THE HIGH COURT

[2023] IEHC 161

[Record No. 2020/616 JR]

BETWEEN:

BARFORD HOLDINGS LIMITED

APPLICANT

AND

FINGAL COUNTY COUNCIL

RESPONDENT

JUDGMENT (REMITTAL) Of Ms. Justice Siobhán Phelan delivered on the 29th day of March, 2023.

INTRODUCTION

1. These proceedings arose from a refusal to extend the duration of a planning permission pursuant to s. 42(1)(a)(ii)(II) of the Planning and Development Act, 2000 (as amended) [hereinafter "the PDA"]. In my judgment delivered on the 26th of April, 2022 [hereinafter "the Judgment"]. I indicated that I would quash the Decision of Fingal County Council [hereinafter "the Council"] made on the 20th of July, 2020 refusing an extension of planning permission pursuant to s. 42(1)(a)(ii) of the PDA [hereinafter "the Decision"] and would remit the matter for determination in accordance with law.

2. Following the delivery of my Judgment I invited the parties to make proposals with regard to the form of any consequential order. The terms initially agreed by the parties and proposed for ruling purported to require a determination of the remitted application pursuant to a statutory provision which has since been repealed and in accordance with the statutory and planning framework applicable at the time of the impugned Decision.

3. This judgment is concerned solely with the proper exercise of my jurisdiction to remit.

BACKGROUND

4. As set out in my Judgment, the Applicant [hereinafter "the Developer"], is the owner of lands at Main Street / Coast Road, Baldoyle, Dublin 13 where the Baldoyle Racecourse was formerly located (the "Lands"). By Order dated the 20th of April, 2015, An Bord Pleanála granted permission to the Applicant (ABP Ref. No. PL.06F.243832) (Reg. ref. F14A/0109) [the "Permission"] for the development of a retirement village and hotel and car park at the site of the Stands, Stables and Parade Ring of the former Baldoyle Racecourse, Main Street/Coast Road, Dublin 13 [the "Development"]. As of the date of the grant of the Permission, the Fingal County Development Plan 2017 – 2023 [the "2017 Development Plan"] applied. The 2017 Development Plan contained Specific Local Objective (SLO) 469, which applied to the Lands, and which objective is to "*provide for a public park and sensitively designed retirement village subject to screening under the Habitats Directive*". In accordance with the provisions of sections 40(3), 251 and 251A of the PDA, the Permission was due to expire on the 29th of July, 2020.

5. On the 29th of May, 2020, the Developer made an application to the Council pursuant to s. 42(1)(a)(ii) to extend the life of the Permission to the 11th of September, 2025 [the "Application"]. The Fingal Development Plan 2017 – 23 [the "2023 Development Plan"] was made by the Elected Members on the 16th of February, 2017 and came into effect 4 weeks later, on the 16th March, 2017. As of the date on which the Application was made, therefore, the 2023 Development Plan applied. The Local Area Plan was due to expire in 2018. However, it was extended for a further period of 5 years to the 11th of May, 2023 by a resolution of the elected members of the Council made on the 12th of March 2018. The elected members of the Council did not vote to remove SLO 469 from the Local Area Plan. Accordingly, while SLO 469 was not carried into the 2023 Development Plan, it continued to be included in the 2013 Local Area Plan (as extended).

6. On the 20th of July, 2020, the Council refused to extend the duration of the Permission and it was this decision which was the subject of challenge in these proceedings. No case was made during the original hearing that the intervening repeal of s. 42(a)(a)(ii)(II) of the PDA rendered the proceedings moot. Instead, the parties proceeded on the basis that were the Applicant successful in the proceedings the matter should be remitted.

THE JUDGMENT

7. In my Judgment delivered on the 26th of April, 2022, I found that the Council, in considering whether there had been a "*significant change*" to the development objectives in the Development Plan, erred in law in failing to have regard to the local area plan adopted to give effect to those objectives in a specific area (at para. 81). I also found that, in failing to have regard to the contention that special local objective (SLO) 469 was continued through the extension of the local area plan, which incorporated that objective, the Council failed to have regard to a relevant consideration (at para. 83). In view of these findings, I indicated that I proposed to grant an order of *certiorari* of the Decision made on the 29th of May, 2020 pursuant to s. 42(1)(a)(ii) of the PDA together with an order remitting the Application made by the Developer to the Council to be determined in accordance with law (at para. 107).

PROPOSED AGREED REMITTAL ORDER

8. Following the delivery of my Judgment it was indicated that the Council was not seeking a certificate for leave to appeal. The matter was then adjourned from time to time as the parties sought to agree the terms of consequential orders and most particularly the terms of a remittal order. When the matter was listed for mention on the 10th of October, 2022 I was furnished with the text of a draft proposed order and asked by the parties to make the following order on consent:

a. An Order of *Certiorari* of the Decision of the Respondent made on the 20th of July 2020 (Decision Order No. PF/0930/20).

b. An Order that the Respondent's Planning Register be corrected to reflect that the Decision of the Respondent made on the 20th of July, 2020 (Decision Order No. PF/0930/20) has been quashed and remitted on terms to the Respondent.

c. An Order remitting all the applications made by the Applicant to the Respondent on the 29th of May, 2020 pursuant to s. 42(1)(a)(ii) of the Planning and Development Act 2000 as amended (the "PDA") to be determined in accordance with law and the PDA, in particular s.42(1)(a)(ii), as it was on 20th July 2020 (*i.e.* the date of the impugned Decision) and Planning and Development Regulations 2001 as amended as they were on 20th of July, 2020 and on the basis that the following circumstances apply:

i. the development plan is the Fingal Development Plan 2017-2023 as it was on 29th May 2020;
ii. the spatial and economic strategy is the Eastern and Midland Regional Assembly (EMRA) Regional Spatial and Economic Strategy (RSES) 2019-2031 (made on June 28th 2019) as it was on 29th May 2020;
iii. the Local Area Plan is the Baldoyle-Stapolin LAP (May 2013) as extended as it was on the 29th of May, 2020;
iv. the guidelines issued by the Minister under section 28 of the PDA are all such guidelines in force on the 29th of May, 2020;
v. in relation to s.42(1)(a)(ii)(IV) the Applicant may, within 8 weeks of the date of this Order, submit to the Respondent further information on the application in respect of whether an appropriate assessment, if required, was carried out before Permission Planning Register Reference Number F14A/0109 and An Bord Pleanála Reference Number PL 06F.243832 (the "Permission") was granted;
vi. upon the expiration of the 8 weeks period referred to at subparagraph vi the Respondent shall make its decision on the application, including such further information as may have been submitted, in accordance with s.42(3)(b) and on the basis that the date of the expiration of the 8 weeks period referred to at subparagraph vi is the date the application is duly made within the meaning of s.42(3)(a);
vii. the maximum period the Respondent may extend the appropriate period of the Permission shall be in accordance with s.42(1) *viz.* such additional period not exceeding 5 years (*i.e.* 5 calendar years and 45 days) as the Respondent considers requisite to enable the development to which the Permission relates to be completed;
viii. the date from which any such the extended period shall commence will be the date of Respondent's decision on the remitted application.

d. An Order that the Respondent pay the Applicant's costs of the proceedings to include reserved costs (if any), such costs to be adjudicated in default of agreement by the Office of the Legal Costs Adjudicator.

9. As is clear from the foregoing, I was asked to make a remittal order on consent on terms which would require the application to be determined as if time had stood still and all considerations remained the same as they had been when the application was originally dealt with, save that the life of any extended permission would run from the date of any new decision for a period not exceeding five years, notwithstanding changes in the law in the intervening period.

10. While I was desirous in providing a remedy to the Developer that it would be returned to the position in which it should have been in but for the mistaken approach to the application which I had found in my Judgment, I am constitutionally bound to be vigilant in ruling terms agreed on a consent basis that there is no trespass beyond the lawful parameters of my jurisdiction. In this regard it is immediately obvious that the planning area is closely regulated in the public interest and subject to the requirements of EU law. Consequently, both separation of powers and primacy of EU law issues arise, each potentially affecting the proper exercise of my jurisdiction on remittal.

11. My concern was specifically prompted in circumstances where the statutory provision under which the Application was made has been repealed since the proceedings were commenced and s. 42 of the PDA has been further amended subsequent to the Application for an extension of the planning permission and its initial determination most particularly the insertion of a new s. 42(8) which provides:

> *"A planning authority shall not extend the appropriate period under this section in relation to a permission if an environmental impact assessment or an appropriate assessment would be required in relation to the proposed extension concerned."*

12. In response to my concern as advised to the parties when they appeared to rule the consent terms agreed by them, I was helpfully referred to the decisions of Clarke J. in *Tristor Limited v. Minister for the Environment, Heritage and Local Government & Ors* [2010] IEHC 454; Barniville J. in *Fitzgerald v. Dun Laoghaire Rathdown County Council & Ors.* [2019] IEHC 890 and Barniville J. in *Clonres CLG v. An Bord Pleanala & Ors* [2018] IEHC 473. I adjourned the matter briefly to consider these authorities.

13. Having considered these authorities, I advised the parties that in my view none of these cases were on all fours with the situation in this case because of the repeal of s. 42(a)(a)(ii)(II) of the PDA and further amendment of s.42. I referred the parties to the decision of McDonald J. in *Barna Wind Action Group v An Bord Pleanala* [2020] IEHC 177 where he said that by remitting a matter, the Court is not giving any advance imprimatur to the approach subsequently adopted by the authority following remittal. I indicated to the parties that I was conscious that in remitting the matter I should be vigilant not to interfere with or trespass upon the statutory role of the Council noting that in *Barna Wind*, McDonald J. had been careful not to make any directions in relation to changes made to the EIA Directive in the intervening time.

14. By Order dated the 12th of October, 2022, I directed the parties to provide written submissions addressing the jurisdiction of the Court to make a remittal order in the terms agreed, with particular regard to the following:

1) The effect of the agreed terms on the subsequent amendment of the legislation, in particular s. 42(8);

2) The effect of the Supreme Court decision in *McKone Estates Limited v Dublin City Council* [1995] 2 ILRM 283 and *Waterford County Council v. John A.Woods Ltd.* [1999] 1 IR 556 on the jurisdiction of the Court to make an order in the terms agreed;

3) Whether s. 27 of the Interpretation Act, 2005 or any specific transitional measures impact on the effect the repeal of s. 42(i)(a)(ii)(II) of the PDA has on any determination of the application now.

15. I further directed that the Attorney General be put on notice of the application for a remittal order on the terms which had been agreed by the parties and he was invited to make such submissions as he considered appropriate in respect of any third party or public interest consideration which the Attorney General identified as having a bearing on my decision to remit and the terms of the proposed remittal. In addition to the repeal of s. 42(1)(a)(ii)(II) of the PDA the potential implications for the exercise of a remittal power of the decision on the Court of Justice of the European Union [hereinafter "CJEU"] in Case C-254/19 *Friends of the Irish Environment Limited -v- An Bord Pleanála and Shannon Lng Ltd* ("*Case 254/19 FOIE v*

ABP") was also identified as an issue of concern for me. I subsequently further indicated that I would welcome submissions on s. 22 of the Planning and Development, Maritime and Valuation (Amendment) Act, 2022, which inserts a new s.50A(9A) into the PDA and to any such further matters as the parties considered appropriate.

16. The position of the parties as regards the terms of proposed remittal evolved during the submission process. The Council suggested in December, 2022 that a variation on what had previously been indicated as agreed would be required. Then, following receipt of the Attorney General's submissions in February 2023, the Developer prepared an entirely new draft order which was furnished to me and to the Council and the Attorney General on the 8th of March 2023. The Developer submitted that the revised draft terms take cognizance of the submissions received and are in terms which both the Council and the Attorney General accept I have jurisdiction to make, provided I am satisfied as to certain matters of law in deciding to make the orders sought. Having considered the draft proposed by the Developer, the Council submitted a further draft with alternative proposals as to declaratory relief and directions on the 21st of March, 2023. This was the final draft presented. In this final draft, the parties had agreed time-frames, subject to the Court, for next steps presuming remittal. This was necessary as there are exigencies of time which now arise in circumstances where a new Development Plan will take effect in May 2023, by which time the parameters for proper consideration of a remitted application may be subject to further change.

17. The primary differences between the Developer's and Council's final drafts is as to whether the Court directs the Council to carry out a screening for Appropriate Assessment hereinafter "AA"] and for Environmental Impact Assessment [hereinafter "EIA"] in respect of the remitted application, in accordance with the judgment of the Court of Justice of the European Union in Case C-254/19 *Friends of the Irish Environment v An Bord Pleanála* pursuant to section 42(8) of the Planning and Development Act 2000 (as amended) on the basis that it applies even though it had not been enacted when the Application was made or alternatively whether such screening is directed pursuant to s. 42 and the provisions of the PDA by virtue of a conforming interpretation on the basis that s. 42(8) of the PDA does not apply. In both draft orders, it appears to be now accepted that the remitted application should be determined in accordance with the plans and guidance applicable as of the date on which a decision is made on the remitted application. Accordingly, I am no longer being invited to make an order which provides for the determination of the Application as if the legal and factual

parameters for the Decision had stood still in May, 2020. The Developer did not raise objections to the alternative terms proposed by the Council.

18. The Attorney General's position in response to both later draft proposed orders might be summarized as being open to either of the two later drafts, provided they flow from findings of law by me which would in turn permit orders in the terms finally ordered. Accordingly, the final form of any order made is now a matter for the Court and subject to my legal findings.

STATUTORY FRAMEWORK

19. Section 42 of the PDA, as it applied as of the date of the original Application (May, 2020), provided that:

> *"(1) On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:*
>
> *(a) either –*
>
> *(i) the authority is satisfied that—*
>
> *(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended;*
>
> *(II) substantial works were carried out pursuant to the permission during that period, and*
>
> *(III) the development will be completed within a reasonable time,*
>
> *or*
> *(ii) the authority is satisfied—*
> *(I) that there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the*

commencement of development or the carrying out of substantial works pursuant to the planning permission,

(II) that there have been no significant changes in the development objectives in the development plan or in regional development objectives in the regional spatial and economic strategy for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area,

(III) that the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section, and

(IV) where the development has not commenced, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted."

20. On the 9th of September 2021, subsequent to the Decision of the Council to refuse to extend the permission at issue in these proceedings, but prior to both the hearing of these proceedings in February 2022 and the Judgment delivered on the 26th of April 2022 granting *certiorari* with respect to that refusal, s. 42 of the PDA 2000 was amended. Two discrete legislative changes on that date are relevant to the issues arising, namely:

(i) the repeal of s. 42(1)(a)(ii)(II) being the provision under which the application for an extension of the permission had been made and

(ii) the enactment of s. 42(8).

21. These legislative changes were effected by s. 28(1) of the Planning and Development (Housing) and Residential Tenancies Act 2016 (as amended by s. 58 of the Planning and Development (Amendment) Act 2018) which substituted a new s. 42(1)(a). The new provision was commenced by the Planning and Development (Housing) and Residential Tenancies Act 2016 (Commencement) Order 2021 (S.I. No. 455 of 2021). On the 9th of September 2021, s.

42 was also amended by the European Union (Planning) (Habitats, Birds and Environmental Impact) Regulations 2021 (S.I. No. 456 of 2021).

22. Section 42 of the PDA, as amended, now provides as follows:

(1) "On application to it in that behalf, but subject to subsection (8), a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:

(a) (i) the authority is satisfied that—

(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,

(II) […]

(III) substantial works were carried out pursuant to the permission during that period, and

(IV) the development will be completed within a reasonable time,

(b) the application is in accordance with such regulations under this Act as apply to it,

(c) any requirements of, or made under those regulations are complied with as regards the application, and

(d) the application is duly made prior to the end of the appropriate period.

(2) In extending the appropriate period under subsection (1) a planning authority may attach conditions requiring the giving of adequate security for the satisfactory completion of the proposed development, and/or may add to or vary any conditions to which the permission is already subject under section 34(4)(g).

(3) (a) Where an application is duly made under this section to a planning authority and any requirements of, or made under, regulations under section 43 are complied

with as regards the application, the planning authority shall make its decision on the application as expeditiously as possible.

(b) Without prejudice to the generality of paragraph (a), it shall be the objective of the planning authority to ensure that it shall give notice of its decision on an application under this section within the period of 8 weeks beginning on—

(i) in case all of the requirements referred to in paragraph (a) are complied with on or before the day of receipt by the planning authority of the application, that day, and

(ii) in any other case, the day on which all of those requirements stand complied with.

(4) A decision to extend the appropriate period of a permission shall be made not more than twice under this section and a planning authority shall not further extend the appropriate period. Where a second decision to extend an appropriate period is made under this section, the combined duration of the 2 extensions of the appropriate period shall not exceed 5 years.

(5) Particulars of any application made to a planning authority under this section and of the decision of the planning authority in respect of the application shall be recorded on the relevant entry in the register.

(6) Where a decision to extend is made under this section, section 40 shall, in relation to the permission to which the decision relates, be construed and have effect, subject to, and in accordance with, the terms of the decision.

(7) Notwithstanding subsection (1) or (4), where a decision to extend an appropriate period has been made by a planning authority prior to the coming into operation of this section, the planning authority, where an application is made to it in that behalf prior to the expiration of the period by which the appropriate period was extended, may further extend the appropriate period provided that each of the following requirements is complied with—

(i) an application is made in that behalf in accordance with regulations under section 43,

(ii) any requirements of, or made under, the regulations are complied with as regards the application, and

(iii) the authority is satisfied that the relevant development has not been completed due to circumstances beyond the control of the person carrying out the development.

(8) A planning authority shall not extend the appropriate period under this section in relation to a permission if an environmental impact assessment or an appropriate assessment would be required in relation to the proposed extension concerned."

23. As can be seen from the above, the provisions of s. 42 of the PDA have been amended such that the provision invoked by the Developer – s. 42(1)(a)(ii)(II) – has now been repealed. Of note, there is no saver or transitional provision in the amending legislation with respect to applications under subsection 42(1)(a)(ii) that were ongoing as of the date that subsection was repealed.

24. My suspicion that s. 42(8) was enacted to address the findings of the CJEU in Case C-254/19 *FOIE v ABP* was confirmed on behalf of the Attorney General. In that case, the CJEU had held, *inter alia,* that a decision to extend the period originally set for the construction of a development, for which works had not commenced, must be regarded as a "*project*" within the meaning of:

1. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 ("the EIA Directive"), and
2. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").

25. The effect of the insertion of subsection (8) is that an extension of planning permission may not be granted if an EIA or an AA would be required in relation to the proposed extension concerned. In addition, the European Union (Planning) (Habitats, Birds and Environmental Impact) (No.2) Regulations 2021 (S.I. No. 457 of 2021) amended Chapter 3 and 3A of the

Planning and Development Regulations 2001 to introduce EIA and AA screening procedures in respect of all extension of duration applications.

26. Again, there are no transitional provisions in the amending legislation with respect to applications under s. 42 that were ongoing as of the date s. 42(8) was enacted.

27. In the absence of specific transitional provisions, the general provisions of the Interpretation Act, 2005 [hereinafter "the 2005 Act"] arise for consideration. Section 26(2) of the 2005 Act provides that:

> "*Where an enactment ("former enactment") is repealed and re-enacted, with or without modification, by another enactment ("new enactment"), the following provisions apply:*
>
> *…*
>
> *(c) proceedings taken under the former enactment may, subject to section 27 (1), be continued under and in conformity with the new enactment in so far as that may be done consistently with the new enactment."*

28. Section 27 of the 2005 Act further provides that:

> *"(1) Where an enactment is repealed, the repeal does not –*
>
> *(a) revive anything not in force or not existing immediately before the repeal,*
>
> *(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or*
>
> *(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.*

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

29. A further statutory development since the delivery of my judgment in this matter is that the jurisdiction of the Court to remit was given a statutory footing in respect of planning decisions by section 50A(9A) of the PDA (as inserted by section 22(b) of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 and which came into operation on 20th of October 2022 (S.I. N. 535/2022)), as follows:

"*If, on an application for judicial review under the Order, the Court decides to quash a decision or other act to which section 50(2) applies, made or done on an application for permission or approval, the Court shall, if requested by the applicant for permission or approval, remit the matter to the planning authority, the local authority or the Board, as may be appropriate, for reconsideration, subject to such directions as the Court considers appropriate, unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so*."

SUBMISSIONS

30. Detailed written submissions were received on behalf of the Developer and the Council in December 2022. While it had originally been suggested that a common submission might be possible, this did not transpire to be the case. Notwithstanding that a draft consent order had been presented to me in October 2022, some differences or nuances to their approaches emerged between the parties in the written submissions received. It should be observed in this regard that the legal and factual matrix within which the issues arising fall to be determined continue to evolve and I understand, for example, that a new Development Plan is likely to shortly take effect potentially impacting on relevant considerations. Similarly, intervening judgments of the superior courts continue to impact on factors which bear on the proper consideration of remittal of the application the subject of these proceedings. Accordingly, I make no criticism of the parties for the fact that positions have evolved and become more

nuanced over the period since Judgment was delivered in April 2022. It is also true that whilst clearly in agreement with a wish to return the Developer to the position it should have been in but for the mistaken approach adopted by the Council, as found by me, the Council also has a specific statutory role and prescribed functions which mean that in agreeing terms of a Court order it cannot act in a manner which impedes the proper discharge by it of its statutory functions.

31. The submissions received on behalf both the Developer and the Council were duly furnished to the Attorney General. Carefully considered and detailed written submissions were filed in response on behalf of the Attorney General in February, 2023. I would like to gratefully record that the submissions received on behalf of the Attorney General have been of considerable assistance to me in coming to my decision in relation to the complex issues which the question of remittal gives rise to in this case.

The Developer's Submissions

32. Not unexpectedly, the submissions filed on behalf of the Developer were supportive of an order being made in the terms of the proposed draft Order. The Developer made the point that unlike the situation here, *Case 254/19 FOIE v ABP* concerned a situation where the grant of the original development consent was not preceded by an AA carried out in accordance with Article 6(3) of the Habitats Directive (Articles 22 and 23). It was submitted that, as can be seen from the judgment in that case, an AA must be carried out in respect of an application to extend a planning permission unless:

a. an AA was carried out prior to the grant of the original planning permission, which complies with the requirements of Article 6(3) of the Habitats Directive; and

b. there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account.

33. Thus, it was contended on behalf of the Developer that the judgment of the CJEU in *Case 254/19 FOIE v ABP* is not authority for the proposition that the duration of a development consent cannot be extended unless an AA is carried out under Article 6(3) of the Habitats Directive. Rather, this decision requires that consideration be given to whether it is necessary

to carry out an AA in respect of an extension of the duration of a development consent and this will be the case where an AA was not carried out prior to the grant of the original development consent or where there have been changes in the intervening period which require a new assessment.

34. The Developer further submitted that this is recognised in s. 42(8), as inserted by S.I. No. 456 of 2021, which provides that:

> *"A planning authority shall not extend the appropriate period under this section in relation to a permission if an environmental impact assessment or an appropriate assessment would be required in relation to the proposed extension concerned."*

35. It is submitted, therefore, that this decision does not preclude the grant of an extension of time in this case, given that an NIS was submitted with the original application for planning permission and a stage 2 Appropriate Assessment was carried out by the Board prior to the grant of the Planning Permission. Moreover, reference is made to the fact that in order to address any potential implications of this decision, the draft Agreed Order provides that:

> "v. *in relation to s.42(1)(a)(ii)(IV) the Applicant may, within 8 weeks of the date of this Order, submit to the Respondent further information on the application in respect of whether an appropriate assessment, if required, was carried out before Permission Planning Register Reference Number F14A/0109 and An Bord Pleanála Reference Number PL 06F.243832 (the "Permission") was granted*;
>
> vi. *upon the expiration of the 8 weeks period referred to at subparagraph v the Respondent shall make its decision on the application, including such further information as may have been submitted, in accordance with s.42(3)(b) and on the basis that the date of the expiration of the 8 weeks period referred to at subparagraph vi is the date the application is duly made within the meaning of s.42(3)(a);*"

36. As for the jurisdiction to make an order for remittal and the principles which apply in respect of same, I am referred on behalf of the Developer to a series of cases where this issue has been considered. These included the following: *Usk and District Residents Association Ltd.*

v An Bord Pleanála [2007] IEHC 86, *Tristor Limited v Minister for the Environment* [2010] IEHC 454, *Christian v Dublin City Council (No. 2)* [2012] IEHC 309, *O'Grianna v An Bord Pleanála* [2015] IEHC 248, *Clonres CLG v An Bord Pleanala* [2018] IEHC 473, *Fitzgerald v Dun Laoghaire Rathdown County Council* [2019] IEHC 890, *Barna Wind Action Group v An Bord Pleanala* [2020] IEHC 177, and *Joyce Kemper v An Bord Pleanala* [2021] IEHC 281. It is submitted on behalf of the Developer that the overriding principle which emerges from this case law is that the court should attempt, in as clinical a way as possible to *"reset the clock*". It is submitted that this means remitting the matter to the point just prior to when the error of law occurred to allow the decision-making process to resume from that point in time. It is submitted that it necessarily follows that the decision-making process should resume on the basis of the law as it stood at that point in time.

37. With reference to s. 50A(9A) of the PDA (as inserted by section 22(b) of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 placing jurisdiction of the Court to remit on a statutory footing it is submitted that this provision creates a presumption in favour of remittal and indicates a legislative policy that remittal should be ordered whenever possible.

38. Addressing the transitional provisions of the 2005 Act with reference to the decisions in *J. Wood and Co. Ltd v Wicklow County Council* [1995] 1 ILRM 51 and *McKone Estates Limited v Dublin County Council* [1995] 2 ILRM 283 it is submitted that these authorities are distinguishable and/or no longer represent good law. I am referred to *Kenny v An Bord Pleanala* [2001] 1 IR 565 in which McKechnie J. held that when under a statutory regime a process has been commenced, those involved in or affected thereby, have a right to see that process through, to a conclusion, under the law as it was at the date of its commencement. McKechnie J. distinguished *J. Wood and Co. Ltd v Wicklow County Council* and *McKone Estates Limited v Dublin County Council* on the basis that the jurisdiction to mount a claim for compensation arose only after a decision to refuse planning permission had been made. As such, there was no question of the applicants in those cases being a position to avail of the repealed provisions. It is submitted on behalf of the Developer that *McKone* and *J. Wood & Co. Ltd*. can be distinguished from the within proceedings on the same basis. I am reminded that here, not only was the Developer entitled to avail of s. 42(1)(a)(ii) of the PDA but the Developer had in fact submitted an application and the Court has found that it was not determined in accordance with law by the Respondent. It is submitted that had a decision been

made to grant an extension of the planning permission, there would be no doubt but that the Developer has a vested right to an extension of time. It is submitted that it cannot be the case that, because the Respondent erred in law and refused to extend the planning permission, the Developer ought now to be deprived of a remedy. It is submitted that, the Developer having lawfully submitted an application under s. 42(1)(a)(ii) of the PDA, has the right to see that process through by having the application remitted to the Respondent to be determined in accordance with s. 42 of the PDA, as it applied as of the date of the impugned Decision.

39. The Developer refers in written submissions to the fact that the decision in *Kenny v An Bord Pleanala* was followed by Clarke J in *CIE v An Bord Pleanala* [2008] IEHC 295, (paras. 5-8), where the issue which arose for determination was whether a change in the law, which had the result that a railway station became a protected structure, rendered works which were exempted development "*de-exempted*". Clarke J. found that the Board was correct in concluding that the works did not lose their exempted status, largely in reliance on *Kenny*.

40. It is submitted on behalf of the Developer that the broad scope of the Court's discretion in fashioning a remedy in judicial review proceedings was reaffirmed by the Supreme Court in *Kelly v Minister for Agriculture* [2021] IESC 62 where O'Donnell J considered that the approach of the Court to remedies in the field of public law as best explained in the judgment of Clarke J in *Tristor Limited v Minister for the Environment*.

The Council's Submissions

41. In their separate written submissions, the Council point out that as regards the Application that it is proposed to remit, the Council is a *"disinterested party"* (see *Clonres CLG v An Bord Pleanala* [2018] IEHC 473 at para. 44(6)). Its concern on the remittal application is to ensure that there is legal clarity in the event of remittal and that appropriate directions are made as to how any such remitted application should be considered by it, *i.e.* that the applicable legislative provisions, plans and guidelines are clearly set out. It is confirmed on behalf of the Council that the terms incorporated into the original draft proposed order were agreed in an endeavour to achieve a just outcome for the Developer, given that the Council's decision to refuse the application for an extension of duration had been quashed by this Honourable Court. It is explained that it was to this end that the draft agreed order proposed that the remitted application be determined in accordance with the legislative provisions, plans

and guidelines as they were when the decision the subject of these proceedings was made, *i.e.* 20th of July, 2020.

42. Referring to s. 50A(9A) of the PDA which came into operation on the 20th of October 2022, it is submitted that sub-section 9A appeared to only apply to an "*applicant for permission or approval*" and not other decisions or acts under the PDA 2000, for example, a decision to extend the duration of a permission. The Council's submissions further refer me to the decision of the High Court (Humphreys J.) in *Hickwell Limited & Anor -v- Meath County Council (No. 2)* [2022] IEHC 631 (at para. 10), where the Court noted "*this applies to permissions rather than plans as such*". However, it is submitted, the principle contained in s. 50A(9A) that remittal does not arise if it would not be lawful to remit would seem to apply to other decisions. In *Hickwell (No. 2)* Humphreys J. noted (at para. 11):

> *"The law in relation to permissions is that remittal does not arise if it would not be lawful to remit, and there is no huge reason in principle why a corresponding approach to that extent at least should not apply in other areas."*

43. As regards the lawfulness of remittal in the case before him - which concerned a development plan - Humphreys J. observed (at para. 10) that remittal *"seems doubtful legally … in circumstances where express statutory provision already exists".* He expanded on that (in para. 11) as follows:

> *"This must include a situation where the law has specified how exactly a decision can be amended. In the case of a plan, an order would either have to replicate exactly the statutory provisions for variation (in which case it would be so pointless as to constitute the wasteful consumption of judicial resources and legal costs, contrary to legal principles), or to amend those statutory procedures (in which case it would be substantively unlawful)."*

44. The Council maintains that in the instant case s. 42(1) "*has specified how exactly*" a decision to extend a duration is to be made – there is a prescribed discretion. That prescribed discretion no longer includes the provisions the Developer relied on in its application (*i.e.* s. 42(1)(a)(ii) which apply where *inter alia* development has not commenced). Applying Humphreys J's observations in *Hickwell (No.2),* it is contended by the Council that any remittal

which seeks "*to amend those statutory procedures… would be substantively unlawful*" and ought not to arise. In this regard, paragraphs 56 to 80 of *Clifford & Anor -v- An Bord Pleanála & Ors; O Connor & Ors -v- An Bord Pleanála & Ors (No. 3)* [2022] IEHC 474 are identified on behalf of the Council as also of note. This case concerned the Board's obligation to apply new legislation in ongoing planning applications (see para. 50). Humphreys J. held (at para. 71):

> *"71. Overall the law is clear – and that includes a great deal of law that pre-existed, but was not opened to the court in, Kenny [v An Bord Pleanala [2001] 1 IR 565]. Nobody has a "right" to maintenance of current procedural arrangements by reference merely to the fact that the procedure has already commenced when a new law is enacted."*

45. While acknowledging that the judgment in *Clifford* focused on a procedural, as opposed to substantive, change in the law the Council refers me to Humphreys J.'s comment (at para. 73) that:

> *"Kenny is best interpreted as having simply no relevance to merely procedural change. Insofar as Kenny might be said to have some possible relevance to substantive change in terms of vested rights, I might be allowed to say in passing that I am not persuaded by the argument that there could ever be a legally recognisable vested right to demolish a structure that warrants protection. Just as a local authority does not have a "right" not to be abolished (see Christchurch Borough Council, para. 58) a developer does not have a right to knock down a protected structure or damage it in any way. The hope of anticipating the possibility of getting permission for a particular development is not a legally cognisable vested right. To that extent it is qualitatively different from a permission that has actually been granted."*

46. On behalf of the Council it is noted that in the above quoted text, while it is not an issue Humphreys J. decided on, he was of the view "*[t]he hope of anticipating the possibility of getting permission for a particular development is not a legally cognisable vested right*". It is submitted that if that is accepted, there does not seem to be any reason why that would not also be so as regards the hope of anticipating the possibility of getting an extension of the duration of a permission, which is the issue in these proceedings. In other words, an application for an extension of duration of planning permission is "*not a legally cognisable vested right"* for

which a person has "*a 'right' to maintenance of current procedural arrangements by reference merely to the fact that the procedure has already commenced when a new law is enacted*".

47. It is observed by the Council that Humphreys J. further explained (at para. 74) why he was "*not persuaded*" by *Kenny* insofar as it "*might be said to have some possible relevance to substantive change in terms of vested rights*". His view was that:

> "*objective environmental considerations affect the whole community and transcend the rights of any particular landowner*"*…."Likewise, by analogy with Antonelli it is hard to see how the legislature intended that there would be no protection against the destruction of protected structures that were subject to planning applications made before 1st January, 2000 but only for planning applications made after that date. Generally, objective environmental considerations affect the whole community and transcend the rights of any particular landowner such as they are. However, any further consideration of that point can be left to a case where it arises."*

48. Humphreys J. further explained (at para. 79 of his judgment) – in the context of a planning application, but the Council submits that this would seem to apply equally to an extension of duration of a planning permission – that "*the law to be applied is that as of the date of the decision, not the date of the original application.*" Humphreys J. added:

> *"A planning application is not a "unitary process" in the sense argued by the board. If the law, whether procedural or substantive (having regard to objective environmental considerations) changes during the process prior to a decision, the new law should be applied as of the time of the decision, not as of the time of the original application. This is fundamental and has a vast range of implications. For example, the board bridled at the suggestion that they would or should disregard new ministerial guidelines merely because they were published after a planning application was made, and immediately shied away from that consequence of their argument. Similarly, where a development plan changes, the board also seemed to resist the point that it was a necessary consequence of their argument that such a change should be disregarded as well. I agree with that reluctance – the law to be applied is that as of the date of the decision, not the date of the original application. The board can't be allowed to make an unlawful decision merely because the law was otherwise on the date when the original planning application was made."*

49. It is submitted on behalf of the Council that these recent authorities tend to imply that if the Application is remitted, the law to be applied should be "*the law as of the date of the decision*" (*Clifford (No. 3)*). As it stands, they submit, the law does not provide for an extension of duration on the basis that the application was made (*i.e.* where development has not yet commenced) – and, as an application for an extension of duration of planning permission is "*not a legally cognisable vested right"* for which a person has "*a 'right' to maintenance of current procedural arrangements by reference merely to the fact that the procedure has already commenced when a new law is enacted*" (*Clifford (No. 3)*) it "*would be substantively unlawful"* (*Hickwell (No.2)*) for remittal to direct the Application to be determined in accordance with the law as of the 20th of July, 2020. The Council further acknowledges, however, that the observations of the High Court in *Hickwell* and *Clifford (No.3)* might be considered *obiter* and therefore conclude that it is open to me to conclude that I *can* remit the matter to the Council. Were I to take this view and conclude that U can remit the matter for determination in accordance with law as at July, 2020, the Council invites me to consider what further directions might accompany such a remittal, if made. It is also being assumed for these purposes – albeit contrary to the tenor of the Court's observations in *Hickwell* and *Clifford (No.3)* – that the law which would apply is the *unamended* version of s. 42 of the PDA 2000.

50. With reference to the Developer's submissions in relation to *Case 254/19 FOIE v ABP* where the CJEU concluded that "*a consent such as the consent at issue in the main proceedings does constitute a new consent under the EIA Directive and, consequently, also an 'agreement' under Article 6(3) of the Habitats Directive*" (para. 47 of the CJEU judgment), it is accepted on behalf of the Council that the fact that the original consent had expired before the decision to extend was made featured in the reasoning of the CJEU (see para. 45). The Council accepts that the extension of duration the subject of these proceedings differs from that considered in *Case 254/19 FOIE v ABP* as it was made on 20th of July, 2020, before the permission was due to expire on 29th of July, 2020, and so it was renewing an extant consent. However, the Council suggests that it seems unlikely that point of distinction should make a difference on the facts of this case, where the project had not commenced and there was only a matter of days left in the currency of the extant consent. The Council submits that the decision the subject of these proceedings "*does constitute a new consent under the EIA Directive and, consequently, also an 'agreement' under Article 6(3) of the Habitats Directive*" (per para. 47

of the judgment of CJEU in *Case 254/19 FOIE v ABP*). In those circumstances, *Case 254/19 FOIE v ABP* (see para. 56) requires:

> *"… the competent authority [the Council in the instant case] to assess whether a consent … which extends the period originally set in a first consent for carrying out a project … must be preceded by the appropriate assessment of its implications under the first sentence of Article 6(3) of the Habitats Directive and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as changes to the project and the existence of other plans or projects."*

51. In the light of this dicta of the CJEU it is submitted on behalf of the Council, altering their position in proposing the draft agreed terms in view of its consideration of the issues which had been raised, that if I remit the matter, it would be appropriate that any order of remittal require (in addition to what is set out in the draft agreed order) that the Developer submit and the Council consider:

> *"Further information on the application in respect any previous assessments, changes in the relevant environmental and scientific data, the project and any other plans or projects that must be taken into account for the purposes of appropriate assessment under the Habitats Directive."*

Attorney General's Submissions

52. In submissions on behalf of the Attorney General, the questions which I had raised were addressed in a considered, comprehensive, non-partisan manner with a proper focus on the public interest and in assisting the Court. Four issues were identified as arising, with respect to the terms of the draft Order which I had been asked to rule in October 2022, that engage public interest considerations and on which the Attorney General made submissions.

53. First, the draft Order required the Council to determine the Application not only in accordance with law, but in accordance with the law (and in particular the PDA 2000 and the PDR 2001) as it was on the date of the Council's original decision (20th of July, 2020).

54. Secondly, the draft Order required the Council to determine the Application based not on the statutory plans and guidelines that apply as of the date of the Council's decision following remittal, but the plans and guidelines that applied as of the date the application for an extension was made (29th of May, 2020).

55. Thirdly, although the draft Order permitted the submission of additional information as to whether AA of the original permission, if required, was carried out, it contained no provision with respect to the AA screening of the proposed extension of the permission, and no confirmation as to how the decision in Case C-254/19 *FOIE v ABP* in that respect was to be addressed.

56. Fourthly, the draft Order was silent with respect to EIA screening of the proposed extension of the permission, or, if required, EIA of that extension, and it contained no confirmation as to how the decision in Case C-254/19 *FOIE v ABP*, insofar as it may be cross-applied to EIA, was to be addressed.

57. The Attorney General addressed each of these issues in turn.

58. With regard to the first issue, the law applicable to the remitted application, having regard to the repeal of s. 42(1)(a)(ii), without any specific saver or transitional provisions, it is indicated that the position of the State was that remitted applications should be determined in accordance with the law that applies as of the date of the decision on remittal and not in accordance with the law frozen as it was on the date of the impugned decision. It is acknowledged that the position would be otherwise where the original application has the benefit of a transitional or saver provision, either in the repealing legislation or under section 27 of the 2005 Act. It is acknowledged also, however, that provisions creating new substantive requirements commenced after the original application is made may not be intended to apply to applications that are ongoing as of the commencement of those provisions, and therefore may not (having regard, in particular, to the presumption against retrospective effect) apply to the remitted application. It is important in the Attorney General's submission that these scenarios involve the interpretation and application of existing law at the date of the decision following remittal – which will include any transitional or saver provisions as well as the presumption against retrospective effect – to the remitted application. They do not require the

Court to direct that the remitted application be determined based on the law frozen as it was on the date of the impugned decision, as per the agreed terms of remittal here.

59. The position adopted by the Attorney General on behalf of the State is that it is open to the Court to determine that s. 27 of the 2005 Act preserves the effect of s. 42(1)(a)(ii) of the PDA 2000 for the purposes of applications made under that subsection prior to its repeal, and therefore continues to preserve its effect for the purposes of the remitted application here. In those circumstances, subject to the EU law considerations, remittal would be lawful, and the remitted application would be determined under s. 42(1)(a)(ii) of the PDA 2000. It is submitted, however, that the terms of an order remitting the matter on that basis should simply be that the application is to be remitted to be determined in accordance with law. An interpretation as to the operation of any relevant saver clause, if the Court considers the pronouncement of such an interpretation appropriate, is a separate matter for declaration rather than for direction in an Order. An Order that the remitted application be determined based on the PDA 2000 and the PDR 2001 as they were on the 20th of July, 2020, as per the initial draft agreed Order, would be neither necessary nor appropriate in the Attorney General's submission.

60. The Attorney General further submits, however, if – contrary to the foregoing – I were to determine that the effect of s. 42(1)(a)(ii) was not preserved under s. 27 of the 2005 Act for the purposes of applications made prior to the repeal of that subsection, and where there is no other saver or transitional clause, the position of the Attorney General is that remittal on the agreed terms would be unlawful. It is submitted that it is not open to me to revive the effect of the now repealed s. 42(1)(a)(ii) for the purposes of a remitted application, if the legislature chose not to include a saver clause with respect to applications ongoing when that subsection was repealed (whether in the repealing legislation or under s. 27 of the 2005 Act). In those circumstances, it is submitted that remittal would have no purpose and should be refused. In either event, it was the Attorney General's position in submissions that the draft agreed terms of remittal required further consideration and, if the matter is to be remitted, amendment with regard to the first issue.

61. In addressing the second (related) question of whether it is appropriate for the Court to direct that the remitted application be dealt with based on the plans and guidelines in force as of the date of the original application (29th of May 2020), as per the agreed terms of remittal in

the first proposed draft Order, rather the plans and guidelines in force when the decision on remittal is made, the Attorney General refers me to the judgment of Holland J. in *Crofton Buildings Management CLG v An Bord Pleanála & Ors* [2022] IEHC 704 (decision of 20th of December, 2022) delivered after my Order seeking submissions in this matter, and the filing of written submissions by the Developer and the Council. In that case, Holland J. held that a remitted application must be determined based on the plans and guidelines that are in force when the remitted decision is made, not the plans and guidelines that were in force when the application was submitted and/or when the impugned decision was made. This is not consistent with the agreed terms of remittal as had initially been proposed in this case. It is submitted on behalf of the Attorney General that it does not appear that any circumstances arise that would require, or justify, me departing from the decision in *Crofton,* which decision considers the issues arising, including the public interest considerations, in detail. It is submitted on behalf of the Attorney that a decision that departs from the precedent in *Crofton* is likely to result in significant uncertainty, with respect to an issue that will arise in many, if not all, remittal applications in planning cases. The Attorney General therefore submits that the draft agreed terms of remittal initially presented require further consideration in light of the decision in *Crofton* and, if the matter is to be remitted, amendment, with respect to this issue.

62. The third issue arising namely, the implications of the decision of the CJEU in *Case C-254/19 FOIE v ABP*, and the insertion of s. 42(8) of the PDA 2000, on the lawfulness of remittal on the terms agreed having regard to the Habitats Directive, is considered by the Attorney General to also require further consideration and amendment of the initial draft proposed Order. As pointed out on behalf of the Attorney General, the first draft proposed Order did not address the requirement for the Council to carry out AA screening and/or substantive AA if required on the remitted application, or its jurisdiction to do so. It is the Attorney General's position that remittal of the application to be determined under s. 42(1)(a)(ii) would not be lawful if such a requirement – and jurisdiction – did not arise. Rather it is submitted, if the matter is remitted, the terms of the remittal must ensure that EU law obligations are complied with, or at a minimum that such compliance is feasible.

63. The submissions further recall that the unamended s. 42 has, on a number of occasions (*State (McCoy) v Lackagh Quarries Ltd v. Galway City Council* [2010] IEHC 479 *("Lackagh"); Merriman v. Fingal County Council* [2017] IEHC 695; [2018] IEHC 65 *("Merriman")*, been held to preclude the Council from considering the Habitats Directive or

the EIA Directive when making a decision on an extension application (other than on the limited basis provided for by s. 42(1)(a)(ii)(IV)) of the PDA. In light of those decisions, the Attorney General submits that it cannot be assumed that, if the remitted application is to be determined under the unamended s. 42(1)(a)(ii), the Council will have the jurisdiction to make that decision in a manner that complies with the Habitats Directive. It is submitted on behalf of the Attorney General, however, that it be open to the Court to conclude that s. 42(8), although enacted after the Application was made, nonetheless applies to the remitted application. This is in circumstances where the enactment of s. 42(8), which did no more than give effect to an existing EU obligation, cannot be considered to interfere with vested rights of persons who had made applications under s. 42 prior to that enactment. The presumption against retrospective effect would not, therefore, necessarily prevent the application of s. 42(8) to applications made under s. 42 prior to its enactment, including the application here.

64. While the Attorney General submits that if s. 42(8) were to apply to the remitted application, no issue with respect to EU law compliance would arise, it was further submitted in the alternative that if I were not satisfied that s. 42(8) would apply to the remitted application, it would arguably be open to me to hold that a conforming interpretation may be given to the unamended s. 42(1)(a)(ii), so that it does require – and permit – the Council to carry out AA screening and AA if required. Although such an interpretation would sit uneasily with the terms of the provision, and the previous jurisprudence, the Attorney General identifies a number of bases on which it is submitted I could reach such a conclusion.

65. What emerges from the submissions on behalf of the Attorney General is that he is satisfied that once it is clear that the Council has jurisdiction to carry out AA screening and/or AA, then subject to the considerations arising with respect to the EIA Directive, it is considered that it would be lawful to remit the application. It is suggested that the Court might consider, in those circumstances, making a direction, or providing an indication, as to the Council's jurisdiction to carry out AA screening and/or AA, as well as the basis for that jurisdiction, to ensure that any remitted application can be dealt with in accordance with the obligations that arise under the Habitats Directive. On the other hand, the position adopted on behalf of the Attorney General is to the effect that if I were to conclude that the Council does not have sufficient jurisdiction to permit it to deal with the remitted application in accordance with the obligations that arise under the Habitats Directive, then remittal would be unlawful. It would further serve no purpose, where the Council in those circumstances would in any event be

required to disapply section 42(1)(a)(ii) in accordance with the decision of the CJEU in *C-378/17 Minister for Justice v Workplace Relations Commission ("the WRC case*").

66. Finally, on the fourth issue, the Attorney General observes in submissions that he is unaware as to whether the original Application, or the proposed extension, required or requires EIA screening or EIA. However, it is noted that the decision of the CJEU in *Case C-254/19 FOIE v ABP* held that an extension of a permission is a project within the meaning of the EIA Directive, as well as the Habitats Directive. Similar – although not identical – considerations therefore arise, with respect to the EIA Directive, as with the Habitats Directive. In that respect, the Attorney General submits that if the Court is satisfied that s. 42(8) would apply to the remitted application, no issue arises with respect to the compliance of the remitted application with the EIA Directive. However, if I am not satisfied that s. 42(8) would apply to the remitted application, more difficult issues arise in the context of the EIA Directive, with respect to a conforming interpretation of s. 42(1)(a)(ii). In particular, the nature of the assessment required under the EIA Directive, if EIA cannot be screened out, is difficult to reconcile with the mandatory nature of s. 42. Again, the Attorney General's position is that remittal of the application will be lawful only if the decision on remittal made complies with the obligations (if any) arising under the EIA Directive. Otherwise, remittal would be unlawful and would in any event serve no purpose, having regard to the Council's obligations as identified in the WRC Case. It is considered by the Attorney General, therefore, that the first draft agreed terms of remittal require further consideration with respect to this issue also.

67. In sum, the position adopted by the Attorney General is that the interaction between each of the four identified issues requires to be considered, to determine whether remittal is lawful and, if so, on what terms. It is the position of the Attorney General that whether remittal should and/or can be directed will depend on my determination as to:

i. Whether s. 27 of the 2005 Act preserves the application of s. 42(1)(a)(ii) for the purposes of the remitted application (as there would otherwise be no purpose to remittal); and

ii. If so, whether s. 42(1)(a)(ii) and/or other relevant provisions of the PDA 2000 or the PDR 2001 can be interpreted as requiring – and permitting – the Council to apply that section in a manner compliant with the Habitats Directive, and insofar as it arises the EIA Directive (as otherwise remittal would be unlawful).

68. It is submitted on behalf of the Attorney General that if I am satisfied with respect to both of those issues – and it appears that it is open to me to so find on the Attorney General's submission – remittal would be lawful. However, it is further submitted that the terms of any remittal should confirm that:

I. The remitted application is to be determined in accordance with law (not in accordance with law as of the date of the impugned decision);

II. The remitted application is to be determined in accordance with the plans and guidelines in force when the remitted decision is made (not in accordance with the plans and guidelines in force when the application was originally made); and

III. The decision on the remitted application is a project within the meaning of the Habitats Directive and the EIA Directive and must be determined accordingly.

69. The Attorney General agrees in the submissions filed with the position of the Developer and the Council that the overarching principle governing remittal applications, that the discretion to remit "*must be exercised both judicially and judiciously with the overall objective of achieving a just result" (*as emphasised in cases such as *Clonres CLG An Bord Pleanala* [20I8] IEHC 473) leans heavily towards remittal in this case if remittal can be achieved lawfully. This is particularly the case where the repeal of s. 42(1)(a)(ii) means that the Developer now has no basis to make a new application for the extension of the duration of the permission, by reason of the Council's error. It is clear from the Attorney General's submissions that it is the State's position that any remittal should be on the basis that the remitted Application will be determined in accordance with law (as distinct from in accordance with the law frozen as it was on the date of the impugned decision).

Developments Post-Submissions

70. As noted above, following consideration of the submissions on behalf of the Attorney General, a further draft Order was prepared on behalf of the Developer in materially different terms to that which had originally been proposed. This draft Order was presented to the Court during the course of a for mention hearing on the 8th of March 2023 and did not meet with any demur from either the Council or the Attorney General at that time, albeit that they did not have

advance sight of the further draft order. It was agreed that there should be liberty to indicate any issues of clarification or difficulty with the proposed terms within a further seven-day period. A further for mention listing was subsequently sought and on the 21st of March 2023, I was advised that the Council had circulated an alternative draft order and that agreement had been reached in respect of a time-frame for next steps, subject to the Court.

DISCUSSION AND DECISION

71. My purpose in fixing the terms of remittal is to undo the consequences of the wrongful or invalid acts of the Council as found by me in the Judgment in April 2022, if possible. Prompted by the detailed terms proposed by the parties on consent which sought more than a remittal *simpliciter* with the application to be determined in accordance with law but rather asked me to remit for fresh determination of the application as if the law was frozen as of the date of the original decision, the issue which now arises for me is the identification of the proper parameters on the exercise of my remittal jurisdiction.

72. The law in relation to remittal has been the subject of considerable jurisprudence, not least in the planning and development area. In *Tristor Limited v Minister for the Environment* [2010] IEHC 454, a case which was concerned with a challenge to two directions given by the Minister under s. 31 of the 2000 Act, following receipt of which two resolutions were passed by Dun Laoghaire Rathdown County Council, by which the zoning of Carrickmines in the Development Plan was amended, Clarke J. made an order quashing the Ministerial directions. This gave rise to a dispute as to whether, as a consequence of this, the resolutions should also be quashed and, if this was required, what the status of the Development Plan was.

73. Notwithstanding that the adoption of a development plan is a process governed by statute, which involves public participation, Clarke J. considered it appropriate to make an order quashing the resolutions. As regards the appropriate remedy, he concluded that the appropriate remedy was to remit the matter back to the council, but on the basis that the council was in the same position as it would have been on the day or days when it received the relevant ministerial directions but needed to consider the matter on the basis of the statutory process that had already been validly conducted up to that date (at [4.2]). The Council would then be required to adopt an appropriate zoning in respect of the Carrickmines lands.

74. In the course of his judgment in *Tristor*, Clarke J. formulated the following fundamental principle, consistently applied in subsequent case law (para. 4.1):

> "*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*."

75. In *Tristor* the question which arose was at what stage of the process involved in the adoption of a development plan the remittal should be made to in circumstances where it did not follow that the development plan would have been adopted in the form in which it had been prior to the Minister's directions but where the statutory scheme governing the process were designed to ensure proper public consultation at all stages of the process. Although that case concerned a statutory process regulating the adoption of a development plan, it differs from this case in that no issue arose in relation to the intervening repeal of a statutory provision or statutory amendment as occurs here. In his judgment Clarke J. acknowledged that there will be a whole range of circumstances in which the courts may have to consider the knock-on effect of a finding that a particular decision in the planning process is invalid (para. 3.10). He observed that each such case is likely to turn both on its own facts and on the precise statutory issue with which the court is concerned. He continued (para. 3.10):

> *"However, it seems to me that the overriding principle ought to be that the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making and that, insofar as it may be possible so to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been had the invalid decision not taken place The extent to which it may be possible to achieve that overall principle is likely to vary significantly from case to case."*

76. At paragraph 3.11 he referred to the approach of Blayney J. in *Glencar* to reflect that in quashing a part of a development plan the legitimate interests of the public or third parties may come into play. He considered that the Court should consider whether it was possible to fashion a straightforward or limited court interference with the development plan for the purposes of

undoing the consequences of a successfully impugned decision. In *Tristor*, Clarke J. stated the following at paras. 4..1 and 4.2 of his judgment:

> *"…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. The extent to which it may be possible to do so will, of course, depend on the facts and the legal framework within which any invalid decision may have taken place…….The process for the formulation of the development plan with which I am concerned had no difficulty attaching to it until what has turned out to be an invalid ministerial direction was received. In my view the proper remedy is to remit the matter back to Dun Laoghaire Rathdown Council, but on the basis that the council is now in the same position as it would have been on the day or days when it received the relevant ministerial directions but needs to consider the matter on the basis of the statutory process that had already been validly conducted up to that date."*

77. In *Tristor* Clarke J. noted that the need for the Court to take this approach arose from the fact that the legislation was silent as to what happens if a particular provision in a development plan is found to be invalid. Similarly, in this case, the PDA does not deal with what happens where a provision authorising the extension of a planning permission is repealed during the currency of what transpires to be a successful challenge to a refusal of an extension under a now repealed provision. As Clarke J. observed this meant that (para. 4.3):

> *"it is thus left to the court to attempt to deal with such a situation based on first principles".*

78. At para. 4.4 of his judgment Clarke J. said that it is no function of the court to decide what the proper zoning of any lands within the functional area of a local authority should be. That is a matter for the elected local representatives together with the Minister in circumstances where a valid exercise of ministerial power is engaged in. He continued (para. 4.4):

> *"the sole function of this Court is to fashion an order which puts matters back into the position in which they were immediately before the wrongful exercise of a ministerial discretion occurred. The consequence of such a measure lies where it falls. The final*

adoption of an additional part of the development plan to comply with the need to provide for the zoning of the relevant Carrickmines lands is ultimately a matter for Dun Laoghaire Rathdown Council. However, in exercising the power of the elected representatives to finalise the zoning of the lands in question, the elected representatives are not at large. They reason why they are not at large is nothing to do with any views or order of the court. Rather, the reason why the elected representatives are not at large is because of their own actions up to the point when the process became tainted by an invalid ministerial direction. The elected representatives cannot go back behind that point for there was nothing wrong with the process up to that point. The elected representatives must take the matter up now from that point onwards and adopt a revised development plan to fill the gap left by the quashing of the zoning of the lands in question."

79. Clarke J. returned to discuss the remittal jurisdiction in *Christian v. Dublin City Council (No. 2)* [2012] IEHC 309 stating (para. 4.8):

"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 decisionmaker or decision-makers to continue the process from the point in time where it can be said to have gone wrong. […]"

80. 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 stating (para. 4.17):

"It seems to me that where a matter is referred back to a decisionmaker, 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."

81. The applicable principles guiding a court exercising a remittal jurisdiction were authoritatively summarised as follows by Barniville J. in *Clonres CLG v An Bord Pleanala* [2018] IEHC 473, at [44], as follows:

"(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. 26(4) of the Rules of the Superior Courts ... 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 ...

(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' ... 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' ...

(3) The 'overriding principle' behind any remedy in civil proceedings including in considering whether to remit 'should be to attempt, in as clinical away as is possible, to undo the consequences of any wrongful or invalid act but to go no further' ... 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' ...

(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 decision-makers 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' ... Further, 'the court should endeavour to avoid an unnecessary reproduction of a legitimate part of the process' ...

(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 …

(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]' … 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' … 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' …

(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 …

(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 …

(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 … 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' …

(10) Short of giving directions in the event of a remittal, it is open to the court to make recommendations in remitting the matter … 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 …"

82. What emerges from both *Tristar* and *Clonres* is that the Court may go further than simply remitting for an application to be determined in accordance with law and has certain powers to make directions or recommendations when remitting which are directed to undoing the consequences of the invalid act and attempt to replicate the legal requirements that would apply to the making of decisions of the type in question.

83. While the Court has power to make directions, however, care is required in doing so that there is no improper trespass upon the statutory functions of the decision-maker. In *Barna Wind Action Group v An Bord Pleanala* [2020] IEHC 177 McDonald J. was unhappy to make directions regarding the law to apply on remittal. In that case a dispute arose as to whether a remittal order should be made pursuant to Order 84, rule 26(4) of the Rules of the Superior Courts, 1986. An Bord Pleanála had conceded that its decision to grant planning permission should be quashed on a specific narrow ground. The applicant opposed remittal on the basis that the EIA Directive had been amended significantly in the intervening period by Directive 2014/52/EU. Opposition to remittal was advanced 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. Under the transitional provisions set out in Article 3 of the 2014 Directive, applications which were initiated prior to 16th May 2017 continued to be subject to the EIA Directive, in its unamended form.

84. The principles applying to the remittal jurisdiction were summarised by McDonald J. in *Barna Wind* as follows (para. 22):

"(a) The court has an express power to remit under *O. 84, r. 27 (4);*

(b) The court has a wide discretion to remit. The governing criteria in any decision to remit are fairness and justice.

(c) In considering the question of remittal, the court should aim to undo the consequences of any wrongful or invalid act but should go no further.

(d) Where the process undertaken by the Board has been conducted in a regular and lawful way up to a certain point in time, active consideration should be given by the court as to whether there is any good reason to start the process from the outset again. The court should endeavour to avoid an unnecessary reproduction of a legitimate process.

(e) Among the factors to be weighed in the balance are the expense and inconvenience which may arise by sending the matter back to the drawing board;

(f) The court should treat the Board as a disinterested party which has no stake in the commercial venture being pursued by a developer. In cases 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, the court should not lightly override that view.

(g) By remitting the matter, the court is not giving any advance imprimatur to the approach subsequently taken by the Board following remittal;

(h) Thus, any applicant who is not satisfied with the decision taken by the Board following remittal, will be entitled again to seek leave to challenge that decision.

(i) If the court decides to remit the matter to the Board, the court has an inherent power to give directions to the Board as to the process to be undertaken following remittal.

(j) It is also open to the court, if it is minded to remit the matter, to make non-binding recommendations which do not interfere or trespass upon the discretion vested in the Board."

85. McDonald J. made an order for remittal in *Barna Wind*. In doing so, he noted as follows (at para. 34):

"*A further factor to bear in mind, is the ability of the board, in the event of a remittal, to seek updated information on the existence and impact of any relevant changes in the*

local environment. I have considered whether I should, in the event of remittal, direct the Board to request such information. I have come to the conclusion that it would not be appropriate to do so. As counsel for the Board submitted, to do so would significantly trammel the Board's discretion in the exercise of its expert assessment of the issues. That said, it seems to me that it would be wise for the Board to request updated material."

86. In his judgment in *Barna Wind*, McDonald J. reflected the issue arising regarding the law to be applied on a remitted application where there have been changes in the intervening period stating (at para. 36):

"36. For completeness, it should be noted that a debate took place at the hearing on 10th March as to whether, in the event of remittal, the pre-existing regime under the unamended 2011 EIA Directive and implementing regulations would apply or whether the Board would be obliged to apply the provisions of the 2018 Regulations implementing the changes made by the 2014 Directive. I do not believe that it would be appropriate for me, on an application of this kind, to make any final determination on that issue. That seems to me to be a matter that would require more extensive legal debate following the exchange of the usual judicial review pleadings. I merely observe that the prima facie *position appears to be that, if the decisions of the Board are quashed, the appeals would fall to be considered under the unamended 2011 EIA Directive and relevant implementing national provisions. That seems to follow from the transitional provisions of Article 3 of the 2014 Directive. I stress that I make no determination to that effect. This seems to me to be an issue that will have to be considered by the Board in the event of a remittal and any decision by the Board will be subject to challenge in due course by the applicant or any other party with the necessary* locus *to challenge the Board's decision.*

87. This case differs from *Barna Wind*, however, by reason of the absence of transitional measures and also because in this case both the Developer and the Council have sought the Court's directions and there have been extensive submissions within the confines of the existing proceedings.

88. In *Redmond v An Bord Pleanala* [2020] IEHC 322 (at para.15), Simons J. also considered the authorities in respect of remittal and observed that:

> "*… 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*."

89. In the course of his deliberations Simons J. referred to the two judgments of Clarke J. in *Tristor* and *Christian* and observed that they 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 s. 28 of the PDA 2000 (Tristor Ltd.). He noted, however, that the principles in these two judgments have 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. Simons J. observed (para. 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."*

90. In *Redmond*, the Board opposed remittal on the basis that the application for planning permission was fatally flawed from the outset, as it failed to identify that the proposed development would be in material contravention of the development plan and to follow the procedures which apply in those circumstances, including the requirement for public

participation. Simons J refused to make an order for remittal in these circumstances. He observed that (para. 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*."

91. In *Kemper v. An Bord Pleanala* [2021] IEHC 281, the Applicant opposed remittal on the basis that the regulations which gave rise to the ground for *certiorari* – the Waste Water Discharge (Authorisation) Regulations 2017 – had been amended since the impugned decision was made, so as to significantly alter the legislative landscape to which a remitted application would be returned (para. 22). Allen J. rejected this argument and made an order for remittal. He considered that the applicant had failed to establish how the public consultation obligations imposed on the Board had been altered by the amendments to the Regulations, which were principally directed to the obligations of the EPA in dealing with an application for a discharge licence, and not the obligations of the Board in dealing with an application for permission. With regard to the general principles which apply to remittal, Allen J. stated as follows (paras. 50 to 55):

> *"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.*
>
> *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.*
>
> *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.*

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.

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.

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

92. As noted above, the Council, in its written submissions, also reference another recent decision of Humphreys J. in *Hickwell Limited & Anor v Meath County Council (No 2)* [2022] IEHC 631 ("*Hickwell (No. 2)*"). In *Hickwell (No. 2),* the Court had granted *certiorari* with respect to a provision of a development plan. Remittal was not sought by any party. The Court nevertheless made a number of *obiter* remarks as to the appropriateness of remittal in the context of a development plan. In particular, Humphreys J. noted:

"8. I note finally under this heading that remittal does not arise because the council did not seek it. However, whether and to what extent remittal is really appropriate in a case of quashing a provision of a development plan seems to be questionable. That is for the very simple reason that detailed, elaborate and technical statutory provision of an express nature has been made in s. 13 of the Planning and Development Act 2000 as to how a development plan is to be varied.

9. The problem basically is that the development plan is adopted as a whole, so it is not as if there is a particular point in the process to which the draft plan can be remitted if the adopted plan is partly quashed on certiorari. The rest of the plan just stands and there is nothing as such to remit. It is perhaps slightly different if the whole plan is quashed, or if a variation is quashed in full for some reason – in those circumstances the process could be remitted back to whenever it went wrong. But if part of a decision is quashed with the rest left standing, there is not any "proposal" that can be remitted to any particular point – the whole statutory process involves the draft plan moving forward as a unit with all parts broadly moving at the same speed (albeit those meetings

to consider the same stages of particular parts would take place at different but closely related dates). One possible response to partial quashing is to just do nothing, and that may well be acceptable in some cases. Alternatively, the obviously preferable way to address any partial quashing (if the Chief Executive can persuade members that doing so is desirable and appropriate) is by way of statutory variation.

10. Under those circumstances, it seems doubtful legally, especially having regard by analogy to the policy of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (albeit that this applies to permissions rather than plans as such), for the court to repeat the experimental procedure adopted in Christian & Ors. v. Dublin City Council [2012] IEHC 163, [2012] 2 I.R. 506, [2013] 2 I.L.R.M. 466, [2012] 4 JIC 2708 of engaging in a quasi-legislative process of creating proto-statutory mechanisms by order, in circumstances where express statutory provision already exists.

11. The law in relation to permissions is that remittal does not arise if it would not be lawful to remit, and there is no huge reason in principle why a corresponding approach to that extent at least should not apply in other areas. This must include a situation where the law has specified how exactly a decision can be amended. In the case of a plan, an order would either have to replicate exactly the statutory provisions for variation (in which case it would be so pointless as to constitute the wasteful consumption of judicial resources and legal costs, contrary to legal principles), or to amend those statutory procedures (in which case it would be substantively unlawful). Hence, I think that, perhaps absent exceptional circumstances, have-a-go attempts by the judiciary to devise ad hoc procedures for variation of development plans (or of any other decision where there is already adequate provision to allow the decisionmaker to amend it) are generally not appropriate. It would be different if the body concerned did not have power to adjust its decision itself – but councils do have such a power, and do not need the "help" of the judiciary in that regard."

93. None of these cases are on all fours with this one in that none involve both a repeal of the statutory provision on foot of which the application had been made and a statutory amendment regarding EIA and AA obligations. It seems to me that the most helpful way for me to address the issues which arise is to adopt the structured approach to the issues followed

in the submissions filed on behalf of the Attorney General and to break down the questions into component parts before determining the terms of any order for remittal.

The Law Applicable on Remittal

94. The first issue raised by the terms for remittal which had been agreed by the Developer and the Council in the initial draft Order is whether the Court has jurisdiction to remit the application to be determined in accordance with: "*the PDA, in particular s.42(1)(a)(ii), as it was on 20th July 2020 (i.e. the date of the impugned Decision) and Planning and Development Regulations 2001 as amended as they were on 20th July 2020".*

95. The Attorney General helpfully draws a distinction between two propositions and observes that this distinction is not properly drawn in the terms of the first proposed draft order, being:

> Proposition 1: The law applicable to a decision on a remitted application is the law that is applicable to the original application (in contradistinction to the law that would be applicable to a new application); and
>
> Proposition 2: The law applicable to a decision on a remitted application is the law frozen as it was on the date of the impugned decision.

96. I agree with the Attorney General's submissions that conflation of these two propositions is to be avoided. The first proposition is correct as a matter of law in that the remitted application is the original application. It will be determined in accordance with the law that applies to the original application, including any transitional or saver provisions that the original application benefits from. There is no requirement for the Court to make directions as to the law applicable being the law frozen as of the date of the impugned decision for a saver or transitional provision to apply, and no separation of powers issue arises. The matter may simply be remitted to be determined in accordance with law, which remittal captures the relevant transitional and saver provisions. The second proposition, which appears to be the basis for the first proposed draft Order was prepared, requires the Court to disapply legislative intentions with regard to intervening amendments in order to ensure a just outcome in a particular case by requiring it to be decided as if all factors remain the same as when the

decision was first made. This is not a proposition which has been supported by authority. I consider it is wrong in law.

97. Accordingly, the issue as to whether s. 42(1)(a)(ii), since repealed, was preserved for the benefit of the application the subject of these proceedings is a primary consideration and must be the point of departure when considering the terms of any remittal in these proceedings.

98. As a matter of common law, a repealed provision has no ongoing effect, other than with respect to matters past and completed. This is the case even if an application is pending pursuant to the repealed provision as of the date of repeal, and irrespective of the unfairness that might arise as a result. In that respect, the comments of Dodd on Statutory Interpretation, endorsed by the Supreme Court (O'Donnell J) in *Minister for Justice v Tobin (No. 2)* [2012] 4 IR 147 when considering the saver provisions in s. 27 of the 2005 Act, are worth noting:

> *"25. As is pointed out in Dodd's Statutory Interpretation in Ireland [Tottel Publishing, 2008] to understand the genesis of such provisions it is necessary to understand the position that prevailed at common law arising from the repeal of a Statute. As the author of that book points out "at common law, the repeal of an enactment made it as if the enactment had never been, except as to matters past and closed. This went so far as to revive enactments repealed by the enactment repealed." (at p.78). The effect of the repealing of a Statute as described by Tindal, C.J. in Kay v. Goodwin (6 Bing., at 582) was cited with approval by Murnaghan J. when he delivered the judgment of this Court in Hosie v. Kildare County Council (cited above). Tindal, C.J. stated "I take the effect of repealing a Statute to be to obliterate it as completely from the record of the parliament as if it had never been passed; and must be considered as a law that never existed, except for the purposes of those actions, which were commenced, prosecuted, and concluded whilst it was an existing law."*

99. It is therefore only where an application or action has commenced and concluded prior to repeal that a repealed provision can have any effect as a matter of common law. Otherwise, that provision must "*be considered as a law that never existed*" by the Courts. I have taken this as my starting position for consideration of the impact of the repeal of s. 42(1)(a)(ii) here. The common law position can, of course, be overridden by legislative provision.

100. Here there is no specific transitional or saver provisions in the repealing legislation which preserves the effect of repealed provisions in prescribed circumstances. However, the 2005 Act, in particular s. 27 of that Act, preserves certain rights, privileges, obligations and liabilities acquired under an enactment prior to its repeal. In *Minister for Justice v Tobin (No. 2)*, O'Donnell J. confirmed that the intent of those provisions, originally inserted in the Interpretation Act 1889, is to mitigate the common law consequences of repeal:

> *"27 … The saver provisions inserted in the Interpretation Act of 1889 were intended, in certain circumstances, to address a range of possible consequences which could flow from the enactment of a repealing Act if the common law consequences of a repeal were to apply in a unfettered fashion.*
>
> *28. Thus, in certain circumstances a party to whom a right under the repealed enactment had accrued could rely on that enactment as if it had not been repealed"*

101. Section 27 of the 2005 Act must, however, be read in light of s. 4(1) of the 2005 Act. The effect of that section is that, where, *inter alia*, s. 27 applies, the repealed provision will be preserved, "*except in so far as the contrary intention appears*" in the enactment itself, or the Act under which the enactment is made. In that respect, it is open to the legislature to determine that a right vested as of the date of repeal is not preserved following repeal, despite s. 27 of the 2005 Act, provided such an intention is expressly included in the statute. No such intention has been indicated in this case in respect of the repeal of s. 42(1)(a)(ii). Equally, it is open to the legislature to provide that a repealed provision will have some continuing effect in circumstances that go beyond what is provided for in s. 27; this is frequently done by way of transitional provisions in amending legislation but again this has not occurred in this instance. It is clear, however, that the extent to which the effect of a repealed provision is preserved (if at all) is a matter to be determined by the legislature. The exercise to be carried out by the Court when considering the effect of a repeal is, subject to considerations of constitutionality, therefore one of statutory interpretation. The effect of a repealed provision will be preserved where there is legislative provision to that effect, not where the Court considers that it is fair or just in a particular circumstance to revive that repealed provision.

102. Where an application is remitted, the application to be determined by the decision maker is the original application. The remitted application therefore benefits from any saver

or transitional provisions that apply to that original application. This can, in practice, have the effect that the remitted application is determined based on an old legal regime, or a repealed provision, whereas a new application would be determined based on a new legal regime. An example referred to in the Attorney General's submissions include recent cases of SHD applications. Although the specified period within which applications can be made under the Planning and Development (Housing) and Residential Tenancies Act 2016 has expired, s. 4(3) of that Act preserves the effect of the 2016 Act for applications pending at the expiry of that period. As noted by Holland J. in the recent decision in *Crofton*, at paras. 5 and 135*:*

> *"5. A significant consequence of the decision whether to quash simpliciter or to remit is that remittal would preserve the planning application for decision — and for decision as an SHD planning application made pursuant to S.4 of the 2016 Act. Given the expiry of that Act, certiorari simpliciter would imply that a new planning application would be required and that any such application would not be an SHD application.*
>
> *…*
>
> *135. It was not disputed that the procedures set out in the 2016 Act would apply to any remitted decision-making process. While the specified period under 2016 Act has expired, s.4(3) of that Act preserved its effect in favour of SHD planning applications pending at the expiry of the specified period. S.17(6) of the 2021 Act 180 will repeal the 2016 Act as it relates to such procedures, including s.4(3) of that Act, but s.17(6) has not been commenced."*

103. A further example identified, commonly seen in planning cases, is the transitional provisions in the 2014 EIA Directive. Where an application was made prior to the 16th of May, 2017 it will on remittal, by reason of the transitional provisions in Article 3 of the 2014 EIA Directive, be determined in accordance with the provisions of the 2011 EIA Directive rather than the new regime under the 2014 EIA Directive (see *Barna Wind Action Group v An Bord Pleanála* [2020] IEHC 177; *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2021] IEHC 629). It is therefore clear from the jurisprudence – and it follows as a matter of first principles – that on a remitted application, any saver or transitional provisions that apply to the original application will continue to apply. This does not equate to, or require, an Order pronouncing that the remitted decision be determined in accordance with the

legislative provisions frozen as they were on the date of the impugned decision. Rather, it is the result of the application of the law as of the date of the remitted decision, which will include any applicable saver or transitional clause.

104. If there were a transitional or saver provision that applied to the original Application by the Developer in these proceedings, it would apply equally to the remitted Application. All that would be required, in those circumstances (and leaving aside the EU law issues considered below) is an Order remitting the matter to be determined in accordance with law (rather than in accordance with the law as it was on 20th of July 2020). As there are no saver or transitional provisions in the legislative provisions repealing s. 42(1)(a)(ii), the question that arises, then, is whether s. 27 of the 2005 Act serves to preserve the effect of section 42(1)(a)(ii) for the purposes of the application in these proceedings.

105. I had sought submissions on two decisions that consider the application of s. 27 in the context of the Planning Acts: *J Wood* and *McKone* (both cited above). In *J Wood,* the developer was refused permission for development under the Local Government (Planning and Development) Act 1963 ("*the 1963 Act"*). Part VI of the 1963 Act provided for compensation when permission is refused, in certain circumstances. However, after the application for permission was made, but prior to the Board refusing permission, the Local Government (Planning and Development) Act 1990 was enacted. That Act repealed Part VI of the 1963 Act. New sections dealing with compensation were enacted in the 1990 Act. The applicant for permission, following the refusal of the Board, sought compensation under Part VI of the 1963 Act.

106. The High Court (Costello J.) held that any decision refusing permission that post-dated the repeal of Part VI of the 1963 Act would be subject to the new compensation provisions of the 1990 Act. In particular, Costello J. held that s. 21(1) of the Interpretation Act 1937 (substantially replicated in section 27(1) of the 2005 Act) did not avail the applicant. This was because, until a decision was made to refuse permission no right to compensation could have arisen.

107. The Supreme Court approved that decision in *McKone,* which involved a similar factual scenario. In *McKone*, the developer was granted permission for a housing development under section 26 of the 1963 Act. That permission was appealed to An Bord Pleanála. After

the appeal was lodged, but before it was decided, the 1990 Act was enacted. On appeal, the Board refused permission. The developer sought an extension of time to seek compensation under the 1963 Act, which was granted in the Circuit Court. That decision was appealed to the High Court and a point of law was referred to the Supreme Court as to whether, given the repeal of Part VI of the 1963 Act, there was jurisdiction to extend the time for a submission of a claim for compensation under the 1963 Act. Dublin County Council argued that no such jurisdiction arose, where the refusal of permission – and thus the entitlement to compensation under the 1963 Act – occurred after the repeal of the provisions providing for compensation. The developer, however, submitted that *J Wood* was incorrectly decided, again relying on section 21(1) of the Interpretation Act 1937.

108. First, the Supreme Court rejected the submission that the planning application made was a "*legal proceeding*" within the meaning of s. 21 of the 1937 Act. Section 27(1)(e) of the 2005 Act does not therefore assist the Developer here. Second, the Supreme Court endorsed Costello J's conclusion that no "*right*" within the meaning of s. 21(1)(a) had arisen until after the provision was repealed. Such a right would arise only on the refusal of permission, which post-dated the repeal of Part VI.

109. The Supreme Court therefore concluded that neither the Circuit nor the High Court had jurisdiction to extend the time for submission of a claim for compensation under the 1963 Act. While these decisions make clear the limitations of the jurisdiction of the Courts with respect to repealed provisions, absent applicable saver clauses, they are not of significant assistance when considering the application of s. 27 of the 2005 Act in these proceedings. In that respect, as the Developer notes in its written submissions, *J Woods* and *McKone* can be distinguished where, at the time of the repeal, an application under the repealed section had not yet been made.

110. Furthermore, however, it is not clear that a "*vested right*" under a provision for the purposes of s. 27(1)(a)(ii) will arise merely by reason of the making of an application under a provision prior to its repeal. A further distinction therefore between *J Wood* and *McKone* and the present circumstances, is that in those decisions, the event necessary for a vested right under the repealed provision to accrue – the refusal of the permission – did not occur until after the repeal of the 1963 Act. There could therefore have been no "*right*" to compensation vested in the applicant prior to the repeal. In contrast, there was no intermediate step, or requirement, in

the within proceedings that had not occurred prior to the repeal of the section. I agree therefore that the decisions in *J Wood* and *McKone* do not operate to preclude me from holding that s. 27 of the 2005 Act applies to the application for an extension here.

111. The question for me is whether a "*right*" has vested in the Developer under s. 42 such as is preserved by s. 27(1)(c) of the 2005 Act by virtue of the making of an application under that section prior to its repeal. In this regard it seems to me that the decision of the Court of Appeal in *Podariu v. the Veterinary Council* [2017] IECA 272 offers some assistance with regard to the effect and operation of s. 27(1)(c) of the 2005 Act. In his judgment for the Court in that case Hogan J. found that it was clear from the authorities that Mr. Podariu enjoyed a vested right to have disciplinary complaints dealt with in accordance with the then prevailing disciplinary legislation in 2012. He concluded that s. 27(1)(c) of the 2005 Act had the effect that any right, privilege, obligation or liability acquired, accrued or incurred under the enactment would not be affected by the repeal of provisions applying at the time the complaint was made. Hogan J. considered a number of extradition/surrender cases (specifically *Sloan v. Culligan* [1992] 1 I.R. 223, *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16, [2012] 4 I.R. 1 and *Minister for Justice and Law Reform v. Tobin (No.2)* [2012] IESC 37, [2012] 4 I.R. 147)) where the question of the possible application of s. 27(1)(c) of the 2005 Act (or earlier versions of that provision) had been considered.

112. The cases considered were largely concerned with the question of whether an application for extradition/surrender was governed by the law obtaining at the date of the alleged offence or whether subsequently enacted legislation could properly apply to a later extradition request. Hogan J. referred in particular to the judgment of O'Donnell J. in *Tobin (No.2)* in relation to what constitutes a "*vested*" right where O'Donnell J., quoting from 9th edition of *Craies on Legislation* (Sweet & Maxwell 2008) at para. 14.4.12 to conclude that the effect of the saving in s. 27(1)(c) does not apply to a mere right to take advantage of a repealed enactment and something must have been done or occurred to cause a particular right to accrue under a repealed enactment. Applying the reasoning in *Tobin (No. 2)* to the case before him, Hogan J. found that it could be said that something had happened which went beyond simply depriving Mr. Podariu of his right to avail of the pre-existing enactment, namely, the regime provided for by the 2005 Act. What had happened was that that disciplinary regime had been commenced by the laying of the complaints on 1st of May, 2012. Hogan J. found:

"At that point, I consider that Mr. Podariu had what amounted to a vested right to have the complaints heard and determined under the law as it stood at that date."

113. It might similarly be said here that the Developer had what amounted to a vested right to have the application for an extension determined under the law as it stood at the date he presented his application. The jurisprudence indicates, however, that the making of an application under a repealed provision prior to its repeal will not, of itself, be sufficient to invoke the application of section 27(c). In that respect, as noted by Keane J in *VB v Minister for Justice* [2019] IEHC 55 ("*VB*"):

"51. Citing the decision of the Supreme Court in McKone Estates Ltd v Dublin County Council [1995] 2 ILRM 283, amongst others, the author of Dodd, Statutory Interpretation in Ireland (Dublin, 2008) concludes (at para. 4.53) that no vested right accrues under s. 27(1)(c) of the Act of 2005 to have a statutory process of application determined in accordance with repealed law merely because it was commenced prior to that repeal. It seems to me that, a fortiori, no vested right accrues merely because a statutory application could have been commenced prior to a repeal but was not. As Dodd explains in the same paragraph:

> *"Where the conferring of a statutory benefit is discretionary, the benefit may not be acquired. In such a case, such provisions may be beyond the saving provision on the premise that the applicant can only have a hope that the discretion be exercised in their favour [see the New Zealand case of Wellington Diocesan Board of Trustees v Wiaraprapa Market Buildings Ltd [1974] 2 NZLR 562]. In [the] Privy Council decision of Director of Public Works v Ho Po Sang [1961] AC 901, it was held that a builder in compliance with a statutory procedure to obtain a rebuilding certificate, who had taken most of the necessary steps, had not obtained any acquired right, or right to have the procedure completed, because whether the certificate was awarded depended on the discretion of the final decision maker. The Privy Council drew a distinction between a pending investigation to see whether a right existed, which was covered by their equivalent of s. 27(1)(c), and a pending investigation into whether a right should be given or not."*

51. The passage I have just quoted seems to me to be a correct statement of the law. Under s. 18(4) of the Refugee Act, the issue would have been whether the applicant's mother should be given permission to enter and reside in the State or not; it would not have been whether the applicant's mother had an existing right to enter and reside in the State. Thus, the applicant can have had no vested right to a decision under that sub-section, even if an application for one had been pending at the time of its repeal. It is, I assume, for precisely that reason that an express transitional provision, in the form of s. 70(14) of the International Protection Act, was necessary to permit pending applications under s. 18(4) of the Refugee Act to proceed to a determination notwithstanding the repeal of that provision."

114. It should be emphasised that the application at issue in *VB* was made *after* the repeal of the relevant provision, so the dicta on that point is, strictly speaking, *obiter*. The language used in that quote, however, of an applicant having no more than a "*hope*" that they will successfully obtain a benefit, as opposed to a vested right to a benefit, is used frequently in the jurisprudence, albeit not with respect to the particular issue that arises here.

115. The purpose of s. 27 of the 2005 Act was considered by the Supreme Court in *Udarás Úchtála v M* [2020] IESC 64 (albeit in very different circumstances than those that arise here). O'Donnell J., as he then was, noted:

"51. The principle embodied in s. 27(1)(c) of the Interpretation Act is a sensible one. Legislation has a general application intended to act prospectively and establish the rules for, and legal consequences of, certain actions. Such legislation will not always address transactions and activities which may have been in train as of the date of the enactment of the legislation. Matters may have progressed to a point under the pre-existing legal regime where it would be right to assume that the Oireachtas did not intend, by the repeal of one piece of general legislation and its replacement with another, to deprive the citizen of the benefits which had been acquired under the prior legislation unless it uses clear language to show that it has specifically considered not just the general question, but also the issues arising in this specific class and has decided that it was nevertheless necessary or appropriate to do so."

116. O'Donnell J. further made clear, however, that the fact that a person, prior to repeal, had a right to take advantage of a repealed provision will not be sufficient to establish a "*vested right*" that will be preserved under s. 27 of the 2005 Act:

> *"In identifying what can be said to be 'vested' rights which trigger the presumption in s. 27 of the Act of 2005 there is I think much useful guidance to be gained in Bennion, Statutory Interpretation (4th ed. Butterworths, 2002) which states at p. 259 that 'the right must have become in some way vested by the date of a repeal, i.e. it must not have been a mere right to take advantage of the enactment now repealed'. A similar point was made in the 9th edition of Craies on Legislation (Sweet & Maxwell, 2008) at para. 14.4.12:-*
>
> *'The notion of a right accrued in s. 16(1)(c) requires a little exposition. In particular, the saving does not apply to a mere right to take advantage of a repealed enactment (clearly, since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or occurred to cause a particular right to accrue under a repealed enactment.'"*

117. The proposition that *J Wood* and *McKone* do not preclude the Court from holding that s. 27 of the 2005 Act applies to the application for an extension here does not, of course, necessarily mean that a "*vested right"* arises in this case sufficient to invoke s. 27, in particular in light of the dicta of Keane J. in *VK*, above. The various further *dicta* to which I have been referred to with respect to when a "*vested right*" arises in the planning context expose a conflict between the decision of McKechnie J. in *Kenny* and the dicta of Humphreys J. in *Clifford (No. 3)* cited respectively on behalf of the Developer and the Council. The decision in *Kenny* proceeds on the basis that an applicant for permission has a "*vested right*" that should not be interfered with. In contrast, Humphreys J. in *Clifford (No. 3)* observes that *"the hope of anticipating the possibility of getting permission for a particular development is not a legally cognisable vested right."* It is recalled, however, that this case does not involve an application for permission. It involves an application for an extension of an existing permission.

118. What emerges from the caselaw is that it cannot be assumed that, by reason only of the making of an application prior to the repeal of s. 42(1)(a)(ii), s. 27 of the 2005 Act will serve to preserve the effect of that section for the remitted application in these proceedings.

Rather, it must be established that the Developer had a "*vested right*" under that provision prior to its repeal. To determine whether a "*vested right"* accrued to the Developer under s. 42(1)(a)(ii), it is important to consider the nature of s. 42 and the extent to which it operated automatically or afforded the Council discretion to refuse to extend the permission if the requirements of the section are met. The decision of the High Court in *Start Mortgages Ltd v Gunn and Others* [2011] IEHC 275 ("*Start Mortgages*"), identified in the submissions filed on behalf of the Attorney General, is instructive in that respect. That decision involved the repeal of s. 62(7) of the Registration of Title Act 1964, which provided for the registered owner of a charge to make a summary application for possession when repayment of the principal became due. That provision was repealed on the 1st of December, 2009, without any express saver provisions. The replacement provision applied only to mortgages created after the 1st of December 2009.

119. This lacuna caused significant difficulties and generated a large volume of case law. *Start Mortgages* was the first case to consider the application of s. 27 of the 2005 Act to the repeal of section 62(7). The plaintiffs in *Start Mortgages* argued that s. 27(e) of the 2005 Act preserved their entitlement to issue and/or maintain proceedings under section 62(7), where a right to possession had been acquired prior to the repeal of that section. The defendants argued that where s. 62(7) had been repealed it could not be relied on, even in those cases where proceedings had issued prior to its repeal. The defendants emphasised that s. 62(7) provided that the Court "*may, if it so thinks proper*" order possession. Relying, *inter alia,* on the English cases cited by Dodd in the extract above, it was emphasised that where the Court had discretion as to whether to grant relief, the Plaintiff did not have a right to possession but no more than a "*hope or expectation*." This could not, they submitted, be sufficient to invoke s. 27 of the 2005 Act.

120. The Court (Dunne J.) framed the issue to be determined as follows (p. 15):

> *"It is not in dispute that if the plaintiffs in each of the cases cannot rely on the provisions of s. 62(7) there is no basis upon which an order for possession in a summary manner can be made. Following the repeal of s. 62(7) by the provisions of s. 8 of the 2009 Act, the question arises as to the extent, if any, to which the provisions of s. 62(7) are saved by the provisions of s. 27(1) and (2) of the Interpretation Act 2005.*

The key to that question lies in the interpretation to s. 27 of the 2005 Act. Reliance is placed by the plaintiffs principally on the provisions of s, 27(1)(c) and (e) and section 27(2). The focus in the submissions before me was on the meaning of the following words appearing in that section, namely, "right" "acquired" and "accrued".

It would be useful at the outset to consider the nature of the "right" in this case. The "right" contended for by the plaintiffs in these cases is the right to apply for possession pursuant to section 62(7)."

121. Ultimately the Court, having considered the very limited discretion that arises under s. 62(7), was satisfied that section did confer a "*right*" within the meaning of s. 27 of the 2005 Act, not merely a "*hope or expectation*". In doing so, the Court considered the decision of the Privy Council in *Director of Public Works v. Ho Po Sang* [1961] AC 901 and *Chief Adjudication Officer v. Maguire* [1999] 1 W.L.R. 1778, and the comments in Bennion on *Statutory Interpretation* (5th Ed., 2012) p. 309 cited by Dodd. Dunne J. concluded (p. 19):

"It is clear from the authorities referred to above that s, 62(7) conferred on a registered owner of a charge the right to obtain an order for possession for the purposes of a sale out of court. It can clearly be seen from the decision in the Smyth case, the decisions in the Birmingham Citizens Permanent Building Society v. Caunt and Anglo Irish Bank v. Fanning that the scope of the discretion conferred on the court is very limited. In practical terms if the principal sum due on foot of the charge has become payable the registered owner of the charge is entitled to an order for possession. That is not to say that the borrower is not entitled to an adjournment of proceedings to pay off the mortgage in full or alternatively to come to an arrangement with the lender as to the repayment of the mortgage. However, if the proofs of a plaintiff are in order and there is no other bar to an order being made, then it seems, the court has no discretion but to make the order. Accordingly, it was argued by the plaintiffs that there is a right to apply for an order for possession, when repayment of the principal monies secured by the instrument of charge has become due.

…

It is my view that the right to apply for possession of the lands is a right within the meaning of s. 27 of the 2005 Act which confers on the owner of a registered owner of land an entitlement to an order of possession and not a mere hope or expectation. The

fact that there may be discretion, limited as it is, as can be seen in Bank of Ireland v. Smyth, Birmingham Citizens Permanent Building Society v. Caunt and Anglo Irish Bank plc v. Fanning does not alter the fact that the right to apply to court for relief is such a right."

122. This decision is not authority for the proposition that once an application is made under a provision there is always a right under s. 27 of the 2005 Act to have that application progressed, even if the provision is repealed. Rather, the Court cited and endorsed dicta of the English Courts with apparent approval:

"It would be useful at this stage to refer to a passage from the judgment of Lord Morris of Borth-y-Gest in the case of Director of Public Works v. Ho Po Sang referred to above where it was stated at p. 53 of the judgment as follows:-

> *"It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not. Their Lordships agree with the observation of Blair-Kerr J. that:"*

'It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any right exists at the date of the repeal, if any procedural step is take prior to the repeal, then, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion.'"

123. The Court did not therefore hold that s. 27(c) and (e) of the 2005 Act applied because the plaintiffs had already applied for possession under s. 62(7) as of the date of repeal; in some cases they had not. What was key was the mandatory nature of the provision, in practice, and the Court's very limited discretion to refuse to grant an order of possession under s. 62(7).

Having entered into a detailed analysis in that respect, the Court concluded that the plaintiffs (once the principal monies had become due prior to repeal, i.e. once a demand had been made prior to repeal) did not merely have a "*hope or expectation"* of possession, they had a "*vested right*" to possession as of the date of repeal.

124. I note that in *Irish Life and Permanent v Dunne* [2015] IESC 46, the Supreme Court left open the issue as to what point in time a right to possession under s. 62(7) was 'acquired' or 'accrued' (and in particular whether the right, although contingent, accrued once a mortgage was put in place) (see para. 6.21). The answer to this question will depend on the particular statutory context. I am satisfied that an application for permission for development – where the granting of the benefit sought is discretionary – is qualitatively different from an application to extend the duration of a permission already granted, where the granting of the benefit sought is mandatory. This is critical in the context of establishing a "*vested right"* for the purposes of s. 27. The Courts have repeatedly emphasised the limited discretion afforded to the Council under s. 42. In *McDowell and Anor v. Roscommon County Council* [2004] IEHC 396, an argument that the Council had a residual discretion to refuse to extend the permission where the development being undertaken was not in accordance with the permission was rejected. Finnegan P held:

> "*1. The wording of section 42 is clear. It provides that if the Planning Authority are satisfied on certain matters the Planning Authority must grant an extension. It is clear on the authorities that to take into account any other matter, fact or circumstance is ultra vires.'*

125. Similar comments were made in *State (McCoy) v Lackagh Quarries Ltd v. Galway City Council* [2010] IEHC 479 *("Lackagh"):*

> *"In this regard, the wording of s. 42 does not give any support to the view that the decision to be made by the planning authority is of a quasi-judicial nature. The planning authority has very little discretion in relation to its decision, and its role appears to be confined to satisfying itself as to whether the applicant has complied with the statutory conditions for the grant of an extension of time and the legislation makes no provision for third party participation of any nature. …These factors tend to suggest*

that the role of the planning authority on a s. 42 application is an administrative decision, thus limiting the circumstances in which judicial review is available as a remedy."

126. Those dicta were endorsed in *Merriman v. Fingal County Council [*2017] IEHC 695; [2018] IEHC 65 *("Merriman"),* in the context of s. 42(1)(a)(ii), where the Court referred to the "*administrative or mandatory nature of the function being exercised by a planning authority pursuant to s.42*" and noted that "*a planning authority is being mandated to do something in the event that certain circumstances present*."

127. Even if the *obiter dicta* of Humphreys J. in *Clifford (No. 3)* is accepted as a correct statement of law, it would not mean that the Developer had no "*vested right"* here, having regard to the distinction between an application for permission and an application for an extension. Having regard to the decision in *Start Mortgages,* I am satisfied that it is proper for me to hold that a person who had made an application under s. 42(1)(a)(ii) as of the date of repeal, had a vested right to have their application determined under that provision so as to engage s. 27(1)(c) of the 2005 Act. Key in that respect is that like the terms of s. 67(2), the terms of s. 42(1)(a)(ii) were *mandatory* and afforded no discretion to the planning authority. The Developer here did not have only a "*hope or expectation"* of receiving a benefit under a discretionary provision – as might be the case with an application for permission – but rather had attained by the date of repeal, in particular having regard to the decision in *Start Mortgages* and *Podariu,* a "*vested right*" to an extension under s. 42(1)(a)(ii), provided it met the requirements of that section.

128. I am therefore satisfied as a matter of law that the Developer, having made an application under s. 42(1)(a)(ii) prior to its repeal, acquired a vested right to be granted an extension if they meet the relevant criteria, and that s. 27(1)(c) therefore serves to preserve the effect of s. 42(1)(a)(ii) for such applications after its repeal, including the application in this case following remittal.

129. As I have found that s. 27 of the 2005 Act operates to preserve the effect of s. 42(1)(a)(ii) for the purposes of the application in these proceedings an order remitting the application to be determined in accordance with law does not involve the Court entering into a quasi-legislative role and *"amending"* the provisions of s. 42. Remittal for determination in

accordance with law is nothing more than a proper interpretation and application of s. 27 of the 2005 Act, which forms part of the statutory provisions that require to be applied. I do not consider that this would be incompatible with the observations of Humphreys J in *Clifford (No 3)*.

The Plans and Guidelines Applicable on Remittal

130. The second issue that arises is as to whether the application on remittal should be determined with regard to the plans and guidelines in force as of the date the application for the extension was made or those in place at the date of the decision on remittal. The first draft order presented for ruling proceeded on the basis that the application should be determined on remittal on the basis of the plans and guidelines in force as of the date the Application for extension was first made. That approach is inconsistent with the very recent decision of Holland J on this issue, in *Crofton.* The issue in that case was whether the plans and guidelines applicable on a remitted decision are the plans and guidelines in force as of the date of the impugned decision, or those in force when the decision on remittal is made. Holland J noted that – to his stated surprise – this issue had never previously been determined. In *Crofton, certiorari* was conceded on the basis that the Board was in error in granting permission where the development was in material contravention of the objectives of the Dún Laoghaire-Rathdown Development Plan 2016-2022 ("*the 2016 Plan*") with respect to building height.

131. Between the date of the Board's decision and that concession, the 2016 Plan was replaced by the Dún Laoghaire-Rathdown Development Plan 2022-2028 ("*the 2022 Development Plan*"). The position of the applicant and the Board was that the remitted application must be determined under the new 2022 Development Plan, despite the very significant implications of that position for the developer. The developer contended that the remitted decision must be considered in light of the 2016 Plan. It had submitted a material contravention statement based on the 2016 Plan, and public consultation had taken place under the 2016 Plan. It could not be the case, it argued, that the Board's error in failing to recognise the material contravention could result in the developer being prejudiced to such an extent as it would be if the remitted decision was to be made under the 2022 Plan. The developer emphasised strongly the unfairness that would accrue to it were the matter to be determined in those circumstances, in similar terms to those put forward by the Developer here. The Court summarised those arguments as follows:

"55. Fitzwilliam strongly urge remittal to a decision having regard to the 2016 Development Plan. They argue that:

• Their constitutional right to fair procedures, and their right to an effective remedy and to rectification of the error by the Board, requires that the application be returned, as precisely as possible, to its condition before the error.

• Remittal to decision having regard to the 2022 Development Plan would have put them not just on the usual hazard of a change in the development plan but on the specific and unjustified hazard of error by the Board for which it bears no responsibility.

• Putting the same point a different way, Fitzwilliam was entitled, both generally and on remittal, to a lawful decision on its planning application. Though Fitzwilliam didn't put it quite that way, the point necessarily goes further — it argues in effect that it is entitled not merely to a lawful decision on its planning application but a lawful decision as if at the date of the quashed unlawful decision — when the 2016 Development Plan was still in force."

132. The applicant in *Crofton*, on the contrary, argued that the 2016 Development Plan no longer existed, and could not form the basis of the decision on remittal. It argued that Fitzwilliam's assertion of "*its private interests in the "justice" of the remitted decision proceeding on the basis of the 2016 Development Plan ignores, or is outweighed by, the wider public interest in proper planning and sustainable development, which requires that regard be had to the current 2022 Development Plan and not to a 2016 Plan now over six years out-of-date*." The applicant in *Crofton* further argued that remittal for a decision based on the new 2022 Development Plan would require rewriting the application, and fair procedures could not be guaranteed where there was no facility to request further documents or for public consultation under the 2016 Act. The Board in *Crofton* took the view that if the application were remitted it would fall to be decided under the new 2022 Plan, and that the Court should permit the Board to identify a manner in which that decision could be reached while respecting fair procedures, absent which the Board would refuse the remitted application. The Board argued against the Court making detailed directions in that respect and emphasised that directions on remittal "*cannot confer powers on the Board which it has not otherwise been granted by the Oireachtas*".

133. Holland J. began his analysis by considering whether an "*ordinary*" planning application – leaving aside any question of remittal – fell to be considered based on the development plan in force at the time of the application or the development plan in force as of the date of decision. He noted that although it was generally accepted that the latter position was correct, there was no Irish authority on this issue, other than an obiter comment of Humphreys J in *Clifford (No 3)* (cited above).

134. Having considered at some length the academic commentary and the English authorities, as well as the *dicta* of Humphrey J, Holland J. ultimately concluded that the development plan in force as of the date of the decision must apply, in an "*ordinary*" case that does not involve remittal. In doing so, he placed significant emphasis on the public policy issues arising, and the public interest in ensuring that planning decisions are made based on the most up to date framework:

> *"75. It seems to me that policy is ever-evolving and ever-changing because it must do so to meet ever-evolving and ever-changing social, economic, environmental and other circumstances. In addition, public, democratic and political views of those circumstances change significantly over time, as do those views of how those circumstances should both inform and be affected by decisions bearing on planning how development should be managed, regulated and prioritised. At times, the need for roads will be acute, at others housing needs may loom larger, and at others again job creation may do so. At certain times and places, low-rise and low-density residential development will be considered appropriate. At other times and places, higher density and higher buildings will be favoured. The development plan is the contemporary statutory expression of the democratic political will as to where the public interest lies as concerns planning policy for the area to which it relates. This is why it must be replaced every six years and that via a complex and lengthy process (at least two years) involving considerable public consultation. As a result, it is necessarily presumed that each development plan is significantly better suited, politically, democratically and for purposes of proper planning and sustainable development, to the circumstances of its time than was the plan it replaces.*
>
> *76. In that light it is, at very least generally, highly desirable that the up-to-date and current development plan be that which informs planning decisions. From that*

perspective of the public interest, it is very easy to see that, as to a planning decision to be made, as I presume a remitted decision would be, in early 2023, it is highly desirable that it be made having regard to the development plan adopted in 2022 rather than that adopted in 2016. I would be highly reluctant to interpret the relevant legislation to any contrary effect and see no need to do so."

135. He proceeded to consider whether that "*default*" position applied equally on remittal, noting the additional considerations raised by the Developer in that respect:

"*79. For reasons set out above, it seems to me that the default position is that the development plan in force at the time the decision is made applies — if so on a remitted decision, that would be the 2022 Development Plan in this case.*

80. However, as I have said, the parties have differing views on the question whether, why and how the position described above, in which the development plan current at the date of the decision is that to which the decision-maker must have regard in making the decision, may be affected by each of, and/or the combination of, two circumstances which arise in the present case:

• First, that Fitzwilliam has secured a grant of permission by a decision which had regard to the 2016 Development Plan, which was current at the date of that decision, such that the difficulty in the present case derives, not just from the "usual" hazard described above (which hazard Fitzwilliam accepts), but from the error of the Board which will result in certiorari quashing that decision.

• Second, that in an SHD process such as the present, in which the Board has very limited possibility of canvassing further information, fair application of the principle audi alteram partem may be frustrated by the scheme of the 2016 Act, even allowing for such scope as may exist for adapting that scheme to the circumstances of any remittal."

136. Holland J. further considered and rejected an argument by the developer based on constitutional property rights, citing in that context the *dicta* of Humphreys J. in *Clifford (No 3)* cited above:

"The unspoken premise of this submission was, in truth, that at the date of and by reason of the decision now to be quashed, Fitzwilliam acquired a right to a lawful decision on the planning application as at that date. And it is asserted, in reality, that such is not merely a legal but a constitutionally protected right. I cannot see on what legal basis or constitutional basis it is asserted — as it is in effect asserted — that an order of the Board, though invalid, was nonetheless effective to crystallise a right of the kind asserted which right Fitzwilliam did not, until that order was made, possess.

99. Finally in this regard I refer to the observation of Humphreys J in Clifford #3 that "The hope of anticipating the possibility of getting permission for a particular development is not a legally cognisable vested right". I would be prepared to shorten that to "The hope of getting permission for a particular development is not a legally cognisable vested right". As Humphreys J said: "it is qualitatively different from a permission that has actually been granted." And while one can readily sympathise with Fitzwilliam and the present situation is not its fault, nonetheless the Quashed Decision has proved illusory — it vested no rights in Fitzwilliam. Accordingly, I cannot see, with reference to Article 40, that Fitzwilliam has a substantive constitutional right which could be under unjust attack."

137. Ultimately, Holland J. determined that the "*default*" position must apply equally on remittal; there was no basis for holding that the development plan in force as of the date of the original decision should apply to the remitted decision. In reaching that decision, Holland J. considered, and rejected, an argument that the *"overriding principle"* of putting matters back in the position that they were immediately prior to the invalid act required that the development plan that applied at the time of the original decision would apply to the remitted application. Holland J. held as follows, in that respect:

"Restoration of the Position Immediately Prior to the Quashed Decision.

109. Clonres establishes that the 'overriding principle' is to attempt to undo the consequences of the invalid act by putting matters back into the position in which they were immediately before the invalid order was made. Establishing what Fitzwilliam's position was immediately before the invalid order made is in part a matter of framing — of deciding at what level of generality or particularity to describe that position. One

could frame that position, as Fitzwilliam does, as one in which it was entitled to a valid planning decision to which the 2016 Development Plan applied. However, that paradoxically views an order, though invalid, as nonetheless crystallising Fitzwilliam's entitlement to have its application so considered.

110. In my view the proper framing of Fitzwilliam's position immediately before the invalid order was made, is one of an entitlement to a valid planning decision to which the development plan current at the date of such valid decision applied. I do not see that it now has, or ever had, a right to a valid planning decision to which the development plan current at the date of an earlier invalid planning decision applied. I take this view for a number of reasons:

> *• First, as Fitzwilliam accepts, it was generally on the hazard of a change in the development plan before the planning decision was made. That hazard can be expressed, without altering its substance, by the assertion that the Fitzwilliam's position at all times prior to and on the making of a planning decision was to have that decision made having regard to the development plan current at the date of the planning decision applied.*
>
> *• Second, I do not see that the fault of the Board in making an invalid decision takes Fitzwilliam "off" the hazard, which it otherwise accepts, of a change in the development plan.*
>
> *• Third, the framing I prefer is consistent with the underlying and clear purpose of the Planning Acts — which is that planning decisions conform to the principles of proper planning and sustainable development. The development plan is a vital expression of the "overarching principles" of proper planning and sustainable development. The proposition that the principles of proper planning and sustainable development represents a high public interest hardly needs citation of authority. Albeit in a different context, the Supreme Court recently referred to "the public interest imperative in upholding and maintaining planning control, planning regulation, orderly and sustainable development and the rule of law." While the principles of proper planning and sustainable development persist and evolve, that their application to locales necessarily produces outcomes changing significantly over time is recognised in the statutory scheme for periodic and mandatory replacement of development*

plans and for their variation as required in the interim. The considerations informed by those principles have been judicially described as ever-changing. There is a clear public interest in applying those principles and considerations as they subsist at the date of the planning decision. It is clearly consistent with that public interest "imperative" identified by the Supreme Court, and the statutory scheme, that the development plan to which regard is had in making a planning decision be that current when the decision is made. Indeed, the greater the relevant differences between successive plans, the greater the public interest imperative that regard to be had to the later rather than the earlier in taking a planning decision.

• Fourth, I cannot see that a planning decision which is invalid and ineffective and is a nullity for all but very limited purposes can vest a right of the type contended for — to have a later valid decision made applying the development plan current at the invalid decision. I appreciate that this is to state my conclusion as my reason for drawing it but in truth it is a case of res ipsa loquitur. In this respect, I note that in Barry Humphreys J. noted that the effect of certiorari is that is "quashes — i.e. positively invalidates — the impugned decision. The person who (or body which) took that decision is thus free to consider the matter afresh".

111. Viewing the matter in that way — that Fitzwilliam's entitlement always was and remains to a valid decision which has regard to the development plan extant at the date of that decision — Fitzwilliam's arguments as to retrospective application of the 2022 Development Plan and the increased Part V requirement, unfair procedures by way of such retrospective application, prejudice to Fitzwilliam, incomplete rectification of the error which infected the Quashed Decision and failure to respect an alleged legitimate expectation or analogy with legitimate expectation all fall away."

138. I agree with the decision reached by Holland J. on this issue, for *inter alia* the reasons set out in that decision, and in particular having regard to the public interest concerns arising. Those public interest concerns weigh heavily in favour of remitted decisions being determined based on plans and guidelines applicable as of the date of the decision on remittal. While it is undoubtedly the case that this will in some instances prejudice the interests of applicants following remittal, as emphasised by Holland J this is a hazard that any applicant for permission

must accept, where the 'default' position is that planning decisions are made based on the plans and guidelines in force at the date of the decision, and in any event outweighed by the public interest concerns arising.

139. It seems to me that the reasoning developed by Holland J. in *Crofton* is directly transferrable to this case. It cannot be said that plans and guidelines are of any less importance in s. 42(1)(a)(ii) applications than in SHD applications. That there has been no material change in planning objectives since the permission was granted is one of the central criteria required to be satisfied for an extension to be granted. Further, it does not appear that Holland J. considered the decision to be limited to SHD permissions. Rather, he held:

> *"86. Incidentally, counsel for Fitzwilliam accepted that the logic of its argument that the 2016 development Plan should apply, if correct, would apply to all remittals of quashed permissions — not just of SHD permissions. It would also apply to all relevant planning policy documents, including S.28 guidelines and the like. It seems to me that it would also have wider implications in judicial review generally — to the general effect that material considerations to which a decision-maker may have regard in making a decision following remittal in judicial review would be frozen in time at the date of the quashed decision. As a matter of good public administration, that would be an undesirable position and a decision to which I would only very reluctantly come."*

140. Holland J. further emphasised that his decision as to which development plan applies is not a matter of discretion to be exercised on a case-by-case basis, but a matter of law:

> "*119. In my view the question which development plan applies to any remitted decision is a question of law — which I have decided — rather than a matter of discretion."*

141. It is also noteworthy that Holland J., in the context of considering the conflict between *Kenny* and *Clifford (No 3)* discussed above, drew a distinction between the applicable law and the applicable development plan, and expressly declined to make a decision on the former:

> *"116. I do not find it necessary to come to a final or all-encompassing view as to the differences between Clifford #3 and Kenny #1. In any event, fuller argument on the*

question would be needed. In the absence of binding authority on which development plan applies, I am content to follow the obiter in Clifford #3 on the issue, in addition to the rationale set out above.

117. However I would add the observation that, as to making a planning decision, there seems to me to be a relevant distinction between the law applicable on the one hand and, on the other, the relevant considerations to which a planning decisionmaker must have regard. While development plans do have legal status and consequences, it nonetheless seems to me that they fall into the latter category such that Kenny #1 would not apply to them.

142. Following the decision in *Crofton*, I am satisfied that remittal in this case should be on terms that the remitted application be determined in accordance with the plans and guidelines in force when the decision on remittal is made.

EIA and Habitats Directives

143. The final issue arising concerns the lawfulness of remittal having regard to the obligations arising under the Habitats Directive and the EIA Directive, and the decision in *Case C-254/19 FOIE v ABP*. Prior to the preliminary reference in *Case C-254/19 FOIE v ABP*, it was settled law that an application under s. 42 of the PDA 2000 for an extension of a permission was not a project within the meaning of the Habitats Directive or the EIA Directive. The jurisprudence confirmed that a planning authority was neither required, nor permitted, to take account of the Habitats Directive or the EIA Directive when determining a section 42 application (See, for example, *Lackagh* and *Merriman*, both cited above). Indeed, leave to appeal with respect to that issue had been refused by the Supreme Court, on the basis that: (i) no matter of general public importance arose, and (ii) a reference to the CJEU was not required (*Merriman v. Fingal County Council* [2018] IESCDET 102).

144. Subsequent to those decisions, an opinion delivered on the 29th of November, 2018 by Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des Ministres* indicated that, in principle, the extension of the duration of a development consent is subject to the Habitats Directive. In *Friends of the Irish Environment v An Bord Pleanála* [2019] IEHC 80, Simons J. held that the

issue was not *acte clair*, having regard to that opinion. He made a preliminary reference to the CJEU with respect to the application of the Habitats Directive to extension applications.

145. The CJEU in Case C-254/19 *FOIE v ABP* concluded that the extension of the duration of a permission for a development that had not commenced was a project for the purpose of the EIA Directive and the Habitats Directive. In the context of the Habitats Directive, it was for the domestic authority to carry out AA screening to determine whether AA was required. In doing so, it could take account of any AA carried out for the original consent, but the fact that an AA had been carried out for the original consent did not mean the extension necessarily did not require AA:

> *"55 However, the taking into account of such previous assessments when granting a consent extending the construction period for a project, such as the consent at issue in the main proceedings, cannot rule out the risk that it will have significant effects on the protected site unless those assessments contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account.*

146. The AA screening of an extension application can therefore take account of the AA of the original consent, but the extension application can be screened out on that basis only where:

i. The AA of the original application contains complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and

ii. There have been no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account.

147. The CJEU therefore confirmed that the position adopted in *Lackagh* and *Merriman* was incorrect. Insofar as the unamended s. 42 did not require, or permit, screening and assessment under the Habitats Directive or the EIA Directive, it must therefore be considered to be non-compliant with EU law.

148. In light of the foregoing, as a matter of EU law, any application for an extension of the duration of a permission requires AA screening and, if screened in, that extension cannot be granted unless the requirements of Article 6(3) are met. Applications for extensions will further be subject to the EIA Directive, and it will be necessary to determine whether EIA screening and/or EIA of the proposed extension is required. It is important in terms of the Developer's position and any question of unfairness that the decision of the CJEU did not create those obligations; it merely recognised obligations that already arose. In that respect, the CJEU has confirmed that it is settled law that where it clarifies the scope of an obligation, that obligation as interpreted by the CJEU applies retrospectively, and must be taken to have been the correct interpretation of the provision of EU law from the date the provision had effect. In that context, the Court's interpretation: "*may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied*." (See, for example, Case C-292/04 *Wienand Meilicke and Others v Finanzamt Bonn-Innenstadt*, para. 34, and the cases cited therein).

149. It cannot, in the circumstances, be argued that the obligations identified by the CJEU do not apply to the remitted application. There is therefore no question of the application being determined without AA screening and, if screened in, AA. Nor is there any question of the application being determined without (if applicable) EIA screening and, if screened in, EIA. Even if I could lawfully make such an order – and I am satisfied I could not – it seems to me that the Council would in any event be obliged to disapply s. 42(2)(a)(ii) in those circumstances, in accordance with the decision of the CJEU in the *WRC* case. In that respect, the previous remittal cases in which objections to remittal based on EU law considerations were raised and rejected are not comparable.

150. Thus, in *Barna Wind Action Group v An Bord Pleanála* [2020] IEHC 177 and *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2021] IEHC 629, the Court remitted the applications at issue to be determined in accordance with law. As a consequence of saver provisions in the 2014 EIA Directive, the remitted applications would be subject to the 2011 EIA Directive, having regard to the date on which the original applications were made.

In both cases, an argument that the Court should refuse to exercise its discretion to remit the matter on that basis was rejected.

151. In *Kemper v An Bord Pleanála* [2021] IEHC 281, the regulations that applied to the application had been replaced since the impugned decision. It appears to have been accepted, and was not at issue, that the remitted application (if remittal were ordered) would be determined based on the old regulations. There was nothing in the remittal order to the effect that the law applicable was the law frozen as of the date of the impugned decision. The applicant argued that remittal would in those circumstances not properly respect EU law obligations, where the old regulations did not adequately transpose EU law. That argument was rejected by the Court, where there was no question of the regulations to which the remitted application would be subject being contrary to EU law. On the contrary, the Court had held in the main proceedings that the old regulations were compatible with EU law.

152. In none of those cases was there any question of the matter being remitted to be determined under legislation that was contrary to EU law. Those cases are therefore materially different from the situation that arises here, where the unamended s. 42(1)(a)(ii), as interpreted by the Irish Courts, is unequivocally contrary to EU law obligations that pre-date the making of the application. In the circumstances, any remittal must be on the basis that the remitted application will be subject to the requirements of Article 6(3) of the Habitats Directive, as interpreted by the CJEU in *Case C-254/19 FOIE v ABP*, and the requirements of the EIA Directive. A remittal on any other basis would be unlawful. In any event, a remittal for the application to be determined other than in accordance with the Habitats Directive and the EIA Directive would be of no assistance to the Developer; the Council would in those circumstances be obliged to disapply s. 42(a)(1)(ii) in accordance with the decision of the CJEU in the *WRC Case*.

153. The question which follows therefore is whether, where the application is remitted to be determined in accordance with law in this case on the basis that s. 27 of the 2005 Act preserves the effect of s. 42(1)(a)(ii) for the purposes of that application), s. 42(8) will apply to that remitted application or alternatively, whether the unamended Article 42(1) may be given a conforming interpretation by requiring the project to be screened in accordance with the requirements of EU law as a condition to entitlement to an extension. If s. 42(8) does apply to the remitted application, no issue arises with respect to the EU law compliance of the remitted application, in the context of either the Habitats Directive or the EIA Directive. As

we have seen above, s. 42(8) provides that an extension cannot be granted under s. 42 if that extension requires AA or EIA. The procedures for AA and EIA screening, in that respect, are now set out in the PDA.

154. Whether s. 42(8) applies to the remitted application depends on whether s. 42(8) is interpreted as applying only to applications made under that section after s. 42(8) commenced, or to all decisions made under s. 42 after that provision commenced, even where the application was made prior to commencement. When considering that issue, the relevant legal principle is the presumption against retrospective effect. Section 27 of the 2005 Act is not engaged where the issue relates to the enactment of a new obligation, not a repeal. The presumption against retrospective effect assumes, absent the contrary being expressly or impliedly provided for in the legislation, that substantive changes will not have effect with respect to applications or proceedings commenced prior to the enactment of the relevant provisions. The default position, therefore, is that if the presumption against retrospective effect applies to section 42(8), any substantive change in the law by reason of s. 42(8) would be presumed not to be intended to apply to applications made prior to its commencement, absent clear intention to the contrary being expressly stated or necessarily implied by the legislation. In that respect, it is apparent that there is no express statement in the amending legislation that s. 42(8) will have effect to applications made prior to its enactment. On the other hand, it was made crystal clear that extension would not be granted going forward if the project is screened as requiring AA or EIA and this has not occurred. It might be inferred that this equally applies to applications which were in train and subject to the exercise of a remittal jurisdiction as it does to new applications. In this regard, it is imperative that sight not be lost of the fact that the enactment of s. 42(8) did not result in any substantive or significant alteration to the existing law. Rather, it recognised and implemented pre-existing requirements of EU law as declared by the CJEU in *Case C-254/19 FOIE v ABP*. That judgment did not preclude an extension of planning permission, but rather made it clear that an extension could not occur unless subject to appropriate screening.

155. The question I must now determine is whether: (i) the presumption against retrospective effect applies to s. 42(8), and (ii) if it does apply, whether a clear intention that s. 42(8) would nonetheless apply to ongoing applications arises by "*necessary implication*". Those questions are, to a significant extent, linked. In that respect, the nature and purpose of the amendment, which corrects a lacuna in the transposition of EU law, is significant. That

amendment does not alter the legal obligations that arose as of the date the application for an extension was made. Rather, it recognises and gives effect to legal obligations that arose from the date obligations under the EIA Directive and Habitats Directive first came into effect, which significantly pre-dates the making of the application.

156. A number of observations arise, in that context as helpfully identified by the Attorney General in submissions filed in the public interest.

157. First, prejudice to a "*vested right*" as a result of a substantive change in the law is fundamental to the invocation of the presumption. It cannot be said that there is a "*vested right*" to have an application determined in a manner contrary to EU law, in particular where the EU law obligation pre-dates the making of the application. Insofar as the Developer had a "*vested right*" to a decision under s. 42(1)(a)(ii), that vested right was at all times subject to the EU law obligations that arose, and that continue to apply. The nature of the applicable EU law obligations have not changed in the intervening period. Nor is it clear that the enactment of s. 42(8) resulted in a substantive change in the law, where it did little more than recognise and give effect to existing obligations.

158. Second, in considering the application of the presumption against retrospective effect, it is relevant that an interpretation of s. 42(8) as applying to an application ongoing on its enactment is the only interpretation that would permit a lawful decision to be made on such an application. If s. 42(8) did not apply to those applications, the planning authorities would (unless a conforming interpretation could be adopted) be obliged to disapply s. 42 as being contrary to EU law, in accordance with the decision in the *WRC Case*, and the application necessarily would be dismissed.

159. Third, the Supreme Court has recognised that an essential element of the presumption against retrospective effect is that it is designed to guard against injustice, and further that it is not an inflexible rule. In *Minister for Social, Community and Family Affairs v Scanlon* [2001] IESC 1, the Court held, having cited the decision in *Hamilton v Hamilton*:

> *"The two essential elements of the rule, as it emerges from these, passages are: Firstly, it is designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions; secondly, the rule is one of construction,*

not of law. It amounts to a presumption against retrospective effect which may be displaced by the clear words of the statute.

In this explanation of the rule, there is not, as Mr O'Donnell pointed out, any inconsistency between the views of O'Higgins C.J. and those expressed in the dissenting judgment of Costello J. The latter stated at p. 481:

"..... the general rule is not an inflexible one and ...., if necessary, the courts will give effect to the words of the statute and apply it retrospectively when by express words or necessary intendment it appears that this was the legislative intent."

160. It is difficult, having regard to the foregoing, to see what injustice would arise in applying s. 42(8) to applications ongoing on its enactment, particularly where s. 42(8) is introduced to reflect an obligation already arising under EU law.

161. Reference must be made, however, to the *dicta* of the Supreme Court in *Sweetman v. Shell E. & P. Ireland Ltd.* [2016] IESC 58, [2016] 1 I.R. 742 where the Court, when rejecting an argument that the costs protection rules in the Environmental (Miscellaneous Provisions) Act 2011 had application to cases ongoing on its commencement, held:

"18. This [i.e. the contrary argument] *has to be correct. There is nothing in the Act of 2011 which requires, or even enables, a retrospective application. There is nothing to suggest that the Oireachtas intended to alter the rule as to costs for litigation that had already commenced. It is not within the purview of the legislation that a High Court order from 10 years previously should be altered by statutory intervention, even supposing that the doctrine of separation of powers did not outrule such a step. There is nothing to indicate that the legislature intended any such result or were obliged to provide for it through European obligations. If the latter were the case, parliamentary draftsmen are well aware that there is an obligation to make any such position clear and explicit. In any event, any such change would be unfair. Anyone who commences litigation, as every practitioner will know, is interested in how a case will be funded."*

162. The Supreme Court appears here to posit that, even if EU law required that an amendment apply to applications ongoing as of the date of its enactment, this should still be expressly stated in the amending legislation. In its subsequent decision in *DPP v District Judge*

Elizabeth McGrath [2021] IESC 66 the Supreme Court clarified that *Sweetman* decided that the changes effected by the 2011 Act in respect of the costs regime were of such moment and had the potential to significantly alter calculations made in relation to the commencement of the proceedings that they could not be considered to have been intended by the Oireachtas to apply to litigation then in being. As such, the Court clarified (at para. 38 of the judgment in *McGrath*), it is a decision on the interpretation of the 2011 Act which seeks to discern the intended meaning of that provision by using the guidance of the principles of statutory interpretation developed in the case law. In the extract quoted above, the Court specifically states that there was nothing to indicate that the Legislature intended to give retrospective effect to the 2011 Act or were obligated to provide for it through European obligations. The same cannot be said here, at least insofar as European obligations are concerned.

163. The situation here is quite different to that in *Sweetman* given that s. 42(8) was enacted to give effect to a pre-existing obligation as declared by the CJEU which would in any event have applied to the underlying application for permission and extension thereof as a matter of EU law. It seems to me that it must have been the intention of the Legislature to enact a provision which ensured compliance with existing EU obligations as this was the obvious and accepted purpose of the amendment. It necessarily follows in my view that s. 42(8) must be given an interpretation which conforms with the obligation to give effect to the same EU law requirement which prompted the amendment of the legislation in the first place. It should properly, therefore, be interpreted as applying to applications ongoing on its commencement as those applications were already subject to the obligation as a matter of EU law, as found by the CJEU.

164. It should be noted also that it was made crystal clear in *Sweetman* that the overarching principle guiding an interpretation which leans against retrospectivity is that of fairness. Charleton J. emphasised this (at para. 16 of his judgment) by quoting from the speech of Lord Mustill in *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 527-8 in support of the overarching principle of a presumption that a legislature in a democratic system cannot have intended to produce unfair consequences by means of retrospective legislation as follows:

> *"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them*

capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by parliament cannot have been intended to mean what they might appear to say,"

165. Given that the requirement to subject the project to AA and EIA screening arises as a matter of pre-existing EU obligation and the absence of a provision which allows for this would therefore inevitably require the Council to reject the application having regard to its obligations under EU law, any unfairness which arises in this instance would flow from the disapplication rather than the application of s. 42(8).

166. Although the application in this case was made prior to the enactment of s. 42(8), it was made at a time when the application was in fact subject to AA or EIA obligations as a matter of EU law albeit Irish statute law was not in conformity. The reality is that a decision to extend without provision for screening made prior to the enactment of s. 42(8) would have been unlawful as a breach of EU obligations. By enacting s. 42(8), the legislative intention was to cure a gap in Irish law whereby EU obligations could be given effect to. The intention was not to create new obligation. There is now no doubt but that the obligations were pre-existing. An application pending at that time could not be lawfully determined without a power on the part of the Council to screen for AA and EIA. Therefore, it is my view that it would be contrary to the requirements of EU law, to limit s. 42(8) to applications made after its commencement unless it could be said that the project was otherwise subject to a screening power as part of Irish law.

167. This raises a question, addressed by the Attorney General in submissions, as to whether it is possible to interpret Irish law in a conforming manner so as to imply a power to

subject the extension application to a screening power. It is also my understanding that the Council would prefer, if I decide to make an order remitting the application, that I would do it on the basis of a conforming interpretation of a power an existing screening power rather than on the basis of a retrospective application of s. 42(8) of the PDA.

168. The more recent Supreme Court decision in *Save Cork City Community Association CLG v An Bord Pleanála & Ors* [2022] IESC 52 would appear to endorse the approach favoured by the Council. That decision involved an application for local authority own development requiring AA under s.177AE. Submissions were made by the public that EIA, in addition to AA, was required and, in light of those submissions, it was determined that EIA screening was required. There is no express provision for the carrying out of an EIA screening under s. 177AE. The Board nevertheless carried out such screening and determined that EIA was not required. Approval for the development was granted. The applicant challenged that grant of approval, on the basis, *inter alia*, that the Board did not have jurisdiction to carry out an EIA screening under s. 177AE.

169. In the High Court, Humphreys J. noted that s. 177AE(15) provided that where an application under s. 175, which provides for local authority own-development requiring EIA, was also required, it was sufficient to make one application. He was satisfied that there must be an implied jurisdiction to carry out AA screening, despite there being no express transposition of the detailed procedures in the EIA Directive, in those circumstances. Therefore, although the jurisdiction arose "*in a highly indirect manner*", Humphreys J. was satisfied it could properly be read into the section.

170. On appeal, the Board argued that such jurisdiction arose both by implication from s. 177AE(15)(as held by Humphreys J) and by virtue of a conforming interpretation. The Supreme Court upheld the decision of Humphreys J. It did so in reliance on s.177AE(15) and therefore did point to a textual basis for the power (albeit one that was indirect). However, the Court further held:

> *"57. Secondly, the fact that the AA screening cannot be lawfully carried out by the Council pursuant to Article 120 provides another justification for holding that the Board has an implied jurisdiction pursuant to s. 177AE. It was common case at the hearing of this appeal that an EIA screening determination is required by EU law, and*

therefore some competent authority has to do that screening. "There is clear judicial authority for the proposition that statutory provisions should be read, where possible, so as to produce a workable and coherent interpretation": per Hogan J. in his judgment for this Court in Pembroke Road Association v. An Bord Pleanála [2022] IESC 30, at para. 43. In the present case the above interpretation as to the Board's implied jurisdiction is the only possible interpretation which produces a workable interpretation of the statutory scheme."

171. That the Supreme Court was willing to read a power to screen for EIA – which typically involves detailed legislative provisions – into a section that was entirely silent in that respect, lends support to an argument that I should, in light of the decision of the CJEU, interpret s. 42(1) as operating to superimpose a power on the part of the Council to screen applications and to refuse to extend a permission where the extension requires AA or EIA, even where no such power has been expressly provided for. While there is some undoubted force to this argument, I cannot ignore that it is not readily reconcilable with the established position in Irish jurisprudence pre-dating the decision of the CJEU in the FOIE case to the effect that an extension of permission did not require development consent. There was no ambiguity in the previous decisions of the Courts in this regard. Indeed, I have been persuaded that it is proper to treat an application under s. 42(1) as giving rise to vested rights given the extent to which the section was previously construed as mandating the grant of an extension. To now interpret s. 42(1) in its unamended form as providing the Council with a power to screen for AA or EIA whilst at the same time holding that the Developer enjoys vested rights to have an application for an extension determined would be, in my view, too radical a departure from existing jurisprudence. Furthermore, it would result in a strained and artificial interpretation of the unamended s. 42(1). This interpretation would be both irreconcilable with previous jurisprudence and internally inconsistent with the logic of my conclusion that the mandatory nature of the s. 42 power to extend gave rise to a vested right for the purpose of s. 27 of the 2005 Act such that the Developer is entitled to maintain a remitted application notwithstanding the repeal of s. 42(1)(a)(ii)II.

172. My primary concern when asked to rule the original draft Order proposed by the Council and the Developer on consent was to ensure that obligations which flow from Habitats Directive or the EIA Directive were not avoided in breach of the requirements of EU law and to the detriment of the public interest in properly considering matters of environmental concern

in extending consent for the Developer's project, particularly where the now repealed s. 42 gives rise to an entitlement, so long as certain conditions are satisfied, to an extension. Having considered all of the submissions helpfully provided by the parties, it seems to me that where an extension of a permission is an entitlement on satisfaction of certain conditions (as found in cases such as *Lackagh* and *Merriman*) and where the Courts have also found (albeit pre-FOIE case) no power on the part of the local authority to require an EIA absent provision in legislation, the only means of ensuring compliance with the requirements of EU law is to superimpose the process of EIA and AA in the manner achieved by s. 42(8).

173. Section 42(8) operates to exclude from the scope of s. 42 cases where full AA or EIA of the extension application is required, so that screening (or pre-screening) EIA out becomes one of the conditions to the otherwise mandatory grant of an extension. This operates to reconcile the entitlement (qualified) to an extension with EIA obligations. In the absence of a provision like s. 42(8), it is difficult to see how the (qualified) entitlement to an extension may be reconciled with AA and EIA obligations given that the Supreme Court has already ruled that an express statutory basis for same is required. While a stateable argument might be made, adopting a process of reasoning akin to that of the Supreme Court in *Save Cork City Community Association CLG* that there is an implied power to screen for EIA and AA and to make the extension application subject to same where necessary, given that the case-law from the CJEU is now clear and means that the position which prevailed when s. 42 was previously considered by the Courts is no longer correct in law, I do not consider that it is properly open to me to now imply a power, without reference to a statutory amendment, which the Courts have previously found did not exist. It seems to me that an interpretation which infers a legislative intention to apply s. 42(8) retrospectively to the extent that it applies to any applications already in train at the date of its commencement sits far more easily with the existing jurisprudence of the Supreme Court whilst securing an interpretation which conforms with EU law obligations.

174. I am satisfied that the presumption again retrospective effect does not apply to s. 42(8). Accordingly, it is my view that an interpretation which construes s. 42(8) as applying to decisions in respect of applications in being when that section was commenced for the purpose of giving effect to pre-existing EU law obligations sits best with earlier Superior Court jurisprudence and the separate obligation to give effect to the requirements of EU law. While this might be said to amount to retrospective application of s. 42(8), it seems to me that this is only superficially the case recalling that the obligation was not created by s. 42(8) but already

existed as a matter of EU law. Furthermore, interpreting s. 42(8) in a manner which applies to applications already made but in respect of which a decision still requires to be taken in accordance with law does not operate to cause an injustice but rather to prevent one. Interpreting s. 42(8) as applying to the remitted application in this case where a decision in accordance with law has yet to be taken operates to bring s. 42 into conformity with EU law. Such an interpretation is open provided that it would not be *contra legem* (Case C-105/03 *Pupino).* I am satisfied having regard to the fact that the clear legislative purpose and intention in enacting s. 42(8) was to cure a non-conformity in Irish law as found in the FOIE case, that such interpretation is not *contra legem*. It is my view that properly construed s. 42(8) applies to a consideration of any remittal of the Application in this case.

175. By interpreting s. 42(8) as applying in respect of decisions made post its enactment a conforming interpretation of the unamended s.42(1)(a)(ii) can be achieved should EIA or AA considerations arise consequent upon the decision in *C-254/19*. I am satisfied s. 42(8), properly construed, applies to a decision made post its enactment in respect of the remitted application in this case where the application had been made and was in train at the time of its commencement given that it operates to give effect to a pre-existing requirement of EU law and its application therefore does not create a new legal obligation or effect an injustice.

CONCLUSION

176. In line with the overriding principle behind any remedy in civil proceedings I now propose, in as clinical a way as is possible, to undo the consequences of the wrongful acts of the Council as found in my judgment in April 2022 but in a manner that ensures that any decision made upon remittal is in accordance with law at the time it is made. In so doing I am mindful that the Council's position is that it would be able to make a decision compliant with the Habitats Directive and the EIA Directive on remittal, subject to additional terms being added to the agreed remittal Order. To this end I will make the following orders:

I. An Order of *Certiorari* quashing the Decision of the Respondent made on the 20th of July, 2020 (Decision Order No. PF/0930/20);

II. An Order that the Respondent's Planning Register be corrected to reflect that the Decision of the Respondent made on the 20th of July, 2020 (Decision Order No. PF/0930/20) has been quashed and remitted on terms to the Respondent;

III. An Order remitting to the Respondent the application made by the Applicant on the 29th of May, 2020 pursuant to s. 42(1)(a)(ii) of the Planning and Development Act 2000 (as amended) to be determined in accordance with law;

IV. A Declaration that section 27 of the Interpretation Act 2005 operates to preserve the effect of section 42(1)(a)(ii) of the Planning and Development Act 2000 (as amended), as it was as of the 20th day of July, 2020, the date of the Decision, for the purposes of the remitted application;

V. A Direction that the remitted application is to be determined in accordance with the plans and guidance applicable as of the date on which a decision is made on the remitted application;

VI. A Direction that the Respondent is required to carry out a screening for Appropriate Assessment and a screening for Environmental Impact Assessment in respect of the remitted application, in accordance with the judgment of the Court of Justice of the European Union in Case C-254/19 *Friends of the Irish Environment v. An Bord Pleanála* and section 42(8) of the Planning and Development Act 2000 (as amended);

VII. A Direction that the Applicant shall, within one week of the date of this Order, submit to the Respondent further information for the purpose of enabling the Respondent to carry out the assessments provided for in paragraph VI above and the date on which that information is submitted is the date on which the application is duly made within the meaning of s.42(3)(a) of the Planning and Development Act 2000 (as amended).

VIII. A Direction that the Respondent shall give notice of its decision on the application, including such further information as may have been submitted, in accordance with paragraph VII above on or before 10th of May, 2023.

IX. A Direction that the maximum period the Respondent may extend the appropriate period of the Permission shall be in accordance with s.42(1) of the Planning and Development Act 2000 (as amended), *viz.* such additional period not exceeding 5 years (*i.e.* 5 calendar years and 45 days) as the Respondent considers requisite to enable the development to which the Permission relates to be completed, with such extended period to commence from the date of Respondent's decision on the remitted application.

X. An Order that the Respondent pay the Applicant's costs of the proceedings to include reserved costs (if any), such costs to be adjudicated in default of agreement by the Office of the Legal Costs Adjudicator.

XI. Liberty to apply.