand how the issue of a potential appeal arises, it is necessary to briefly describe the relevant factual and legal background. The 2016 Act established an expedited process for the consideration of applications for planning permission relating to "*strategic housing development*". Where a development meets the statutory definition of "*strategic housing development*", a developer is required, under s. 4(1)(a)(i) of the 2016 Act to apply for planning permission directly to the Board and not to a planning authority.

6. In order to determine whether an application for permission has to be made under s. 4(1)(a)(i), it is necessary to consider whether the development can be said to constitute "*strategic housing development*" for the purposes of the 2016 Act. That term is defined in s. 3 of the 2016 Act which provides (insofar as relevant for present purposes) that it comprises:-

"… the development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses…

…which may include other uses on the land, the zoning of which facilitates such use, but only if—

(i) the cumulative gross floor space of the houses… comprises not less than 85 per cent… of the gross floor space of the proposed development… and…

(ii) the other uses cumulatively do not exceed—

(I) 15 square metres gross floor space for each house… in the proposed development… subject to a maximum of 4,500 square metres gross floor space for such other uses in any development…"

7. In its statement of grounds, the applicant contended that the proposed development by Oxley adjoining Connolly Station does not fall within the definition of strategic housing development prescribed by s. 3 on the basis that part of the development comprised car parking for the use of CIE which, when taken with the "*other uses*" proposed as part of the development, would exceed the maximum 4,500 metres allowed for uses other than housing. On that basis, it was argued that Oxley was precluded from using the fast track planning procedures available under the 2016 Act and that the only avenue open to Oxley was to make an ordinary planning application to Dublin City Council under s. 34 of the 2000 Act.

8. In the alternative, the applicant contended that, the Board had unlawfully granted planning permission for a car park that did not, in fact, form part of the development. In my judgment of November, 2020, I dealt with these issues in reverse order. I first considered the documents submitted by Oxley as part of its planning application together with the documents generated by the Board itself. I came to the conclusion, on the basis of those documents, that, notwithstanding confusing and contradictory statements in the material submitted to the Board on behalf of Oxley, no application had, in fact, been made by Oxley for permission to use part of the development as a carpark and that the Board had not granted permission for such use. Having reached that finding, I then considered the case made by the applicant that carpark use comprised part of the development.

9. In order to understand the unusual circumstances of this case, I should explain that, in the plans for the proposed development submitted by Oxley to the Board, the proposed housing development (comprising a number of residential apartment blocks) are shown suspended above the railway sidings (which will be retained at ground level) immediately adjoining Connolly Station. For that purpose, it will be necessary to construct what Oxley described in its affidavits sworn in these proceedings as an "*interstitial deck*" which, on the one hand, is required to protect the railway sidings and, on the other, is to provide the necessary support for the residential development above. The "*interstitial deck*" was not counted as a non-residential use for the purposes of the proposed development although the plans and drawings submitted with the application clearly suggested that it is intended to be used as a car park. In addition, the Board was provided with an opinion of counsel which explained that it was a contractual requirement of Oxley's agreement with the landowner, CIE, that a car park would be made available for its use. In this context, it should be noted that, if the proposed development (in conjunction with other non-residential development to be constructed as part of the same masterplan) goes ahead, CIE will lose the benefit of the surface car park to the east of Connolly Station which currently exists for the use of CIE and Irish Rail employees and the public visiting the station. In the opinion of counsel, it was suggested that planning permission was not required for the use of the deck as a car park. This was on the basis that it constituted an existing use (apparently by reference to the surface car park currently in place). Relevant extracts from the opinion of counsel are quoted in para. 50 of my November, 2020 judgment. At this point, it is sufficient to note that, in the opinion, counsel stated that *"there is no question that [Oxley] intends to do anything other than comply with its*

obligation to the owner of the lands and… it is a condition precedent to the making of an application that the owner of the lands… will require to be satisfied that its rights are protected".

10. Counsel also stated, in the opinion, that:-

> *"These existing arrangements do not form part of the application… to be made. The existing carparking is the subject of the agreement, is a valid and subsisting operation and there is no requirement that… these arrangements be included with the application. The existing established use proposed is not included in the application nor is it necessary that it be included because the necessary authorisation to allow this activity is already in place."*

11. In its statement of opposition delivered in the proceedings, Oxley made the case that the application for the proposed development requested permission only for the residential blocks and did not request permission for any of the other blocks to be constructed as part of the masterplan. Paragraph 20 of the statement grounds confirmed that the other blocks would be the subject of an "*ordinary*" application for planning permission under s. 34 of the 2000 Act. In para. 21 of the statement of opposition, it was explained that Block B (which comprises the proposed residential development) oversails the railway sidings and that the residential blocks will be supported by a steel truss support arrangement at third-floor level. That steel truss arrangement is to protect the railway sidings and to provide the necessary support for the residential development above. It was confirmed that the application for the proposed development included this structural support.

12. In para. 22 of the statement of opposition, it was explained that the bridging trusses incorporate a structural depth of three to four metres which creates a "*substantial depth or podium*" which Oxley labelled, for the purposes of these proceedings, the interstitial deck. It should be noted that it was not so described in the documents before the Board. In para. 22 of its statement of opposition, Oxley said that the masterplan proposes that the deck:-

> *"might be used to accommodate car parking. However, the application… did not request permission to use that structure for carparking." (emphasis added)*

13. In contrast, in para. 23(c) of the statement of opposition, it is expressly pleaded that it is proposed that the car parking spaces for the use of CIE "*will be accommodated upon the interstitial deck*". In the same subparagraph, it is pleaded that part of the interstitial deck is proposed as part of the s. 34 application. However, it should be noted that, as confirmed by the affidavit of Fred Logue sworn on 1st July, 2020, the application made to Dublin City Council under s. 34 of the 2000 Act by Oxley did not apply for planning permission for the use of "*interstitial deck*" under the residential blocks as a car park.

14. The documents submitted to the Board on behalf of Oxley in support of its application provided confusing information in relation to whether the proposed use of the deck as a car park formed part of the application for permission. For example, as noted in para. 65

of my November judgment, in the response made by Oxley's agents to questions posed by the Board in an opinion issued under s. 6(7) of the 2016 Act, it was stated that: "*as part of the SHD submission, 135 CIÉ spaces are accommodated within the Block Podium deck*" while, on the other hand, the same paragraph of the document stated that the car park spaces earmarked for CIE "*cannot form part of the proposed development and accordingly cannot be included as a use for the purposes of calculating the extent of other uses*". In the masterplan document submitted with the application, it was stated, on p. 5 that the deck created an opportunity to accommodate car parking spaces for CIE of which 135 spaces were expressly stated to be "*part of the SHD application*". Furthermore, the plans for the construction of the residential development specifically included not just the construction of the deck but also a ramp leading up to it and, furthermore, showed the car park laid out with 125 car parking spaces in grid formation. This was also very clearly shown in section drawings submitted as part of the application. As explained in para. 64 of my November judgment, there were representations of cars shown parked on the deck in the northeast to southwest section drawing submitted with the application. In the northwest to southeast section drawing, there was also a representation of a car on the ramp leading up to the deck. There was no suggestion in the course of the proceedings that the ramp to the carpark was a necessary structural element or that any purpose was served by this section of the ramp other than to provide vehicular access to the deck. The plans and drawings are of particular importance given the terms of the Board Order in this case which referred to the plans in a number of places:-

(a) In the first place, the opening words of the Board Order stated that the application for permission was "*in accordance with plans and particulars lodged… on the 16th day of October 2019*…";

(b) Secondly, in the curial part of the order, the Board Order stated that it was granting permission *"for the above proposed development in accordance with the said plans and particulars… and subject to the conditions set out below*"; and

(c) Condition 1 attached to the Board Order required that the proposed development "*shall be carried out and completed in accordance with the plans and particulars lodged with the application…".*

15. Having regard to the approach taken by the Supreme Court in *Re X.J.S. Investments Ltd* [1986] I.R. 750 and *Lanigan v. Barry* [2016] 1 I.R. 656, I sought to review the relevant documents leading up to and including the decision of the Board in this case in order to determine how they would be understood by a reasonably informed member of the public without legal training. In para. 68 of my November judgment, I indicated that the ordinary reasonably informed member of the public would have difficulty in attempting to make sense of the conflicting aspects of the materials before the Board. However, I expressed the view that, ultimately, such a member of the public would reach the conclusion that the Board, by its decision, did not go so far as to purport to grant permission for the use of the deck as a car park. As outlined in my November judgment,

it was not a straightforward process to get to that point. In para. 70 of my November judgment, I explained:-

> *"Thus, while it would, by no means, be an easy or straightforward exercise for the ordinary and reasonably informed member of the public to cut through the contradictions in the material before the Board, I believe such a member of the public would ultimately come to the conclusion that Oxley had not sought and the Board had not granted permission for the use of the deck as a car park. That said, I believe the documents would clearly convey to the ordinary reasonably informed member of the public that Oxley intended to use the deck as a car park in accordance with its contractual obligation to CIÉ. Counsel for Oxley argued that the deck, as a structural element, should be regarded as having a "nil use". However, I can see no basis in the material before the court to suggest that the deck should be considered to have a "nil use". On the contrary, the plans… and the other materials before the Board all told the Board that the intended use of the deck is as a car park albeit one which Oxley has been advised does not require a separate planning permission…"*

16. I also expressed the view, in para. 71 of my judgment that, on the basis of the documentation before the court, it seems clear that the deck is earmarked for use as a car park and that it was a precondition to the consent of CIE to the making of the application for planning permission that the deck would be so used.

17. Against the backdrop described above, I then examined the question as to whether the development proposed by Oxley falls outside the definition of "*strategic housing development*" in s. 3 of the 2016 Act. My conclusions in relation to that issue are set out in paras. 88 to 96 of my judgment. In para. 88, I expressed the view that, in many, if not most, cases, the question whether a particular use forms part of a development will be answered by reference to the terms of the application for planning permission. However, I also indicated that I could see nothing in the definition of "*strategic housing development*" which necessarily means that the development must always be considered solely by reference to the scope of the permission sought. I drew attention in this context to the way in which the definition expressly envisages that a development may include (subject to compliance with the condition as to maximum floor area) uses other than residential use. On that basis, it seemed to me that the definition clearly envisages that, in the specific context of the 2016 Act, consideration is required not only of the works of construction but also of the uses which are intended to be made of the structures so constructed. I stated that:-

> *"In particular, where the structure is to include uses other than residential use, the Oireachtas clearly envisaged that consideration had to be given as to the extent to which those uses are intended to take place on that structure. Where those other uses are intended to occupy more than 4,500 square metres gross floor spaces, the Oireachtas plainly intended that this fact would take a development outside the*

ambit of the definition of "strategic housing development" and therefore outside the scope of the 2016 Act."

18. For the purposes of the second question, I had to consider whether the development proposed by Oxley includes "*other uses*". In para. 90 of my judgment, I remarked that, notwithstanding the level of debate which took place at the hearing, this seemed to me to be a fairly straightforward exercise involving a consideration of the underlying facts. In para. 91 of my judgment, I drew attention to the fact that the Board was informed in the documents submitted by Oxley that, although no application was being made for planning permission for carparking on the deck within the housing development, the deck would be used for this purpose and the reason why it was not included in the application was not because it did not form part of the development but because it allegedly constituted an existing use and, moreover, that Oxley was legally obliged to provide these spaces under the terms of the development agreement in place with CIE. Against that backdrop, I formed the view that it was implausible to suggest that the proposed use of the car park does not fall, as a matter of fact, within the ambit of "*other uses on the land*" included in the proposed housing development. The materials before the Board clearly indicated that the deck is to be used as a car park and that the deck in question is an essential structural component of the residential development. In those circumstances, I expressed the view that it is impossible to see how it could be suggested that this use (which is not merely aspirational but regarded as necessary in order to comply with an existing contractual obligation owed by Oxley to CIE) is not included in the proposed residential development comprised in Block B.

19. On the basis summarised above, I came to the conclusion, in para. 96 of my November judgment that the proposed car park deck is a use which is included in the proposed residential development and that the subjective declaration by Oxley that it does not form part of the development is not borne out by the facts. I concluded that the car park use falls within the scope of "*other uses"* in the definition of "*strategic housing development*" in s. 3 of the 2016 Act. In circumstances where the floor area of the car park, in conjunction with the other non-residential uses proposed, clearly exceeds 4,500 square metres gross floor space, I formed the view that the condition as to the maximum allowable gross floor space permitted for "*other uses*" by para. (ii) of the definition had been exceeded and that, accordingly, the proposed development did not fall within the definition of "*strategic housing development*" in s. 3. On that basis, I came to the conclusion that the Board had no jurisdiction to grant permission for the development under s. 9 of the 2016 Act.

The principles applicable to an application under s. 50A (7)

20. The principles which govern an application of this kind are well established and were summarised by MacMenamin J. in *Glancré Teo v. An Bord Pleanála* [2006] IEHC 250. Not all of the principles identified by MacMenamin J. are relevant for the purposes of this case. Those principles which are relevant for present purposes are the following:-

(a) The requirement in s. 50A (7) that the proposed point of law be of exceptional public importance is a significant additional requirement. It is not enough that a point of law emerges from the case;

(b) The jurisdiction to certify must be exercised sparingly;

(c) There must be some element of uncertainty such that it is in the common good that the law be clarified so as to enable the courts to administer that law in future cases;

(d) 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;

(e) The requirements requiring "*exceptional public importance*" and "*desirable in the public interest"* are cumulative requirements. Although they may overlap, they require separate consideration by the court;

(f) Uncertainty cannot be imputed to the law by the simple mechanism of raising a question as to the point of law. The uncertainty in question must arise in the daily operation of the law in question; and

(g) Some affirmative public benefit must be identified arising from the proposed appeal.

21. In light of the thirty-third amendment to the Constitution (which postdates the decision in *Glancré*), it is now also a requirement, as a consequence of the decision of the Supreme Court in *Grace & Sweetman v. An Bord Pleanála* [2017] IESC 10, that the court should have regard to the thirty-third amendment and the enactment of the Court of Appeal Act, 2014 and the court should bear in mind the consideration that, while a direct appeal to the Supreme Court under the "*leapfrog*" provisions of Article 34.5.4 is potentially open, an appeal to the Court of Appeal should remain "*the more normal route for appeals from the High Court".*

22. It is, therefore, necessary to consider, by reference to these principles, the question posed by Oxley, in the first instance, and, if I conclude that this question should be certified for the purposes of an appeal, I must then consider whether the question should be reformulated in the manner suggested by the applicant or whether any other reformulation is required.

Does the Question arise out of the November Judgment?

23. Logically, it seems to me that the first of the *Glancré* principles to be considered is whether the question posed by the Board arises out of my November judgment. In my view, there is no doubt that the question proposed by Oxley arises out of the judgment given by me in November, 2020. As counsel for Oxley noted, in the course of the hearing of the present application, I held at para. 70 of my November judgment that a member of the public would ultimately come to the conclusion that Oxley had not sought and the Board had not granted permission for the use of the deck as a car park. On that basis,

Oxley proposes to submit to the Court of Appeal that it follows that car parking did not form part of the "*strategic housing development*" within the meaning of s. 3. Furthermore, in para. 88 of my judgment, I expressed the view that I could see nothing in the definition of "*strategic housing development*" which necessarily means that the development must always be considered solely by reference to the scope of the permission sought. I expressed the view that the definition envisages that, in the specific context of the 2016 Act, consideration is required to be given not only to the works of construction proposed but also to the uses which are intended to be made of the structures so constructed. I further expressed the view that the Oireachtas clearly envisaged that consideration has to be given as to the extent to which those uses are intended to take place on the structure proposed. In these circumstances, it seems to me that the question proposed by Oxley arises out of my judgment.

Is the Point proposed of Exceptional Public Importance?

24. The next issue to be addressed is whether the first of the two statutory criteria laid down by s. 50A (7) has been satisfied by Oxley, namely that the point proposed by it is of exceptional public importance. In this context, it is submitted on behalf of Oxley that:-

    (a) The operation of the 2016 Act is a matter of urgent public concern having regard to the housing crisis that it was enacted to address;

    (b) Secondly, Oxley submits that the definition of "*strategic housing development*" is a central concept around which the entire 2016 Act turns such that there can be no more important question in terms of the functioning of the 2016 Act; and

    (c) Thirdly, it is submitted that there is uncertainty in the law and that the High Court, the Board, the developer and the public at large would all benefit from authoritative clarification from the Court of Appeal.

25. There is no doubt that the 2016 Act was enacted in response to the housing crisis and that the Act is designed to facilitate largescale residential developments and to provide a fast-track planning procedure for that purpose. The long title to the Act states that its purpose is to facilitate the implementation of the Government Action Plan for Housing and Homelessness published in July, 2016. As Oxley has identified in its written submissions in support of the present application, that document expressly stated that the accelerated delivery of housing for the private, social and rented sectors is a key priority for the Government. While bearing in mind that the specific point of law must be shown to be of exceptional public importance, I believe that the strategic importance of the 2016 Act is an important (albeit not a determinative) element of the background against which the question of public importance is to be assessed.

26. Having regard to the authorities, a more important issue is whether there is uncertainty in the law which requires an authoritative decision of the Court of Appeal. In this context, counsel for the applicant urged that there is no uncertainty in the law having regard to the terms of the November judgment. Counsel for the applicant highlighted that no contrary decision has been identified by Oxley. According to counsel for the applicant, the

November judgment provides certainty as to the proper interpretation of s. 3. Counsel submitted that, if anything, an appeal would create uncertainty where none currently exists.

27. In addressing the issue of uncertainty, counsel for Oxley referred to the observations of Costello J. in *Callaghan v. An Bord Pleanála* [2015] IEHC 493 in support of a submission that uncertainty can be said to exist even in circumstances such as the present. In that case, as Costello J. noted in para. 13 of her judgment, the applicant argued that the point proposed by him for the purposes of an appeal was *"novel and the law is uncertain because it is a new point raised for the first time (assuming, as I must for the purposes of determining… whether or not to grant a certificate…, that my judgment may be wrong) and therefore, would benefit from a ruling by the Court of Appeal…*". In response, the respondents argued that the law was certain and that the applicant could not impute uncertainty to the law where none exists "*simply by raising an argument which, in fact, the court has rejected"*. This issue was addressed in the following terms by Costello J. in para. 14 of her judgment where she said:-

> *"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… the law may be clear even though there is no decided authority on the point." (emphasis added)*

28. In para. 15 of her judgment in that case, Costello J. expressed the view that she could not conclude that the law is clear simply because no challenge had been brought to the provision in question in the nine years since the relevant provision was in being. In para. 16 of her judgment, Costello J. cautioned that, on an application of this kind, the court should not look at the merits of the arguments which resulted in the decision which it is sought to appeal. In addition, in paras. 17-19, she highlighted that, where the law is still in a state of evolution, a novel point is likely to lead to the conclusion that the law is unclear and that it would be in the public interest that the law be clarified. Ultimately, in para. 22 of her judgment, Costello J. concluded that there was scope to argue that, as a consequence of the decision of the Supreme Court in *Dellway Investments Ltd v. NAMA* [2011] 4 I.R. 1, the law in relation to fair procedures was still evolving. Having regard to the interplay between the evolving law of fair procedures and the point of law sought to be certified by the applicant in that case, Costello J. came to the conclusion that the requirement of uncertainty had been met.

29. In my view, the approach taken by Costello J. is very helpful for present purposes. In the first place, I must assume, for the purposes of this application, that my November, 2020 decision may well be wrong. Secondly, as Costello J. observed in para. 14 of her judgment, there must always be a first case where a point is raised. The 2016 Act has now been in operation for some years and the issue on which the applicant succeeded in this case does not appear to have been raised or debated previously. It is, therefore, an

entirely novel point. It is true that, in contrast to *Callaghan*, there is no evolving jurisprudence in relation to the definition of "*strategic housing development*". However, in circumstances where my decision may well be wrong, I do not believe that it would be correct to suggest that the law is settled by my November judgment. As Costello J. identified in *Callaghan*, there may well be cases where, even without a decision of the court, there is no uncertainty as to the law. Conversely, there may also be cases where the first decision of the High Court on a particular issue does not eliminate uncertainty at least where there is a plausible argument to suggest that it is wrong. In this context, I do not believe that it is tenable to suggest that the argument made on behalf of Oxley as to the correct interpretation of "*strategic housing development*" is not arguable. Moreover, it was an argument that was supported by the Board at the hearing before me.

30. Furthermore, if one were to take to the approach that a decision by the High Court on a novel point of interpretation of a relatively new statutory provision was sufficient to settle the law on that point, there could never be an appeal to the Court of Appeal on the same point. While the intention of the Oireachtas, in enacting s. 50A (7) was to make the decision of the High Court final in most cases, it would completely undermine the operation of the subsection if it could not be invoked even where a party has arguable grounds for suggesting that the first decision of the High Court on a particular point of statutory interpretation is wrong. If that were so, the only remedy for a party unhappy with the decision of the High Court would be to apply to the Supreme Court for leave to appeal. However, as *Grace & Sweetman* shows, an appeal to the Court of Appeal should remain the more normal route for appeals from the High Court even where the "*leapfrog*" provisions of Article 34.5.4 may provide a potential pathway to a party unhappy with a decision of the High Court.

31. In these circumstances, it seems to me that it would be wrong to regard my decision of November, 2020 as having brought certainty to the law in the manner envisaged by MacMenamin J. in *Glancré*. In addition, it seems to me that the issue relating to the interpretation of "*strategic housing development*" in s. 3 of the 2016 Act is a matter of considerable importance having regard to the fact that, where a proposed development constitutes "*strategic housing development*", an application for permission must be made under the 2016 Act. Section 4(1)(a)(i) makes this clear. In such cases, developers do not have the option to apply for permission under s. 34 of the 2000 Act. In my view, counsel for Oxley was correct in his submission, in the course of the hearing of the present application, that the definition of "*strategic housing development*" is a central concept around which the entire of the 2016 Act turns. In such circumstances, it is obviously of critical importance to all concerned, namely the Board, developers and those who wish to object or to make observations in relation to proposed developments, that there should be certainty and clarity as to the law in relation to what constitutes *"strategic housing development*" for the purposes of the 2016 Act. While, as discussed below, the lifetime of that Act is limited, it seems to me that the issue which arises is one which has obvious implications for the daily operation of the 2016 Act between now and the date when the last of the applications submitted under the 2016 Act falls to be determined. In this context, while I do not have any details of the numbers of applications made to the Board

under the 2016 Act, it is clear from the numbers of cases admitted into the Commercial Planning and Strategic Infrastructure list that this is currently a busy area of activity in the planning process and, therefore, the outcome of any appeal to the Court of Appeal will have significant ramifications for the validity of any case in which a similar or related issue arises between now and the date of cessation of operation of the 2016 Act. In these circumstances, it seems to me that the point of law proposed by Oxley satisfies the first of the two statutory criteria, namely, that it is a point of law of exceptional public importance.

Is it desirable in the public interest that an appeal should be taken?

32. The next issue to be considered is whether it is desirable in the public interest that a point of law should be certified for consideration by the Court of Appeal. In this context, it was strongly argued by counsel for the applicant that no useful purpose would be served in certifying a point of law in circumstances where the 2016 Act will cease to apply after 31st December, 2021. Under s. 4(1) of the 2016 Act, applications for planning permission for a strategic housing development are to be made to the Board during the "*specified period"*. For this purpose, s. 3 of the 2016 Act defines the "*specified period*" as meaning the period from the commencement of s. 3 until 31st December, 2019 and *"any additional period as may be provided for by the Minister by order under section 4(2)*". Under s. 4(2), the Minister is empowered to extend the "*specified period*" but this is subject to the overriding requirement that "*any such extension shall not be made in respect for a period after 31 December 2021*". Such an extension was made by order of the Minister up to and including 31st December 2021. Thus, the opportunity to make applications to the Board under s. 4 of the 2016 Act will expire on 31st December, 2021. The applicant argues that it is unlikely that any appeal to the Court of Appeal will be heard and determined in advance of that date. The applicant also argues that, in any event, the fact that the timeframe is now so short means that it is not worthwhile entertaining an appeal. In response, Oxley has argued that new primary legislation might well be introduced to extend the operation of the 2016 Act. Moreover, Oxley has urged that, even if the 2016 Act is not extended in that way, the outcome of any appeal to the Court of Appeal is still capable of having significant repercussions for all of the applications currently pending and for all those which are lodged in the period between now and 31st December, 2021 where a similar or related issue may arise.

33. I have come to the conclusion that, subject to what I say below in relation to the requirement that any appeal by Oxley should be dispositive of the proceedings, it is in the public interest that an appeal should be taken to the Court of Appeal. The point of law clearly has the capacity to affect other cases. Given the scale of strategic housing developments and given the national policy to accelerate delivery of housing by this method which the 2016 Act was specifically enacted by Oireachtas to achieve, I believe that it is clearly in the public interest that an appeal should go forward.

34. However, it is crucial that the outcome of any appeal on the question certified should be dispositive of the proceedings. In the course of his submissions, counsel for the applicant did not accept that, if Oxley were successful in an appeal on the point of law proposed by

it, that would be the end of the matter. Counsel suggested that it would be necessary to consider the matter carefully after the Court of Appeal has given its decision. Counsel for the applicant, in his submissions, also placed some emphasis upon the individual facts of the case as found by me in my November judgment.

35. In my view, it would be wrong to certify a question for the purposes of an appeal unless that question, either on its own, or in combination with some other question, was dispositive of the proceedings. It is well settled that it would not be in the public interest to certify a point of law that would, in any sense, be moot. This emerges from the decisions of Humphreys J. in *S.A. v. Minister for Justice & Equality (No. 2)* [2016] IEHC 646 and of Simons J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820. In my view, in the present case, any issue as to potential mootness can be remedied by an additional question designed to address a specific aspect of this case. I propose, therefore, that, in addition to the question posed by Oxley, the following question should also be certified for the purposes of an appeal:-

> *"Is the answer to that question any different where it is clear from the materials submitted with the application for permission that, in addition to the non-residential uses expressly included in the application, the applicant for permission either (a) intends and/or (b) is contractually obliged to make use of part of the structure of the proposed development for a non-residential purpose."*

36. In my view, if a question in those terms is added, it addresses the concern expressed by counsel for the applicant in the course of the hearing of Oxley's application and ensures that there can be no debate subsequent to the decision of the Court of Appeal as to whether the decision of that court is or is not dispositive of the proceedings. It also seems to me that this question satisfies both of the statutory criteria on the same basis as I have set out above with regard to the question proposed by Oxley. It is therefore unnecessary to repeat that reasoning here.

The alternative formulation proposed by the applicant

37. As outlined, at an earlier point in this judgment, the applicant has submitted, in the alternative and without prejudice to its outright opposition to the certification of any point of law, that, if the court is satisfied that the point of law proposed by Oxley merits certification, the question should be reformulated in the manner quoted in para. 4 above. In the course of the hearing of this application, it was submitted both by Oxley and by the Board that the reformulated question (insofar as it purported to address the alternative case made by the applicant in the proceedings) manifestly did not satisfy the statutory requirements for the certification of a point of law. Both of those parties submitted that, insofar as the court reached its conclusion in relation to the question as to whether the Board did or did not grant planning permission for the development of the carpark, the court did no more than apply well-established principles in accordance with the decisions of the Supreme Court in *Re X.J.S. Investments Ltd* [1986] I.R. 750 and *Lanigan v. Barry* [2016] 1 I.R. 656.

38. In my view, there is considerable force in the position adopted by the Board and by Oxley insofar as the form of the reformulated question proposed by the applicant is concerned. The question posed by the applicant is simply whether the court was correct to find that the Board did not grant planning permission for the development of the carpark. In my view, a question formulated in those terms would not meet either of the statutory requirements set out in s. 50A(7).

39. However, in the written submissions delivered on behalf of the applicant, the case is made that, on the basis of the findings made by me in para. 63 to 67 of the November judgment, there was significant difficulty in applying the *X.J.S*. principles, having regard to the extent of the contradictory material in the papers generated in the course of the application to the Board. In addition, the case is made that the question as to whether the Board had granted planning permission for the carpark was *"inextricably and irreversibly linked with the question posed by the Developer and it follows that, if the Developer's question is deemed by this Court to satisfy the threshold that the Applicant's question should also be certified*". It was also argued that it would be unfair to the applicant if "*its inextricably and irreversibly linked question"* was somehow deemed to lack sufficient importance to be certified. It was argued that s. 50A must be given a constitutional interpretation which takes account of the right of access to the courts. It was also argued that, if the court is persuaded to certify the point proposed by Oxley, the point proposed by the applicant "*cannot fairly be divorced*".

40. It will not normally be enough for the purposes of an application under s. 50A(7) for a party to complain that the High Court did not properly apply established legal principles to the particular facts of the case. However, as Simons J. noted in *Halpin v. An Bord Pleanála* [2020] IEHC 218, there may, nonetheless, be some cases where a point of law of exceptional public importance may emerge from the manner in which well-established principles were applied. In this context, Simons J. referred to the approach taken by the Supreme Court (in the context of applications for leave to appeal to it) in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134 where the court stated:-

> *"It obviously follows from what has just been set out that it can rarely be the case that the application of well-established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.*

However, having said that, the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts of an individual case, the less it will be possible to say that any issue of general public importance arises. There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met."

41. In the present case, there is no doubt but that the *X.J.S*. principles are well established and, ordinarily, their application does not give rise to any exceptional issues. However, as noted above, the applicant has drawn attention to the rather unusual circumstances of this case where, in the material generated in the course of the application to the Board, there were significant contradictions as to whether or not car park use of the deck formed part of the strategic housing development application under s. 4 of the 2016 Act and/or the permission granted by the Board.

42. The applicant has submitted that the interpretation of documents gives rise to a significant legal question in applying the *X.J.S.* test where the relevant material is "*puzzling*" and where it contains such significant contradictions. In this context, the applicant draws attention to the following views expressed by me in my November judgment:-

(a) At para. 65, I referred to the fact that the reasonably informed member of the public would observe that there are contradictory statements in the documentation which would undoubtedly give rise to puzzlement. Some of these contradictions are noted in para. 14 above;

(b) The applicant also highlights that, in para. 67 of the November judgment, I indicated that a consideration of the Board Order read in conjunction with the plans and drawings would, absent anything in the materials submitted to the Board, lead an ordinary and reasonably informed member of the public to understand that the application included the proposed use of the deck for the purposes of a car park. This was, however, contradicted elsewhere in the papers before the Board which would place the *"the ordinary reasonably informed member of the public in a difficult position in trying to understand the effect of the Board Order*";

(c) In the same paragraph of my November judgment, I posed the question whether the statement in a report from McCutcheon Halley, the agents acting on behalf of Oxley, to the effect that permission was not sought for use of the deck as a car park would "*trump the statements elsewhere to the contrary… effect that the 135 car parking spaces form part of the "SHD development"".*

(d) I also expressed the view in the same paragraph that the ordinary reasonably informed member of the public would have "*significant difficulty in trying to navigate his or her way through these inconsistencies in order to arrive at a conclusion as to the true ambit of the application and, in turn, the ambit of the Board Order";*

(e) Again, in para. 67, I drew attention to the difficulty which the ordinary reasonably informed member of the public would have in attempting to make sense of the conflicting aspects of the materials before the Board, but that, ultimately, such a member of the public would reach the conclusion that the Board, by its decision, did not go so far as to purport to grant permission for the use of the deck as a car park; and

(f) The applicant has also stressed that, in para. 70 of my judgment, I indicated that it would be, by no means, an easy or straightforward exercise for the ordinary and reasonably informed member of the public to cut through the contradictions in the material before the Board.

43. Having reflected further on the matter, it seems to me that a question does arise as to whether, in light of the extent of the contradictions in the papers submitted by Oxley in support of its application under s. 4, the *X.J.S*. principles were the correct principles to apply or whether some adjustment to those principles should be made. This is compounded by the fact that the Board Order gives permission for the development to be carried out "*in accordance with the plans and particulars*". As noted in para. 33 of my November judgment, the plans submitted included section drawings of Block B which specifically referred to the deck as the "*car park deck*" and which show the ramp to the car park which is described as "*car park deck access*". Furthermore, as noted in para. 64 of my judgment, drawing number 18135-RKD-B-03-DR-A-1103 shows the deck as a car park with 135 car parking spaces laid out in grid formation with space in between the rows of carparking spaces to allow the movement of vehicles around the deck. When these drawings are read in conjunction with the Board Order and with Condition 1 of the Board Order which requires that the proposed development "*shall be carried out and completed in accordance with the plans and particulars lodged with the application*…", the ordinary reasonably informed member of the public would, as I found in my November judgment, initially believe that the Board had granted permission for the use of the deck as a carpark. I formed the view that it would only be if the ordinary reasonably informed member of the public went further and examined all of the documents before the Board and, in particular, the report of the inspector and the McCutcheon Halley response to the s. 6(7) opinion issued by the Board that the ordinary reasonably informed member of the public would eventually work out that this is not what was intended or done.

44. There have, of course, been cases in the past where the court has been confronted with contradictory statements in planning permissions. An example is to be found in the decision of the Supreme Court in *Kenny v. Dublin University* [2009] IESC 19. But I have never previously come across a situation where the material before the Board was so

contradictory or where it was so difficult to determine the parameters of what was permitted by the Board's decision. In these circumstances, I am concerned that I may have been wrong to attempt to apply the *X.J.S*. principles without taking account of the extent of the contradictions in the material available and without sufficiently focusing on the impact of those contradictions on the ability of the ordinary reasonably informed member of the public without legal training to reach a definite conclusion as to the effect of the Board Order in those circumstances. The *X.J.S*. test requires the court to construe the relevant materials through the prism of a person without legal training. Accordingly, an issue arises as to whether it was appropriate to apply the *X.J.S*. principles at all or whether some adjustment should have been made to those principles to address circumstances such as these. This seems to me to give rise to an issue of principle and cannot properly be characterised solely as an issue relating to the application of a well-established rule.

45. Furthermore, that question seems to me to satisfy both elements of the s. 50A (7) test. In the first place, it must be borne in mind that the *X.J.S*. test is formulated by reference to how documents would be construed by the ordinary reasonably informed member of the public without legal training. The test is not formulated by reference to how the documents would be read by a lawyer with experience or expertise in interpreting documents and in resolving apparent contradictions within documents. It seems to me that the submissions made on behalf of the applicant have raised an entirely valid issue as to whether it is appropriate to seek to apply the *X.J.S*. principles at all or whether, in the alternative, some adjustment needs to be made to those principles to address the approach which should be taken where the relevant materials to be interpreted contain significant contradictions or otherwise give rise to a significant level of difficulty in interpretation. That question seems to me to transcend the particular circumstances of this case. While I sincerely hope that the existence of contradictions on this scale is rare, that does not mean that something similar will not arise again in the future.

46. It is, accordingly, important that an authoritative decision should be given by the Court of Appeal as to whether it is appropriate to apply the *X.J.S*. principles where the materials generated in the course of a s. 4 application contain significant contradictions or whether, in such circumstances, those principles require to be modified or adjusted in some way to take account of the difficulty that arises for a person without legal training in the interpretation of documents. That question seems to me to be particularly important in the context of applications under the 2016 Act where, by definition, the developments will be of an extremely large scale and where it is, thus, particularly important that everyone (whether a developer, a planner or a person who considers himself or herself to be adversely affected by the proposed development) should know what is the appropriate test to be applied in resolving or addressing contradictions in the materials.

47. For the reasons outlined in paras. 45 to 46 above, it seems to me that a question of this kind is of exceptional public importance. Even though the underlying principles are well established, a separate question arises (which goes beyond the mere application of the principles) as to whether the principles are suitable for use, without modification, to

address circumstances where there are so many contradictions within the available material.

48. It also seems to me to meet the public interest requirement. Given the importance of the *X.J.S*. principles in the interpretation of planning documents, it is very much in the public interest to know whether any adjustments need to be made to the parameters of those principles when confronted with contradictory materials of the kind described in my November judgment. I appreciate that, depending upon the answer given by the Court of Appeal to the question posed by Oxley and the additional question added by me, it may not ultimately be necessary for the Court of Appeal to reach a conclusion on this third issue. However, at this point, it could not be said that the question is moot and the outcome of the question could potentially result either in the reversal of the finding made by me as to the effect of the Board Decision or, alternatively, the setting aside of my finding on that issue and a direction made for a rehearing of that issue in the High Court.

49. Thus, while I do not believe that the question formulated by the applicant is one which meets the statutory test, it seems to me that the following question (which arises out of the written submissions delivered on behalf of the applicant and also out of my judgment) does meet the test, namely:-

> *"Is it correct to apply the test set out in Re.* X.J.S*. Investments Ltd [1986] I.R. 750 and Lanigan v. Barry [2016] 1 I.R. 656 where the available materials contain contradictions of the kind described in paragraphs 65 to 70 of the judgment of the High Court in these proceedings [2020] IEHC 587 or is it necessary to adjust that test in such circumstances."*

50. In the circumstances, I do not believe that it is necessary to consider the issue of fairness raised by the applicant.

Conclusion

51. For the reasons described earlier in this judgment, I now certify for the purposes of s. 50A (7) of the 2000 Act the following questions for the purposes of an appeal to the Court of Appeal:-

    (a) Whether, in reckoning the quantum of "other uses" for the purposes of the definition of "strategic housing development" in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, "other uses" may include a use for which planning permission is neither sought nor granted?

    (b) Is the answer to that question any different where it is clear from the materials submitted with the application for permission that, in addition to the non-residential purposes expressly included in the application, the applicant for permission either (a) intends and/or (b) is contractually obliged to make use of part of the structure of the proposed development for a non-residential purpose?

    (c) Is it correct to apply the test set out in *Re. X.J.S. Investments Ltd* [1986] I.R. 750 and *Lanigan v. Barry* [2016] 1 I.R. 656 without modification where the available

materials contain contradictions of the kind described in paragraphs 65 to 70 of the judgment of the High Court in these proceedings [2020] IEHC 587 or is it necessary to adjust that test in such circumstances?

52. Insofar as the costs of the application for leave to appeal is concerned, it seems to me that, subject to any submissions that might be made by any party to the contrary, the costs of the application for leave to appeal should be reserved to the Court of Appeal. If any party wishes to suggest otherwise, an email to that effect should be sent to the Registrar not later than fourteen days from the date of delivery of this judgment following which I will fix a date for the remote hearing of oral submissions in relation to costs. The parties should, however, be aware that there may be costs consequences if such a hearing has to take place.