APPROVED

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 709 J.R.

IN THE MATTER OF SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

MICHAEL REDMOND

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

DURKAN ESTATES CLONSKEAGH LIMITED
DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 1 July 2020

INTRODUCTION

1. The issue for determination in this judgment is whether the High Court, having found a particular decision to grant planning permission to be invalid in its principal judgment, should now remit the underlying planning application to An Bord Pleanála for reconsideration. The alternative approach would be to set aside the planning permission *simpliciter*. It would then be necessary for the developer to make a *fresh* application for planning permission to An Bord Pleanála.

2. The dispute between the parties on this issue centres on whether—given the grounds upon which the planning permission was found to be invalid—the planning application process can be said to have been conducted in a regular and lawful way up to a certain

point in time. If so, then it would be open to the High Court to unwind the process to that point, and to direct that the process should be resumed thence and be completed in accordance with law. If, alternatively, the planning application process had been irregular from the very outset, then the planning permission should be set aside *simpliciter*, i.e. without any order for remittal.

3. The resolution of this issue turns largely on the legal significance to be attached to public participation rights in the planning process. The principal judgment had found that the proposed development project represents a material contravention of the development plan. The legislation envisages that where a planning application involves a material contravention, express public notice of this fact must be given at the time of the making of the application. This did not happen on the facts of the present case where the developer and the board—mistakenly—considered that there was no material contravention. The question now arises as to whether this absence of public notice, and of a statement of the justification for seeking a material contravention, is fatal to the remittal of the planning application.

ABBREVIATIONS

"PDA 2000"	Planning and Development Act 2000
"PD(H)A 2016"	Planning and Development (Housing) and Residential Tenancies Act 2016

PROCEDURAL HISTORY

4. Insofar as relevant to the net issue which now arises for determination, the procedural history can be summarised as follows. This court delivered its principal judgment in these proceedings on 10 March 2020, *Redmond v. An Bord Pleanála* [2020] IEHC 151 ("***the principal judgment***"). As explained in the principal judgment, the first issue to be

determined in the proceedings had been whether the lands, the subject-matter of the planning application, are designated as "institutional lands" under the development plan. This issue was resolved in favour of Mr Redmond, and both the developer and An Bord Pleanála were found to have been in error in thinking that the designation did not apply. The same error had been made by the board's planning inspector in her report.

5. The principal judgment went on then to find that the proposed development involves a material contravention of the development plan policies and objectives applicable to institutional lands in respect of (i) housing density, and (ii) public open space. The decision to grant planning permission was held to be invalid in circumstances where An Bord Pleanála did not seek to invoke its statutory power to grant planning permission in material contravention of the development plan (section 9(6)(c) of the PD(H)A 2016).

6. The proceedings had then been adjourned for a number of weeks to allow the parties to consider the principal judgment. The court directed that if any party intended to apply for leave to appeal to the Court of Appeal pursuant to section 50A(7) of the PDA 2000, then the draft points of law in respect of which leave was being sought were to be filed in the Central Office of the High Court and circulated to the other parties within twenty-eight days of the date of the principal judgment. The proceedings were to have been listed before the court on 24 March 2020 to address the issue of costs and any application to remit the matter to An Bord Pleanála pursuant to Order 84, rule 27 of the Rules of the Superior Courts.

7. In consequence of the restrictions on court sittings introduced in response to the coronavirus pandemic, the hearing did not go ahead on 24 March 2020. Instead, the proceedings were adjourned generally. The parties put the time to good use, and were in a position to indicate to the Registrar on 18 May 2020 that substantial progress had been reached as to the form of the final orders. The only outstanding issue between the parties

is as to whether there should be an order for remittal. (There is to be no application for leave to appeal, and it is agreed that Mr Redmond is to recover costs from An Bord Pleanála in the sum of €3,959.69).

8. It was also agreed that the question of whether the planning application should be remitted to An Bord Pleanála would be dealt with by the court "on the papers", i.e. without the necessity for an oral hearing. The parties exchanged written submissions as follows.

25 May 2020	First set of submissions on behalf of developer
1 June 2020	Mr Redmond's submissions
4 June 2020	An Bord Pleanála's submissions
17 June 2020	Replying submissions on behalf of developer

9. These written submissions have been carefully considered in preparing this judgment. The relevant arguments of the parties will be referred to, in context, in the discussion below.

HIGH COURT'S DISCRETION TO REMIT

10. Order 84, rule 27(4) of the Rules of the Superior Courts (as amended in 2011) provides as follows.

> (4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

11. The principles governing the exercise of this discretion have been set out authoritatively in two judgments of the now Chief Justice when sitting in the High Court. In *Tristor Ltd. v An Bord Pleanála (No. 2)* [2010] IEHC 454, Clarke J. (as he then was) emphasised that the overriding principle behind any remedy in civil proceedings should be to attempt,

in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that. Clarke J. went on to say that the extent to which it may be possible to do so will depend on the facts and the legal framework within which any invalid decision may have taken place. On the facts of *Tristor Ltd.*, the court ruled that the development plan process should be taken up from the point immediately prior to the invalid Ministerial direction.

12. Clarke J. returned to discuss the remittal jurisdiction in *Christian v. Dublin City Council (No. 2)* [2012] IEHC 309.

> "It is not necessary for a court which quashes an order or measure made or taken at the end of a lengthy process to necessarily require that the process go back to the beginning. Where the process is conducted in a regular and lawful way up to a certain point in time, then the court should give consideration as to whether there is any good reason to start the process again. Active consideration should be given to the possibility of remitting the matter back to the decision-maker or decision-makers to continue the process from the point in time where it can be said to have gone wrong. […]"

13. Clarke J. also indicated that the court's inherent jurisdiction allows it to give directions as to the process to be followed by that decision-maker in reconsidering the matter.

> "It seems to me that where a matter is referred back to a decision-maker, the inherent jurisdiction of the court entitles the court to give directions as to the process to be followed by that decision-maker in reconsidering the matter. However, the court should, in giving such directions, attempt to replicate, insofar as it may be practicable, the legal requirements that would apply, whether under statute, rules or the like, to the making of decisions of that type. It will not always be possible to ensure exact compliance with the relevant regime, for it is in the nature of a decision having already been made and having been subsequently quashed, that some variation on the normal procedure may be necessitated."

14. These two judgments were concerned with planning decisions of a type other than a decision to grant planning permission, i.e. a decision by a local planning authority to adopt a new development plan (*Christian*), and a decision by the Minister for

Environment Heritage and Local Government to issue a direction pursuant to section 28 of the PDA 2000 (*Tristor Ltd.*). The principles in these two judgments have, however, since been applied to decisions to grant planning permission in a series of judgments including *Clonres clg v. An Bord Pleanála* [2018] IEHC 473, *Fitzgerald v. Dun Laoghaire Rathdown County Council* [2019] IEHC 890, and *Barna Wind Action Group v An Bord Pleanála* [2020] IEHC 177.

15. These judgments emphasise that, in considering whether to remit a planning application to An Bord Pleanála, the court should treat the board as a disinterested party which has no stake in the commercial venture being pursued by the developer. Further, where the board, as the statutory decision-maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it for a fresh decision, the court should not lightly reject such an application to remit in favour of simply quashing the decision *simpliciter* with the result that the application goes back to square one.

AN BORD PLEANÁLA'S POSITION

16. On the facts of the present case, An Bord Pleanála opposes the making of an order for remittal. In particular, the board submits that it would be inappropriate to remit the planning application in circumstances where it says that the consequence of the error which led to the planning permission being invalidated is that public participation had been frustrated. The public were not notified that a planning application was being made for a development that would *materially contravene* the development plan. Nor were they given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding that material contravention.

RELEVANT LEGISLATIVE PROVISIONS

17. The planning application has been made pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 ("***PD(H)A 2016***"). Under that legislation, the fact that a proposed development represents a material contravention of the development plan has implications for the processing of the relevant planning application.

18. Section 8(1)(a)(iv)(II) of the PD(H)A 2016 provides as follows.

> "8.(1)Before an applicant makes an application under section 4(1) for permission, he or she shall—
>
> (a) have caused to be published, in one or more newspapers circulating in the area or areas in which it is proposed to carry out the strategic housing development, a notice—
>
> (iv) stating that the application contains a statement—
>
> […]
>
> (II) where the proposed development materially contravenes the said plan other than in relation to the zoning of the land, indicating why permission should, nonetheless, be granted, having regard to a consideration specified in section 37(2)(b) of the Act of 2000,"

19. As appears, the public notice must indicate that the proposed development is in material contravention of the development plan, and that the planning application contains a statement indicating why permission should, nonetheless, be granted, having regard to one or more of the statutory considerations specified in section 37(2)(b) of the PDA 2000. The planning application must be accompanied by such a statement ("***statement of justification***").

20. All of this is intended to ensure that members of the public are, in the first instance, put on notice that An Bord Pleanála is being invited to grant planning permission in material contravention of the development plan; and, secondly, informed of the basis on which

the developer says that such a contravention is justified by reference to section 37(2)(b). This will then allow members of the public to make meaningful submissions to An Bord Pleanála and to engage with the justification advanced on behalf of the developer.

21. This ensures effective public participation. Moreover, it reflects the especial importance attached to the development plan under the PD(H)A 2016. There are statutory restrictions on the board's jurisdiction to grant planning permission for proposed development in material contravention of the development plan. These statutory restrictions are stricter in the case of a "strategic housing development" application under the PD(H)A 2016 than they are in the case of a conventional planning application. The board cannot grant planning permission under the PD(H)A 2016 where the proposed development, or a part of it, contravenes materially the development plan in relation to the *zoning* of the land. This difference in treatment between a "strategic housing development" application and a conventional application is, presumably, intended to reflect the fact that an application of the former type is made directly to An Bord Pleanála without there being any first-instance application to the local planning authority. The enhanced status afforded to the zoning objectives ensures that the planning authority's role, as author of the development plan, in setting planning policy, is respected.

22. Insofar as non-zoning objectives are concerned, An Bord Pleanála may only grant planning permission in material contravention of a development plan by reference to the statutory criteria under section 37(2)(b) of the PDA 2000. (See section 9(6)(c) of the PD(H)A 2016). These criteria read as follows:

    (i) the proposed development is of strategic or national importance;

    (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned;

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government;

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.

DETAILED DISCUSSION

23. In determining whether or not to make an order for remittal, the High Court must first identify the point in time at which the earlier decision-making process went awry. This is because the objective of remittal is to reset the clock, and to allow the decision-making process to resume from a point in time *prior to* the happening of the error of law which ultimately led to the setting aside of the original decision. Of course, it will not be possible to do this in all cases. In some instances, the decision-making process may have been flawed from the very outset or the error of law may be subsisting.

24. On the facts of the present case, the principal judgment has found that the proposed development represented a material contravention of the development plan. The decision to grant planning permission has been held to be invalid on the grounds *inter alia* that An Bord Pleanála did not seek to invoke its statutory power to grant planning permission in material contravention of the development plan (section 9(6)(c) of the PD(H)A 2016).

25. As discussed at paragraphs 17 to 22 above, the fact that a proposed development represents a material contravention of the development plan triggers the following special procedural requirements. The public notice must indicate that the proposed development

is in material contravention of the development plan, and the planning application itself must be accompanied by a statement setting out the justification for saying that permission should, nonetheless, be granted.

26. In the present case, the fact that the developer—mistakenly—advanced the planning application on the basis that it did not involve a material contravention of the development plan had the consequence that these procedural requirements were not complied with. Notwithstanding this non-compliance, the developer submits that the planning application should nevertheless be remitted to An Bord Pleanála for reconsideration. The developer seeks to argue that the point in time at which the processing of the planning application can be said to have first fallen into error was at the time of the preparation of the inspector's report. It is acknowledged that the inspector erred in her interpretation of the development plan, and, in particular, in her conclusion that the "institutional lands" designation did not extend to the application site. This had the consequence that the inspector failed to appreciate that the proposed development represented a material contravention of the development plan.

27. The developer insists that this is the point in time to which the planning application process should be returned (by way of an order for remittal). It is submitted that An Bord Pleanála might be directed to arrange for a new inspector's report to be prepared. It is not envisaged by the developer that there should be any further public participation. This is because, on the developer's argument, it is sufficient that the original planning application and accompanying reports had contained relevant information to enable An Bord Pleanála now to assess the application by reference to the requirements of the "institutional lands" designation in relation to, for example, residential density and open space provision. The developer concedes, as it must, that the documentation submitted

with the planning application had wrongly concluded that the proposed development complied with the key requirements of the "institutional lands" designation.

28. With respect, the developer's analysis is incorrect. In truth, the planning application was fatally flawed from the outset. The planning application failed to recognise that the proposed development represented a material contravention of the development plan. This resulted in non-compliance with the procedure prescribed for such applications. As correctly observed by An Bord Pleanála in its written submissions, the public were not notified that a planning application was being made for a development that would materially contravene the development plan. Nor were they given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding that material contravention.

29. It is no answer to these deficits to imply, as the developer appears to do, that the requirement for public participation should be assessed solely by reference to Mr Redmond's perspective. The developer submits that, in circumstances where Mr Redmond's objection to the initial planning application had been premised on the basis that the "institutional use" designation extended to the application site, he has already had the opportunity to make submissions to An Bord Pleanála on whether the proposed development complied with the requirements of the designation.

30. This argument overlooks the fact that the purpose of giving public notice of a proposed material contravention is to allow all members of the public concerned an opportunity to make submissions or observations on the planning application. The fact that one member of the public, namely, Mr Redmond, correctly identified that the development involved a material contravention does not absolve the breach of the statutory requirements. In any event, the principal issue which would now arise in the event of a remittal to An Bord Pleanála is different from that addressed in the planning application. The issue would be

whether any of the specific statutory criteria which allow An Bord Pleanála to grant planning permission in material contravention of the development plan have been fulfilled. These criteria have been set out in full at paragraph 22 above. Mr Redmond did not have a proper opportunity to address these matters in the context of the original planning application in circumstances where the developer had not put forward grounds for saying that any of the statutory criteria had been met.

31. The simple fact of the matter is that the planning application, as submitted to An Bord Pleanála in May 2019, did not comply with the requirements prescribed for development which represents a material contravention of the development plan. An Bord Pleanála is correct in saying that it does not have jurisdiction to grant planning permission on foot of this non-compliant application, and that were the application to be remitted to it, then the board would have to dismiss the planning application as invalid.

32. The developer has sought to get around this jurisdictional difficulty by arguing that the non-compliant nature of the planning application had not been expressly pleaded and that these issues are accordingly not "in" the case. The developer seeks to rely in this regard on the judgment of the High Court (McDonald J.) in *Barna Wind Action Group v An Bord Pleanála* [2020] IEHC 177.

33. The facts of the present case are entirely distinguishable from those at issue in *Barna Wind Action Group*. There, An Bord Pleanála had conceded that its decision to grant planning permission should be quashed on a specific narrow ground. The applicant for judicial review had sought to resist the making of an order for remittal, by reference to the lapse of time between (i) the date upon which the planning application had first been submitted in 2014, and (ii) the date of the determination of the proceedings in 2020. It was said that the Environmental Impact Assessment Directive (2011/92/EU) ("***EIA Directive***") had been amended in the interim. McDonald J. observed that no complaint

had previously been made in the proceedings as to the adequacy of the environmental impact statement submitted nor as to its being out of date.

34. By contrast, on the facts of the present case, Mr Redmond has consistently objected that the proposed development would involve a breach of the development plan. This objection had been made to An Bord Pleanála in the course of the planning application, and made, again, in these judicial review proceedings. Mr Redmond was successful in this argument. The point is not a "new" point. Mr Redmond cannot be criticised for not having brought his proceedings earlier, i.e. by seeking to challenge An Bord Pleanála's *acceptance* of the planning application in May 2019 in the absence of the requisite public notice of a proposed material contravention. Any such proceedings would have been dismissed as premature on the basis that a complaint that a proposed development represents a material contravention is one which should, in the first instance, be raised as an objection in the planning process rather than in legal proceedings. Put otherwise, an earlier application for judicial review based on the absence of proper public notice would have been refused leave.

35. The judgment in *Barna Wind Action Group* is distinguishable in two other respects. First, the form of remittal in that case envisaged that there might be further public consultation (see paragraph 43 of the judgment), and that the issue in respect of the intervening legislative amendment of the EIA Directive could be raised before An Bord Pleanála. Here, the developer's application to the court is that there should be no further public consultation.

36. Secondly, the planning application was a *conventional* planning application (as opposed to an application for strategic infrastructural development or strategic housing development). The consequence of refusing to remit the matter would have been that the developer would have to recommence the process by making a first-instance application

to the local planning authority, with an appeal thereafter to An Bord Pleanála. The prejudice in refusing an order for remittal is less in the case of a strategic housing development given that the "delay" caused is far shorter.

37. Finally, the developer has sought to argue that public notice and a statement of justification are only required where the developer is of the "opinion" that the proposed development would represent a material contravention. It is further argued that if the developer "gets it wrong", and (mistakenly) advances an application on the basis that no material contravention is involved, then the only party who is at a disadvantage is the developer because it will not have addressed the requirements of section 37(2)(b) of the PDA 2000. It is suggested that it would potentially turn the strategic housing process into an "extraordinarily hazardous obstacle course" if an error on the part of the developer as to the interpretation of the development plan would mean that An Bord Pleanála would have to decline jurisdiction.

38. With respect, the requirements of the legislation are unequivocal. Section 8(1)(a)(iv)(II) of the PD(H)A 2016 indicates that the requirement to give public notice is triggered "where the proposed development materially contravenes" the relevant development plan. The test is objective: it is not qualified by reference to the subjective "opinion" of the developer, nor, indeed, of An Bord Pleanála. This is entirely consistent with the general principle of planning law that the interpretation of the development plan is objective not subjective, and is ultimately a question of law. This issue is discussed in detail in the principal judgment at paragraphs 22 to 28.

39. The developer's argument seeks to discount the importance of public participation. The development plan has an enhanced status under the PD(H)A 2016. One of the consequences of this is that members of the public must be notified at the time of the making of the planning application that it involves a material contravention of the plan.

On the facts of the present case, the question of whether the proposed development represented a "material contravention" was a live issue from the very outset of the process, with the local planning authority indicating that it considered that the application did indeed involve a material contravention. The developer cannot be said to have been taken by surprise by the issue.

40. It behoves an applicant for strategic housing development to address their mind properly to the question of material contravention in advance of the making of a planning application. If, as will happen occasionally, the developer and its advisors misinterpret the plan and fail to recognise that a material contravention is involved, then the legal consequence is that the planning application is invalid. The legislation does not allow the developer's error to be visited upon the public by undermining their rights of public participation.

CONCLUSION

41. This is not a suitable case in which to make an order for remittal. This is because one of the principal objectives underlying the court's jurisdiction to remit a matter to a decision-maker for reconsideration cannot be achieved. The principal objective is to remedy the error in the earlier decision-making, in as clinical a manner as possible, by allowing the decision-making process to resume from a point in time before the error first occurred. On the facts of the present case, the planning application was fatally flawed from the outset. The planning application failed to recognise that the proposed development represented a material contravention of the development plan. This resulted in non-compliance with the procedure prescribed for such applications.

42. These deficiencies are not capable of being remedied by the form of remittal sought by the developer. In particular, the absence of any allowance for further public participation would mean that the making of an order for remittal would result in a risk that planning

permission would be granted in material contravention in circumstances where the public were not properly notified nor given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding the material contravention.

43. This conclusion on its own is sufficient to dispose of the developer's application for an order for remittal. For the sake of completeness, I should record that I would have exercised my discretion against remittal in any event, by reference to the following two considerations. First, in accordance with the case law cited at paragraph 15 above, I attach weight to the fact that the decision-maker, An Bord Pleanála, is opposed to the making of an order for remittal. Secondly, the prejudice to the developer caused by the refusal of an order for remittal in the case of strategic housing development is less profound than in the case of conventional planning applications. The former procedure is more streamlined—the necessity for a first-instance application to the local planning authority is omitted—and An Bord Pleanála is obliged, under pain of financial penalty, to make its decision within a period of 16 weeks (in applications not entailing an oral hearing). The benefit to the developer in terms of a saving of time is greatly outweighed by the prejudice to the public participation rights.

FORM OF ORDER

44. It is proposed now to make an order as follows. An order of *certiorari* will be made setting aside An Bord Pleanála's decision of 15 August 2019 (Case reference: PL06D.304420). The developer's application to have the matter remitted to An Bord Pleanála is refused. The order will also note that it is agreed between the parties that Mr Redmond is to recover costs from An Bord Pleanála in the sum of €3,959.69

Appearances

Michael Redmond, the applicant for judicial review, represented himself
Nuala Butler, SC and Fintan Valentine for An Bord Pleanála instructed by Fieldfisher Solicitors
Eamon Galligan, SC and Suzanne Murray for the notice party developer instructed by Cannon Solicitors

Approved