**THE HIGH COURT**
**JUDICIAL REVIEW**

[2021] IEHC 281
**[2020 No. 22 JR]**

**BETWEEN**

**SABRINA JOYCE KEMPER**

**APPLICANT**

**AND**
**AN BORD PLEANÁLA,**
**IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**
**IRISH WATER DAC**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Allen delivered on the 27th day of April, 2021**

**Introduction**

1. For the reasons given in a long judgment delivered on 24th November, 2020 ([2020] IEHC 601) I concluded that a decision made by An Bord Pleanála ("*the Board*") on 11th November, 2019 under s. 37G of the Planning and Development Act, 2000 to grant permission to Irish Water for the development of a large strategic infrastructure project called the Greater Dublin Drainage Project had been shown by the applicant to have been legally flawed and that it must be quashed.

2. The applicant had sought judicial review of the Board's decision on a very large number of grounds which called for an examination of the pre-application consultation between May, 2008, when Fingal County Council published a Strategic Assessment for the Greater Dublin Strategic Drainage Scheme, and 20th June, 2018 when the planning application was made; the appointment of the Inspectors and Board members who dealt with the application; the approach by the Board to the assessment of the proposed development; the public and statutory consultation; and the reasons given for the decision. Besides, the applicant sought to make the case that there had been a failure on the part of the State to correctly transpose Article 2 of the EIA Directive into Irish national law. Following close case management and the filing of comprehensive written submissions the application for judicial review was heard by way of a telescoped hearing over three weeks in July, 2020.

3. Having carefully considered the evidence, the submissions of counsel, and the very voluminous authorities to which I was referred, I found that the applicant had made out her case on one ground, only, which was that the Board had failed to correctly identify and comply with the obligation imposed on it by art. 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 to seek the observations of the Environmental Protection Agency on the likely impact of the proposed development on waste water discharges.

4. Following the delivery of my judgment I adjourned the matter for mention to allow the parties an opportunity to consider it. The first question to be addressed was whether any of the parties wished to make an application for leave to appeal. None of them did.

5. The next question was whether, and if so the basis upon which, the matter might be remitted to the Board and it is that issue which is the subject of this judgment. The Board and Irish Water submit that the single flaw in the process identified by the judgment of 24th November, 2020 can be addressed and remedied. The applicant submits that the decision of the Board should simply be quashed.

**Legal principles**

6. There is no real contest as to the legal principles previously applied by the High Court in dealing with remittal applications, although – as I will come to – it is argued that they are not applicable to this remittal application. They were distilled by Barniville J. in *Clonres CLG v. An Bord Pleanála* [2018] IEHC 473 from the earlier authorities and have since been applied by him *in Fitzgerald v. Dun Laoghaire Rathdown County Council* [2019] IEHC 890 and by McDonald J. in *Barna Wind Action Group v. An Bord Pleanála* [2020] IEHC 177.

7. In *Clonres* Barniville J. identified the most significant authorities on the question of remittal and the basis upon which the court should exercise its jurisdiction to remit as *Usk and District Residents Association Ltd. v. An Bord Pleanála* [2007] IEHC 86, *Tristor Ltd. v. Minister for the Environment* [2010] IEHC 454, *Christian v. Dublin City Council* [2012] IEHC 309, and *O'Grianna v. An Bord Pleanála* [2015] IEHC 248 from which – starting at para. 44 – he discerned ten principles.

> *"(1) The court has an express power to remit a decision in respect of which an order of certiorari has been made. That power is conferred by O. 84, r. 27(4) of the Rules of the Superior Courts (Usk, p. 12). The court may also have an inherent jurisdiction to remit a decision although it is not necessary to express a concluded view on the existence of such an inherent jurisdiction (Usk, p. 13). Order 84, rule 27(4) RSC states:-*
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> > *'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.'*
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> *(2) The court has a wide discretion to remit. That discretion 'must be exercised both judicially and judiciously with the overall objective of achieving a just result' (Usk, pp. 13 and 15). The court should decide whether or not to remit a decision to a decision-maker in the event of an order of certiorari being made 'on the basis of fairness and justice' (O'Grianna, para. 10).*

*(3) The 'overriding principle' behind any remedy in civil proceedings including in considering whether to remit 'should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act but to go no further' (per Clarke J. in Christian at para. 4.6 referring to his earlier judgment in Tristor Ltd. v. Minister for the Environment and others [2010] IEHC 454 ("Tristor")). Further, 'the sole function of the Court is to fashion an order which puts matters back into a position in which they were immediately before the wrongful exercise of a ministerial discretion occurred' (Christian para. 4.6 quoting from Tristor para. 4.4).*

*(4) Where a particular process has been conducted in a regular and lawful way up to a certain point in time, '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 decisionmakers to continue the process from the point in time where it can be said to have gone wrong' and 'a court should lean in favour of standing over a properly conducted process and only require any part of the process which was invalid to be revisited in the context of a matter being referred back' (Christian para. 4.8). Further, 'the court should endeavour to avoid an unnecessary reproduction of a legitimate part of the process' (Christian para. 4.12).*

*(5) In considering whether the court should remit a decision to the decision-maker, the court should take account of the expense and inconvenience which would be caused by sending the project 'back to the drawing board' and should also consider the 'inevitable and disproportionate delay' in having the matter dealt with again from the start (Usk pp. 16-17).*

*(6) In considering whether to remit an application to the Board, the court should treat the Board as a 'disinterested party' which has 'no stake in the commercial venture being pursued by [the developer]' (O'Grianna para. 9). 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' (O'Grianna para.9). That would have 'the potential to be wasteful in terms of delay and cost' and the court ought not to adopt a course which is 'unnecessarily onerous upon the developer' (O'Grianna para. 9).*

*(7) By remitting a decision or application to the Board, the court is not giving 'in advance […] some sort of 'imprimatur'' to whatever decision or approach is taken by the Board following the remittal (O'Grianna para. 10).*

*(8) If the applicants are not satisfied with the further decision taken by the Board following remittal of the application to it, the applicants will be entitled again to seek leave to challenge the decision (O'Grianna para. 10). (9) Where the court remits or refers a matter back to the decision-maker, such as the Board, the court*

*has an inherent jurisdiction to give directions as to the process to be followed following such remittal (Christian para. 4.17). 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' while recognising that it may not always be possible to ensure 'exact compliance with the relevant regime' (Christian para. 4.17).*

(10) Short of giving directions in the event of a remittal, it is open to the court to make recommendations in remitting the matter (Usk p. 17). Such recommendations would not interfere with or trespass upon the discretion vested in the decision-maker, such as the Board. Such recommendations could include those in relation to the re-opening of an oral hearing and in relation to the composition of the membership of the Board which decides on the application following its remittal (Usk pp. 18 and 19)."

**Arguments**

8. Mr. Declan McGrath S.C., for Irish Water, placed particular emphasis on four of the ten principles listed in *Clonres.*

9. The first of these was principle No. 4: that where it is possible to identify the point in time at which the decision-making process has gone wrong, the court should lean in favour of remitting to that point in time in order to avoid the decision-making process having to start from the beginning. This, he said, was such a case and, he urged, the obvious point at which the matter should be remitted was after the Inspector had completed her report but before the report went to the Board for a decision. Mr. McGrath knew from the applicant's written submissions that the applicant would argue that the process had gone wrong at a much earlier stage in the process, namely at the time of the exchange of correspondence between the Board and the EPA, which was before the oral hearing, and that if the matter was to be remitted at all (which the applicant contended it should not be) it was to this point that it should be remitted. Mr. McGrath submitted that the position taken by the applicant on the remittal application was inconsistent not only with the judgment of 24th November, 2020 but with the case she had made on the substantive application, which was that the Board should have made its assessment before inviting the EPA to make its observations.

10. The second of the *Clonres* principles on which particular reliance was placed was principle No. 5, which is focussed on the expense and inconvenience to the developer of having to start again. This consideration, it was submitted, was particularly important in the case of *"fast track"* applications.

11. Mr. McGrath referred to *Fitzgerald v. Dun Laoghaire Rathdown County Council* [2019] IEHC 890. That was a case in which the proposed development was in a Strategic Development Zone. Barniville J. said that the desirability of avoiding delay, expense and inconvenience applied *a fortiori* to applications within an SDZ where a particular statutory procedure applied directed to ensuring that applications would be dealt with expeditiously

and without significant delay. Mr. McGrath argued that the fact that the development the subject of these proceedings qualified for a *"fast track"* procedure was something to go into the balance in favour of remittal and not, as contended for by the applicant, against it.

12. In support of his argument under this heading, Mr. McGrath recalled the evidence as to the importance of the proposed development. Irish Water's case is that it is anticipated that by 2022 the Ringsend WwTP will be producing treated effluent at the rate of 2.1 million PE and by 2025, after the permitted upgrading of that facility has been completed, at the rate of 2.4 million PE. The GDD Project is said to be a critical piece of infrastructure which will take between five and six years to complete. If it is not built, it is said, this will have serious consequences for development within the Greater Dublin Area as provided for in the Development Plans adopted by the planning authorities in that region. The development of the GDD Project, it is said, is vital to safeguard public health, to protect and improve the environment, and to facilitate the sustainable residential and industrial development of North Dublin and the wider Greater Dublin Area.

13. The third of the *Clonres* principles on which particular reliance was placed was principle No. 6, which requires that weight should be given to the view of the Board as to whether, if a matter were to be remitted, it could carry out its statutory functions. The court should not lightly disregard that view. In this case, it is said. the Board is of the view that there should be remittal and that it can discharge its statutory function.

14. The fourth of the *Clonres* principles on which particular reliance was placed was principle No. 9, which asks whether any directions to the Board are required.

15. The applicant's written submissions had flagged a concern in relation to the availability of public consultation if the matter were to be remitted. Mr. McGrath, for Irish Water, pointed to the written submissions filed on behalf of the Board which had identified the availability to it of a panoply of powers to ensure that there could be public participation, to the extent that the Board might consider necessary or appropriate. He pointed to the powers in s.37F(1) of the Planning and Development Act, 2000 to require further information, including a revised EIAR; to request further submissions and observations from the applicant or any person who has made submissions or observations; and to make any information available for inspection and, if appropriate, invite further submissions or observations. Mr. McGrath pointed in particular to the requirement for public consultation in s. 37F(2) if the Board is of the opinion that any revised EIAR contains significant additional information on the effect on the environment of the proposed development.

16. Mr. McGrath also anticipated the Board's reliance on art. 217(4)(b) of the Planning and Development Regulations, 2001 which allows the Board, at any time before making its decision, to ask any person to make submissions or observations, or to elaborate on submissions or observations in relation to an application.

17. Mr. Rory Mulcahy S.C., for the Board, adopted Mr. McGrath's analysis of the legal principles. In accordance with those principles, the Board's position was that while it was a disinterested party with no stake in the commercial venture, it was obliged to take and express a view as to whether, if the application were to be remitted, the Board could deal with it in accordance with law. Without suggesting that this was such a case, he pointed to *O'Grianna* as an example of a case which might be remitted notwithstanding that a considerable amount of further information or work might be required.

18. Mr. Mulcahy correctly identified the *ratio* of my judgment of 24th November, 2020 as being that the Board had misinterpreted its obligation under art. 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016, which the court held was to carry out an assessment and to convey that assessment to the EPA and ask for the views of the EPA on that assessment. By contrast with *Redmond v. An Bord Pleanála* [2020] IEHC 322 (a case on which the applicant's submissions showed that she would be relying) where the flaw was – as Mr. Mulcahy put it – *"baked-in",* he submitted that this was a case in which the error could be remedied. The flaw in that case was a failure to identify in the application for permission the fact that the proposed development would be in material contravention of the Development Plan. By contrast, he submitted, this was a case in which the mistake could be seen to have been made at a late stage in the process and could be corrected.

19. The Board agreed with Irish Water that the point at which the flaw could be identified and addressed was the time after the Inspector had completed her report and before the Board made its decision. The Board proposed that it might consider the report of the Inspector and form a view as to whether this reflected its view on the likelihood of an impact from waste water discharges, which, if it did, would form the basis of the consultation with the EPA required by article 44.

20. It was submitted that in deciding the merits of remittal the court should consider not only what had gone wrong with the process but what had gone right with it and what remained of value. The Inspector's report, it was said, had been challenged on numerous grounds, none of which had been upheld. That considerable body of work, which had taken fifteen or sixteen months to complete, would be set at nought if the application were not remitted. On the other hand, it was said, the Board had available to it more than adequate powers to address the applicant's concerns as to her public participation rights and the rights of public participation of the public at large. Mr. Mulcahy pointed to s. 37F of the Act and art. 217 of the Regulations, which had already been opened to the court. If it should happen that the Board failed to engage with the public as required by law, it was said, any further decision would be open to challenge. The Board proposed that the application should be remitted at the point after the submission of the Inspector's report to the Board.

21. The applicant opposed the remittal application on broadly two grounds.

22. Mr. Collins' first submission was that the regulations which gave rise to the ground for *certiorari* – the Waste Water Discharge (Authorisation) Regulations, 2007, as amended by the 2016 Regulations – have been amended since the impugned decision was made so as to significantly alter the legislative landscape to which a remitted application would be returned. The 2007 Regulations, it was said, were considerably altered by the European Union (Waste Water Discharge) Regulations, 2020, which came into effect on 10th June, 2020 *"to the extent that a planning decision made in circumstances where the Agency has yet to receive an application from Irish Water for a wastewater discharge licence would be contrary to Irish and EU law."*

23. Secondly, it was submitted that the authorities relied on in support of the remittal involve factual scenarios that do not apply to this case, in particular because the proposed development the subject of these proceedings will require consent from two consent authorities, each of whom must conduct its own EIA and AA, but only one of whom has had an application made to it. If the application were to be remitted to the Board for further consideration – so the argument goes – it is not inconceivable that the Board might grant consent for the development before any EIA of the pollution impacts of the development has been conducted, giving rise to a *lacuna* similar to that considered by the Court of Justice of the EU in *Case-50/09 Commission v. Ireland*.

24. *Usk*, it was said, is distinguishable because *certiorari simpliciter* of a decision by the Board on an appeal from the decision of a planning authority would have meant that the developer would have had to start again before the planning authority. In this case, the quashing of the decision outright would merely return it to the beginning of the SID planning process and not to the drawing board. *Clonres,* it is said, is distinguishable because the decision of the Board was a decision on an application for Strategic Housing Development, in respect of which the requirement for an oral hearing was circumscribed. *Fitzgerald*, it is said, is distinguishable because the admitted error was a failure to show on the face of the record the reasons for the planning authority's conclusion that an EIA or screening determination was not required. All of them are said to be distinguishable on the ground that there *was "no intertwined EIA and AA process … of the type considered here for a planning application where the proposed development requires a wastewater discharge licence."*

25. The principles for remittal set out in *Usk,* it was submitted, are based on the decisions in *Usk, Christian, O'Grianna* and *Tristor,* none of which involved *"a dual consent process where both consent authorities were obliged to conduct interacting EIAs and AAs on the same proposed development."*

26. As to the *"point in time where [the process] can be said to have gone wrong",* Mr. Collins pointed to the fact that the exchange of correspondence between the Board and the EPA was prior to the oral hearing, and to the fact that the 2007 Regulations were substantially amended by the 2020 Regulations. The new amendments, it was said, presuppose the making of a licence application and the submission by the developer to the Agency of an

EIAR and the commencement of a public participation process within the Agency's EIA process prior to the commencement of any consultations between the two authorities.

27. I was uncertain that I had discerned from the applicant's written submissions what point, precisely, was being made in relation to the 2020 amendment of the 2007 Regulations but in oral argument Mr. Collins made the applicant's position clear:-

> *"But what has happened now, Judge, is we now find ourselves in a circumstance in which this court has identified that the Board and the EPA have not complied with* ***the then deficient national provisions*** *and is ordering a certiorari and a remittal in order to secure such compliance and that is happening in circumstances where* ***those original regulations are deficient in terms of European law*** *and the obligations that were not addressed in those remain outstanding. And they have not been addressed by either of the competent authorities at issue in this instance." [My emphasis.]*

28. As he had in the course of the substantive hearing, Mr. Collins referred to the 2020 Regulations and the Commission's submission to the Court of Justice in C-*50/09 Commission v. Ireland*. As he had in the course of the substantive hearing, Mr. Collins suggested that the 2020 Regulations had been, or very likely had been, precipitated by these proceedings and had been introduced by the State to plug a gap in national law.

29. At the conclusion of Mr. Collins' submission I asked whether I correctly understood his argument to be (1) that the Board had failed to comply with the then deficient regulations, and (2) that the reason why the then regulations were deficient was because they did not correctly transpose the Directives. He agreed. While Mr. Collins said that he was not inviting me to say that my judgment on the transposition argument that he had made in the course of the substantive application was wrong, nevertheless he insisted that the 2007 Regulations were clearly deficient, which, he said, was why they had been amended and replaced:-

> *"All I am saying is, is that if the court finds or allows that decision to be made on that narrow basis again without the consultation that's required, my client will end up having to take another set of proceedings. That's what ends up happening. We end up back in the High Court again in a year's time or however long it takes."*

**Discussion**

30. The core issue on this application is whether the shortcoming in the process identified in my substantive judgment can be addressed by remitting the planning application for further consideration by the Board. The essence of the applicant's opposition to remittal is that the State's obligations under the EIA Directive had not, at the time the Board made its decision, been correctly transposed into national law. That is an issue which was fought and lost in the substantive hearing. If the applicant thought that my judgment on her transposition ground was wrong, she had the opportunity to ask for leave to appeal but did not. That apart, the transposition argument advanced at the substantive hearing was made in the alternative to the applicant's primary submission – on which she

succeeded – that the purported consultation by the Board with the EPA was not that which was required by the Regulations.

31. The applicant's primary argument boils down to the proposition that before dealing with the remittal application I should recognise that the interpretation of art. 44 in my substantive judgment was wrong and that I should exercise my discretion on this application with a view to forcing Irish Water back to the beginning of the process . The suggestion was that if I went away and read the transcript of the submission and concluded that Mr. Collins was right, there would be no bar to me saying *"well, actually, in fairness, I think that's correct, the better thing to do here is to remit it back to a point further in time. Back, perhaps, even to the point where the original request under article 44 was made."* But the whole point of the substantive case made on behalf of the applicant, and accepted by the court, was that the request which had been made by the Board was not that which was required by art. 44, and that at the point in the process at which the request was made, it could not have been the consultation which was required by article 44.

32. Mr. Collins suggested that my interpretation of art. 44 was *"not a particularly critical ratio decidendi point"* and was *"not something that was [he thought] particularly informative one way or the other."* He suggested that what he was proposing was something done by judges all the time: although he did not point to any instance in which it had been done.

33. Having been chided by the Court of Appeal recently for the use of blunt language, I will content myself by saying that I cannot possibly accept this submission. It was, as Mr. McGrath said, in part an attempt to re-run arguments that were advanced in the course of the substantive hearing and rejected and in part contrary to the argument then made (and accepted) that the exchange of correspondence between the Board and the EPA was not the consultation that was required by art. 44 of the Regulations.

34. The first point of the ten point summary in *Clonres* was to identify the jurisdiction of the court to order remittal. The second point in that list was the first of the principles which must be applied in the exercise of that jurisdiction, which is that it must be exercised both judicially and judiciously with the overall objective of achieving a just result. I cannot see how it could possibly be thought to be judicial that I might use an application for remittal as an opportunity to upend my judgment on the substantive issues. By the way, when the case was listed to allow the parties to indicate whether they wished to apply for leave to appeal and no one did, it was agreed that the State respondents might be excused until the question of costs would come to be dealt with, which they were. The practical effect of what is now suggested would be to reverse my previous findings in their absence.

35. The applicant, in her written submissions, asserts that the amendments to the 2007 Regulations introduced by the 2020 Regulations have considerably altered the legislative landscape to which a remitted application would be returned but she does not identify in what respect the consultation obligations imposed on the Board are said to have been altered. Reference is made to the amendment of art. 6 of the 2007 Regulations made by

art. 9 of the 2020 Regulations, but art. 6 is principally directed to the obligations of the EPA in dealing with an application for a discharge licence, and not the obligations on the Board in dealing with an application for permission. It is asserted that the point at which consultation between the Board and the EPA can occur under art. 44 cannot be considered in isolation from the consultation between the EPA and the Board under the new art. 6 but I cannot see why. They are separate consultation processes.

36. By art. 5 of the 2007 Regulations, as originally made, an application for a discharge licence must be made at least six months before the WwTP becomes operational, and that has not changed. Nor has any amendment been made to art. 44, which is the basis of the obligation on the part of the Board to consult with the EPA. The applicant's hope appears to be that if the planning application is not remitted Irish Water will have to make a new planning application and will or should make a parallel application for a discharge licence. But however desirable the applicant thinks that might be, it is simply not required by the regulations. Whether the application to the Board for planning permission for the GDD Project comes back from the court or is the subject of a new application, the consultation obligation will be the same.

37. As to the principles to be applied in deciding a remittal application, the core argument appears to be that all of the authorities are distinguishable on the basis that the project requires multiple consents. Mr. McGrath's answer starts with what he says is – and it is – a very obvious point that the challenge in this case was to a decision of the Board and not of any other decision-maker. The applicant did not explain why the requirement for further consents was relevant to the approach which the court should take to the Board's decision and I can see no justification in principle for any different approach. Nor did the applicant suggest what other principles might be applied. All of the cases referred to in argument were inevitably based on different facts, but they were dealt with by the application of common legal principles.

38. Mr. McGrath recalled that in *Usk* the development was a landfill which required a waste licence as well as planning permission and so, like this, was a case of multiple consents, and that the application for planning permission was remitted without any mention of the requirement for a discharge licence. However, in considering whether the point is a good one, I think that the fact that it might previously have been taken but was not is not really relevant. If I thought that there was anything in the point I would not have attached weight to the fact that it might previously have been made but was not. I do not believe that there is anything in the point. The several consents require separate independent processes which may be pursued sequentially or at the same time and there is no connection between the requirement for any other consent and the approach that should be taken to an application for the subject consent, which for any reason has gone wrong.

39. As to the consequences of an order of *certiorari simpliciter*, it is true, as the applicant has submitted, that in the first judicial review in *Usk* and in *O'Grianna* the consequence of an order quashing the decision of the Board on appeal would have been that the developer

would have to start again before the planning authority. I am not immediately convinced that the applicant is correct in her submission that the quashing of the planning permission in this case would return Irish Water to the point of the planning application, as opposed to the pre-planning consultation stage, but I do not believe that it is an issue which I need to decide.

40. The focus on a remittal application is not to identify the "*drawing board*" but rather, if it can be done, the point in time at which the process can be said to have gone wrong. If that can be done, it will be apparent also – as Mr. Mulcahy puts it – what previously has gone right and, by reference to the time and expense incurred in getting to that point, a fair assessment can be made of the consequences in terms of delay and expense if the matter is not remitted for further consideration by the decision-maker. Assuming, for the sake of argument, that the effect of an order simply quashing the decision of the Board of 11th November, 2019 would be to restore the *status quo* immediately prior to the planning application which was made on 20th June, 2018 (or, perhaps, that the applicant might acquiesce in an order remitting the application to that point) the effect in practical terms would be to put Irish Water back by sixteen or seventeen months. That would cause very considerable inconvenience and expense to Irish Water who, I accept, did not bear or share responsibility for the mistake made by the Board. It would furthermore set at nought all of the Inspector's work which, although subjected to a wide ranging attack, was not shown to have been deficient in any way.

41. As to the effect of the delay which would inevitably arise if the matter were not remitted, I think that the focus may be misplaced. The evidence adduced on behalf of Irish Water is directed to the need for the GDD Project, that is what is said to be the necessity that it be allowed to build the development the subject of the planning application. I do not believe that it would be appropriate for the court to approach the case on that basis which, after all, is premised on the assumption that permission for the proposed development will eventually be granted. I do not understand the applicant to contest the fact that there is an urgent and growing problem of drainage capacity for the Greater Dublin Area, and an urgent and growing need for a solution. Rather her position is that what is proposed by Irish Water is not the solution. Whether the proposed development is to be permitted is entirely a matter for the Board. I think that as far as the court is concerned, the urgency is that Irish Water should know as soon as may be whether the development which it proposes as the solution to what is recognised on all sides to be a serious and urgent problem is to be permitted.

42. On this application, the applicant's position is that the statutory consultation required by art. 44 would be no more than a box ticking exercise, but it seems to me that that submission is based on a combination of cynicism and a dogged insistence that the EIA Directive was not transposed. If there is no evidential basis on which it might be concluded that the mandated statutory consultation will be, as Mr. Collins put it, *"a hollow empty exercise"* – and there is not – it seems to me to follow that it would be wrong to assume – one way or the other – what the outcome of that process might be.

43. I do not believe that it would be correct to approach the remittal issue on the basis that Irish Water might be delayed in building, but I am satisfied that Irish Water needs to know, and is entitled to know, as soon as may be whether what it has proposed as the solution will be permitted.

44. I am satisfied that the applicant's reliance on *Redmond* is misplaced. In that case the application was invalid.

45. Mr. Collins' reliance on *Tristor* was also misplaced. The court in that case was not dealing with remittal but with the scope of the order.

**Conclusions**

46. In my judgment of 24th November, 2020 I addressed all of the myriad, diverse and diffuse grounds upon which the applicant sought to challenge the decision of An Bord Pleanála of 11th November, 2019. I then found that the applicant had made out her case on one ground, only, which was that the Board had failed to correctly identify and comply with the obligation imposed on it by art. 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 to seek the observations of the Environmental Protection Agency on the likely impact of the proposed development on waste water discharges.

47. The core issue on this application is whether there is any good reason that the entire process should start again, or whether the flaw in the process identified in my judgment can be isolated from the rest of the process and dealt with.

48. Among the grounds on which the applicant challenged the decision of the Board was an argument – which was advanced in the alternative to the argument that the consultation between the Board and the EPA had been inadequate – that the State had failed to properly transpose Article 2 of the EIA Directive. For the reasons given, I found that the applicant had not identified or established substantial grounds upon which it could be said that there was a failure on the part of the State to properly transpose Article 2 of the EIA Directive into Irish national law.

49. I reject the argument now made on behalf of the applicant that I should approach the remittal application on the basis that the Regulations were deficient, or that I should obliquely revisit the issue as to whether the Regulations were deficient.

50. The court has an express power to remit a decision in respect of which an order of *certiorari* has been made. The court has a wide discretion to remit, which discretion must be exercised judicially and judiciously with the overall objective of achieving a just result.

51. The principles by reference to which that discretion is to be exercised were restated by Barniville J. in his judgment in *Clonres*, which drew heavily from the previous decisions in *Usk, O'Grianna, Christian* and *Tristor*, and later applied in *Fitzgerald, Barna Wind* and *Redmond*.

52. In all of the cases referred to the application of the relevant legal principles depended on the facts, but the formulation of the principles did not.

53. The fact that the proposed development in this case will require a wastewater discharge licence and a foreshore licence as well as planning permission does not affect the principles to be applied.

54. The fact that the proposed development in this case is a strategic infrastructure development is a factor in the application of the established principles but does not go to the principles to be applied.

55. The ultimate touchstone for the exercise by the court of its discretion is to achieve a just result.

56. The effect of an order of *certiorari* simply quashing the decision of the Board to grant the planning application would be to put Irish Water back to, at best, the point immediately before the planning application was lodged.

57. It would not be correct to remit the matter to the point at which the Board previously corresponded with the EPA, which was before the public consultation. The Board's letter of 29th November, 2018, which was based on a mistaken understanding of the requirement for consultation is inherently unlikely to be an accurate reference point for a remittal. While the letter written by the Board to the EPA was based on a misunderstanding of the correct process, that is not to say that it was then that the process went wrong.

58. The legal obligation on the part of the Board, if it should consider that the proposed development is likely to have a significant impact on waste water discharges, is to ask the EPA make observations in relation to the Board's assessment of the likely impact of the proposed development on waste water discharges. That was an obligation that would only arise, and could only have been fulfilled, after the Board had made its assessment: which it had not done at the time the mistaken letter was sent. I am satisfied that the point in the process the which it went wrong was – as the Board and Irish Water have submitted – the point at which the Board could and should have made its assessment: which was when the Inspector's report was finalised.

59. The Inspector's report has withstood forensic scrutiny. Not only was there nothing wrong with it, but it was necessary to enable the Board to make its assessment of the likely impact of the proposed development on waste water discharges.

60. I accept the Board's submission that it has ample powers to ensure further public participation to the extent that that is necessary. The applicant did not engage with the question of what further public consultation might be necessary or appropriate if the matter were to be remitted or suggest that the court might give any particular direction or make any recommendation. I am satisfied that there was no basis for the expressed apprehension that the further consideration of the application might be a box ticking

exercise and that the Board will endeavour to apply itself to its task in good faith and in accordance with law.

61. Finally, although the issue was not argued, I have considered whether it would be appropriate to give any direction or recommendation as to the composition of the Board by which the application is to be reconsidered.

62. The question of whether, in a case which is suitable for remittal, the matter should be remitted to the same decision maker depends very much on the nature of the error which has been identified in the decision. In some cases, for example where objective bias has been established, or where the decision maker has been shown to have misconducted himself, the matter could not possibly be remitted to the same decision maker. In others, for example where the mistake shown to have been made was a legal mistake, there is no reason in principle why a decision maker who has made such a mistake should not be asked to reconsider the decision in accordance with the law as it has been explained. In such cases there will be no basis for any reasonable apprehension that the decision maker will approach the reconsideration otherwise than objectively and in accordance with the law. The fact that the decision maker has previously come to a particular conclusion by reference to a mistake of law will not justify a reasonable apprehension that he will necessarily come to the same conclusion on the basis of a correct understanding of the law.

63. This is a case which clearly falls within the latter category. Without in any way minimising the seriousness of the error or the importance of the consultation with the EPA required by the 2007 Regulations, the mistake was a misstep in the minefield of the Planning and Development Act, 2000 and the Waste Water Discharge (Authorisation) Regulations, 2007 which have been the subject of numerous amendments and revisions. I have found that there was no justification for the assertion that the reconsideration of Irish Water's planning application or the consultation with the EPA might be a mere box-ticking exercise and this, I am satisfied, is the case whether the composition of the Board is the same as that which made the condemned decision or different.

64. I am satisfied that this is not a case in which the court should direct that the members of the Board undertaking the reconsideration of the application should not be those who made the condemned decision, or even, I think, that the court should made a recommendation to that effect.

65. That said, the applicant has shown herself to be exquisitely sensitive to perceived previous association and – following the pragmatic approach taken by Kelly J. in *Ryanair Ltd. v. Terravision London Finance Ltd.* [2011] 3 I.R. 192 – the Board may wish to consider whether future dissatisfaction or complaint might be avoided by the appointment of a differently constituted division.

**Order**

66. There will be an order of *certiorari* quashing the decision of the first respondent dated 11th November, 2019 and an order remitting the notice party's application dated 20th

June, 2018 for reconsideration from the point at which the Inspector's report was submitted to the first respondent.

67. As against the second and third respondents, the application will be dismissed.

68. Unless there is agreement as to the question of costs, it seems to me that the substantive order should be drawn at this stage, showing the directions of the court as to the exchange of submissions on that question.

69. I will list the matter for mention and further directions on this day week at 10:30 a.m.