THE HIGH COURT
JUDICIAL REVIEW

Record No: 2021/562JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A and 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN:

CROFTON BUILDINGS MANAGEMENT CLG
and
STEPHANIE BOURKE

Applicants

And

AN BORD PLEANÁLA

Respondent

And

FITZWILLIAM DL LIMITED

Notice Party

Judgment delivered by Mr Justice David Holland on 16 May 2023

Contents

INTRODUCTION & THE LAW ON CERTIFICATION OF APPEALS

1. In this judgment I decide whether to certify points of law for appeal in a planning judicial review. The Respondent ("the Board") conceded certiorari of its decision dated 28 April 2021[1] (the "Quashed Decision"[2]) to grant planning permission pursuant to the Planning and Development (Housing) Residential Tenancies Act 2016 ("the 2016 Act") to the Notice Party ("Fitzwilliam") for a strategic housing development ("SHD"/"Proposed Development") comprising the demolition of a 2-

1 ABP-309098-21.
2 A convenient usage if somewhat anticipatory of certiorari yet to issue.

storey dwelling and the construction of 102 build-to-rent apartments in 2 buildings, ancillary residential amenities and a publicly accessible café on a 0.42 hectare site ("the Site") at Saint Michael's Hospital Car Park, Crofton Road, Dún Laoghaire, County Dublin.

2. The First Applicant is the owners' management company for the Harbour View residential development, located adjacent to the Site. The Second Applicant owns an apartment in Harbour View. Both objected to Fitzwilliam's application for planning permission for the Proposed Development. For convenience I will refer to both Applicants as "Crofton".

3. The planning process to the point of the Quashed Decision was informed by the Dún Laoghaire-Rathdown Development Plan 2016-2022 ("the 2016 Development Plan"). Certiorari was conceded on the basis that the Board failed to apply s.9(6)(c) of the 2016 Act in granting permission for the Proposed Development in material contravention of the 2016 Development Plan objectives as to building height. The resultant form of order to be made by the Court was agreed by the "Parties"[3] - save for the question of remittal.

4. Fitzwilliam sought remittal of the Quashed Decision to re-decision by the Board. The Board affected general neutrality as to remittal. But the substantive thrust of its written submissions all but favoured remittal on the basis that either it could ensure fair procedures via an oral hearing or, if it couldn't, it would have to refuse permission. Crofton argued against remittal – arguing that the Quashed Decision should be quashed simpliciter. The question of remittal was disputed for three broad reasons:

- A significant consequence of the decision whether to quash simpliciter or to remit the Quashed Decision to the Board for re-decision 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.
  - certiorari simpliciter would imply that a new planning application would be required. Given the expiry of the 2016 Act any such application would not be an SHD application.

  So Fitzwilliam consider that to quash simpliciter would be inimical to their interest – though that was not, per se, a legal basis of objection to quashing the Quashed Decision simpliciter.

- The 2016 Development Plan has been replaced by the Dún Laoghaire-Rathdown Development Plan 2022-2028 (the "2022 Development Plan").[4] The question which development plan should inform the Board's re-consideration of the Quashed Decision, if remitted, was disputed.

- If remittal had to be on the basis that the 2022 Development Plan should inform the re-decision of the matter, questions arose whether remittal on a basis ensuring fair procedures in the

[3] i.e. to the proceedings.
4 Adopted on 10th March 2021, it took effect on 21 April 2022.

remitted decision was possible. If not, it followed that the Quashed Decision should not be remitted to the Board.

5. By judgment delivered 20 December 2022[5] I decided that

- on any remittal, the development plan to which the Board must have regard is the 2022 Development Plan.
- the Quashed Decision should be remitted to re-decision by the Board as, by directions of the Court, fair procedures could be achieved in the remitted process on the basis that the Board would hold an oral hearing into the subject planning application and by way of directions as to procedures to be adopted in and about such oral hearing.

6. I held that I should assume that the application to the present decision of the 2022 Development Plan, by reason of differences between it and the 2016 Development Plan, could well make an appreciable difference to the re-decision on remittal - as to the grant or refusal of planning permission or as to the conditions on which it might be granted. With one exception,[6] I did not consider the content of the 2016 Development Plan or the 2022 Development Plan or any specific differences between them. However, the Parties agreed that such differences were likely to be material to any re-decision on remittal. That issue arose, of course, in light of

- the general importance of the Development Plan in all planning decisions[7] and
- its specifically enhanced importance in SHD planning applications and
- the statutory limits on the Board's power to grant permission in material contravention of the Development Plan.[8] I need not elaborate here upon those limits.

7. As the remitted decision would be decided having regard to a different development plan to that having regard to which the Quashed Decision had been made, the issue arose of enabling the parties, prescribed bodies[9] and the public to be heard as to relevance of the 2022 Development Plan to the decision to be made on remittal. Accordingly, and generally in pursuit of fair procedures, I directed remittal on terms[10] that the Board:

- Hold an oral hearing.

- Notify the Parties, the planning authority, prescribed bodies and the public of the intention to hold that oral hearing.

- Require, under S.135(2A) PDA 2000, Fitzwilliam to provide, within a stated time limit and in documentary form, its intended submissions to the oral hearing. The Board will be at liberty to

5 Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704.
6 As to differences relating to social housing reservation under Part V PDA 2000.
7 See generally Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704 §§59 et seq.
8 See generally Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704 §§135 et seq & §§163 et seq.
9 i.e. bodies (typically public bodies) prescribed by regulation as consultees in planning processes.
10 What follows is a slightly edited version of the directions given in [2022] IEHC 704, 207 – omitting content not here relevant.

be more or less specific as to its requirements in this regard so as to ensure as closely as possible that the documents before it reflect the documentary requirements of the SHD process.

- I recommended that the Board consider imposing requirements which will enable a ready comparison of such documents (applying the 2022 Development Plan) with the documents already before the Board (applying the 2016 Development Plan) to enable ready identification of the differences between them.

- Provide for the circulation of Fitzwilliam's intended submissions to the parties, the planning authority and prescribed bodies and their publication to the public.

- Require, under S.135(2A), the parties, the planning authority, prescribed bodies and the public to respond in writing, by way of their submissions to the oral hearing to Fitzwilliam's intended submissions to the oral hearing.

- Require that all those who make such responses be heard at the oral hearing.

8. The Parties made written submissions on the question of certification of appeal of the remittal judgment and have agreed that I should decide the issues arising having regard to those written submissions and without oral hearing. This is my judgment accordingly.

9. **S.50A(7) PDA 2000** provides as follows:

> *"The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]."*

10. Though s.50A(7) does not explicitly say so, it is clear that not merely must the decision from which it is sought to appeal involve a point of law – that point must be the intended subject of the appeal.

11. The law on certification of appeals in planning judicial reviews is well-understood. It originated in **Glancré**,[11] is set out and glossed in a number of judgments since and was summarised recently in **MRRA**.[12] I need not repeat that detail here and note merely that the issue is governed by S.50A(7), that I am to assume my judgment as to remittal was wrong in the respects asserted by Crofton and the main principles that:

[11] Glancré Teoranta v An Bord Pleanála [2006] IEHC 250.
12 Monkstown Road Residents' Association v. An Bord Pleanála [2023] IEHC 9.

- the High Court's decision which it is sought to appeal is to be final and not appealable in most cases - such that the jurisdiction to certify an appeal should be exercised sparingly.

- the appeal, to be certified, must invoke a point of law of exceptional public importance.

- for the appeal to be certified, it must be desirable in the public interest that the appeal be taken.

12. It is important to mention also **s.50A(9A) PDA 2000**, which came into effect on 20 October 2022[13] and by which my judgment as to remittal was "*considerably conditioned*".[14] It reads as follows:

> *"(9A) If, on an application for judicial review under the Order,[15] 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."*

13. In my judgment as to remittal, I observed that

> *"assuming the preconditions to its operation[16] apply, as the parties all but agree and I am happy they do, s.50A(9A) requires remittal "unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so". It seems reasonable to regard this as a statutory expression and reinforcement of the principles and presumption in favour of remittal generally discernible in the cases. There was no real dispute in this regard - though the Board correctly emphasises that I must be positively satisfied that it would be unlawful to remit before I could refuse to remit."*

THE POINTS OF LAW & GROUNDS OF APPEAL PROPOSED BY CROFTON

14. By submissions dated 20 February 2023, Crofton proposed six "questions" for which it sought a certificate to appeal my decision as to remittal. At my request and by addendum submissions, Crofton translated these questions to eight proposed grounds of appeal – though I take the point, made by Crofton in that addendum, that what requires certification under s.50A(7) is not a ground of appeal as such but is whether the decision from which it is sought to appeal *"involves a point of law ….".* Crofton reserves its rights as to the grounds of appeal which it may formulate as to

13 Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain Provisions) (No. 3) Order 2022.
14 §196.
15 i.e. Order 84 RSC.
16 In this case, a decision to quash a decision made in an application for permission and a request by the applicant for permission to remit.

any point of law which I may certify for appeal. However, I have found Crofton's draft grounds of appeal useful in considering the posited points of law.

15. Put generally, Crofton seeks a certificate to appeal on the basis that, by the directions set out above, I exceeded my powers in that I departed from, or departed excessively from, the scheme of the 2016 Act pursuant to which any re-decision on remittal falls to be made. That Act is notably restrictive of the potential of parties to be heard repeatedly in the SHD planning process.

16. In its submissions of 20 February 2023, Crofton identified the following points of law[17] for certification:

(i) *"To what extent, if at all, can and/or should the Court under s.50A(9A) of the 2000 Act, where it is obliged to remit where it is "lawful to do so", make directions to alter, amend and/or re-shape a statutory scheme?*

(ii) *To what extent, if at all, can and/or should the Court under s.50A(9A) of the 2000 Act, where it is obliged to remit where it is "lawful to do so", make directions to require the Board to take measures which exceed the powers of the Board?*

(iii) *Where the statutory scheme under the 2016 Act fixes certain procedural requirements and steps (including publishing a material contravention statement, notice to inform the public, preparation of Chief Executive Report etc) to inform the public and reflect fair procedures, does s.50A(9A) of the 2000 Act allow the Court on remittal to make directions to achieve fair procedures/public procedures by means, such as by directing an oral hearing and production of certain documents, other than those contemplated and provided for under the statutory scheme?*

(iv) *In circumstances where it is accepted that the Board has no power to request further information and/or revised plans in respect of SHD applications under the 2016 Act, does the power of the Board under s.135(2A) of the 2000 Act to require a person intending to appear at an oral hearing to submit "in writing and in advance of the hearing, the points or a summary of the arguments they propose to make at the hearing", permit a Court on remittal under s.50A(9A) of the 2000 Act to direct that specific documents/information, not part of the original application, be prepared and made available in advance and/or at the oral hearing?*

(v) *Does the power of the Court to make directions on remittal under s.50A(9A) of the 2000 Act allow a Court to make directions that the Board must exercise its powers in a particular manner (to convene an oral hearing) where the statute confers on the Board an absolute discretion as to whether and/or what manner it may exercise such power?*

(vi) *Where the Board has conceded proceedings only on a specific error and/or ground (relating to building height), does the scope of such concession limit the scope of*

[17] I have corrected minor typos.

directions which might be made by the Court on remittal under s.50A(9A) of the 2000 Act, as being confined to only addressing issues relating to that specific error?"

17. By its submissions Crofton accepted that there is some overlap between these posited points of law and that, for the most part, it is not desirable to advance too many such points. However, it says, the posited points reflect the complexity of this matter and are advanced to assist the Court in formulating points of law for certification.

18. By its addendum submissions Crofton translated these six questions to eight proposed grounds of appeal as follows:

a. "The High Court erred and/or acted without jurisdiction and/or misinterpreted s.50A(9A), ss.134-135 of the Planning and Development Act 2000, as amended ("the 2000 Act") and/or the established principles on remittal, in making directions which altered the statutory scheme under the 2016 Act - under which the public are to be informed of policies and/or material contraventions relating to the development in the planning application at the outset (by means of public notice); are afforded an opportunity to make submissions thereon; and with the Chief Executive of the planning authority then preparing a report which addresses the same. By means of directions under s.50A(9A), the Court retrospectively created an alternative scheme by means of an oral hearing and associated directions, and in doing so acted without jurisdiction.

b. The High Court acted without jurisdiction, erred in law, and/or misinterpreted s.50A(9A) and ss.134-135 of the 2000 Act in making directions to overcome established statutory limits in respect of the lack of jurisdiction of the Board to request, and for the developer to submit, further information under the 2016 Act.

c. The High Court acted without jurisdiction, erred in law and/or misinterpreted s.50A(9A) and ss.134-135 of the 2000 Act by making directions for the Board to action, which the Board cannot otherwise do under the statutory scheme of the 2016 Act - in particular by obligating the Board to order the developer to produce certain information/documents within a timeframe in advance of an oral hearing to address matters which were not in the original SHD application. Such an approach is not open to the Board under the legislative scheme provided for under the 2016 Act and, having regard to the established principles on remittal, goes further than replicating the statutory scheme under the 2016 Act.

d. The High Court erred in law and misinterpreted the established principles on remittal, including that in making directions the Court should endeavour to replicate, as far as possible, the statutory scheme, as allowing the Court to create a new statutory scheme, where the basis of such principle of replicating the scheme relates to a limitation on the Courts discretion in making directions to follow the statutory scheme.

e. The High Court erred in law and/or misinterpreted s.50A(9A) and ss.134-135 of the 2000 Act in imposing directions which fail to replicate the statutory scheme under the 2016 Act insofar as

possible, including the provisions under same relating to the preparation of a Chief Executive's Report in relation to a SHD application and/or in circumstances the alternative scheme does not allow the public an[18] equivalent level of participation.

f. The High Court, acted without jurisdiction, erred in law and/or misinterpreted s.135(2A) of the 2000 Act, in light of s.50A(9A), as permitting the Board to address specific issues, such as those relating to a new development plan, when the scope of such provision concerns directing a person who proposes to appear at an oral hearing to make certain points, to make those points in writing in advance of the oral hearing. The purpose of this provision is to get advance notice of what a person appearing at an oral hearing is going to say. It is not a vehicle for the Board to shape an application or direct a specific person, including an applicant, to produce new information.

g. The Court acted without jurisdiction and/or misinterpreted s.50A(9A), ss.134-135 of the 2000 Act, in directing the Board to conduct an oral hearing notwithstanding that the Board has an absolute discretion whether to hold same and where the circumstances do not fall within those contemplated by the Oireachtas under s.18 of the 2016 Act (amending s.134 of the 2000 Act) which were intended to further restrict the availability of an oral hearing and not to facilitate the same.

h. The Court acted without jurisdiction and/or misinterpreted s.50A(9A), in making directions which went beyond the ground for certiorari conceded by the Board concerning material contravention of the development plan relating to height and made directions to deal with other development plan policies under the new development plan, which is inconsistent with the established principles of remittal that the Court in making directions should seek to undo the error and go no further. This is particularly the case where the Court did not consider the other grounds of challenge in the proceedings, which were not conceded by the Board.

DISCUSSION AND DECISION

The Partly Agreed Point

19. The Board[19] agrees generally that a point of law as to the scope of the power to give directions when remitting is suitable for certification of appeal as meeting the tests of exceptional public importance and public interest found in s.50A(7). It states that it will not oppose certification of a point of law as to the jurisdiction of the High Court, on remittal of a quashed decision to the Board, to give directions to the Board to exercise powers which would not otherwise be available to the Board under the statutory scheme governing SHD planning applications. Notably, the single point of law to certification of which the Board agrees is specific to remittal of quashed SHD decisions. The Board formulates its suggested point of law as follows;

18 The original use the words "and the" but the typo and its correction are obvious.
19 Inter Partes letter 20 April 2023.

> *"To what extent, if at all, can the High Court, when granting remittal in accordance with section 50A(9A) of the Planning and Development Act, 2000 as amended, in respect of an application for planning permission made pursuant to section 4 of the Planning and Development (Housing and Residential Tenancies) Act, 2016, as amended, make directions for the processing of that application to include the exercise of powers which are not normally available to An Bord Pleanála under the statutory scheme?"*

20. The Board considers that the point of law is best (though not entirely) captured at §(ii) of the Applicant's draft grounds of appeal:

> *"(ii) The High Court acted without jurisdiction, erred in law, and/or misinterpreted s.50A(9A) and ss.134-135 of the 2000 Act in making directions to overcome established statutory limits in respect of the lack of jurisdiction of the Board to request, and for the developer to submit, further information under the 2016 Act."*

21. In my view, the Board is correct in reformulating the point of law to which it agrees in terms specific to an SHD planning application under the 2016 Act. That formulation best complies with the requirement that the point of law in question be determinative of the issues at stake in the judgment on remittal in the present case. In particular, Crofton's point (i) is too abstract and general to comply with that requirement.

22. The Board cites both the judgment on remittal in the present case and that on remittal in **Crekav**.[20] It considers that:

- Its proposed point of law is novel, having regard to the specific procedures in the statutory scheme of the 2016 Act applicable to SHD applications.

- The present case is the first in which such directions have been made in the remittal of a quashed SHD permission for re-decision.

- S.50A(9), a new statutory provision, has received limited judicial consideration to date.

- It is aware of at least four other proceedings in the CPSID List[21] in relation to decisions under the 2016 Act (i.e. SHDs) where the Board's decision is to be quashed and remittal is sought by the notice parties/developers, and which, therefore, give rise to similar issues as to whether, and to what extent, such directions can be made by the High Court. Further remittal requests in respect of such quashed SHD decisions may yet occur.

20 Crekav Trading GP Limited v. An Bord Pleanála [2020] IEHC 400 – see the remittal judgment in the present case Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704 §44 et seq.
21 The Commercial Planning and Strategic Infrastructure Development List of the High Court.

- Dún Laoghaire-Rathdown is not the only local authority to have recently replaced its development plan. For example, all three other planning authorities in Dublin - Dublin City, Fingal and South Dublin – have done so in the last 12 months. So, remittal of quashed SHD permissions relating to their functional areas may well require re-decision having regard to different development plans to those having regard to which the quashed SHD permissions had been granted. Such cases will raise, as to posited remittal, the same fair procedures issues which the directions in the present case sought to address.

- Therefore, the point of law in question transcends the facts of this case and it is in the public interest to have that question answered by the appellate courts in order to expedite the progress of these proceedings, and any other proceedings in a similar position, to resolution.

23. I am readily convinced by the Board's analysis as set out above. I am further satisfied that

- the point identified by the Board is capable of determining the issues at stake in the judgment on remittal in the present case: namely whether and, if so on what terms, the Quashed Decision should be remitted to re-decision by the Board.

- there is at present uncertainty in the law as to the scope and extent of the power of the High Court, in remitting a quashed SHD decision to re-decision, and in making the directions contemplated by s.50A(9A), to adapt or depart, in greater or lesser degree, from the statutory scheme pursuant to which the remitted decision is to be made.

- this issue is particularly uncertain as s.50A(9A) clearly favours remittal as a general proposition but, at least arguably, the statutory scheme to which re-decision is to be remitted lacks explicit capacity – indeed, arguably explicitly lacks capacity - to vindicate rights of procedural fairness on remittal.

- the resolution of the issue identified above bears on the lawfulness of remittal as contemplated by s.50A(9A) PDA 2000.

- the law in that regard is in a state of evolution. A decision of an appellate court would be welcome.

24. In addition, I consider that Crofton's submissions, as to all its posited points of law, that

- they concern the respective powers of the Court, the legislature and the Board, and also engage issues concerning the separation of powers,

- s.50A(9A) of the 2000 Act has not been considered by any appellate court,

- remittal in general has not been considered in detail by the appellate courts,

apply specifically to the ground of appeal identified by the Board and amplify the case for its certification.

25. Without prejudice to its opposition to certification of any point of law for appeal, Fitzwilliam[22] proposes a reformulation, as follows, of the point of law proposed by the Board:

> *"To what extent, if at all, can the High Court, when granting remittal in accordance with section 50A(9A) of the Planning and Development Act, 2000 as amended, in respect of an application for planning permission made pursuant to section 4 of the Planning and Development (Housing and Residential Tenancies) Act, 2016, as amended, make directions for the processing of that application to include the exercise of powers which are available under the statutory scheme but are varied to facilitate remittal or are powers which supplement those statutory powers in the interests of justice"* [23]

26. The Board responds that this reformulation characterises the statutory scheme and the judgment on remittal in a manner peculiar to the Notice Party's point of view. That may or may not be so but arguably it better reflects the approach which I sought to take (whether successfully or not) in my judgment on remittal. However, I do not consider that I need to resolve this difference between the Board and Fitzwilliam. It seems to me that whichever one might consider the better expression of the point of law at stake, I should certify it as involving, in the words of s.50A(7) "*a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal*". I am satisfied that the **Glancré** tests for certification of an appeal are met. For the reasons I have just set out, and also because they seem to me to argue the substantive issue of the strength of the posited ground of appeal (arguments which I must ignore, taking Crofton's case at its height), I respectfully reject Fitzwilliam's submissions to the contrary. Accordingly, I will certify for appeal both the point of law as formulated by the Board and that formulated by Fitzwilliam.

Remaining Issues

27. As Crofton fairly says, there is much overlap in its posited points of law. Those certified above have the merit of specificity to remittal of an SHD permission and so the capacity to determine the remittal issue specific to the present case. They also encompass some of the more generally expressed points of law posited by Crofton. The Board agrees – as do I - that the points identified at (iii) and (iv) raise specific issues which can be addressed via the points of law I have certified.

22 Letter 20 April 2023.
23 Reformulation underlined.

28. However, two further of Crofton's posited points –(v) and (vi) – do require further consideration.

Directions as to Exercise of Absolute Discretion to hold an Oral Hearing

29. The first point requiring further consideration is as follows:

> ***(v)*** *Does the power of the Court to make directions on remittal under s.50A(9A) of the 2000 Act allow a Court to make directions that the Board must exercise its powers in a particular manner (to convene an oral hearing) where the statute confers on the Board an absolute discretion as to whether and/or what manner it may exercise such power?*

30. This posited point of law does differ from those already certified in that it relates to the exercise of a power which the Board would in any event and ordinarily possess on remittal – the power to hold an oral hearing.

31. By **s.134 PDA 2000** as amended by **s.18 of the 2016 Act**, the Board has an "*absolute discretion*" to hold an oral hearing in an SHD application. The Board had asked me not to direct it to hold an oral hearing but to leave to it to decide, in its discretion, whether to hold an oral hearing and how to provide fair procedures in any such process. In rejecting the Board's submission in this regard, I considered that the necessities of ensuring fair procedures required that I direct the Board to hold an oral hearing. The particular scope of the procedural powers in the 2016 Act for submission and exchange of information informed my view that directions in that regard should be premised on the holding of an oral hearing.

32. Notably, the Board, for whom this very well could be a recurring issue as to directions to hold an oral hearing and be a general issue as to the power to direct a public body in a remittal order to exercise a statutory absolute discretion in in a particular way, does not agree to certification of this point of law. It does not seek to appeal a direction which stipulates that it exercise in a particular way a statutory power as to the exercise of which it ordinarily has an absolute discretion.

33. Crofton, at trial of the remittal issue, did oppose the proposition that I should direct an oral hearing by the Board. It is fair to say that it did so as a stepping stone, as it saw it, to a conclusion that remittal was impossible given an oral hearing was the only means to fairness posited by Fitzwilliam and the Board. Crofton did so on three distinct bases:

- First, it argued that that to direct an oral hearing would inappropriately *"trespass on the Board's absolute discretion to hold an oral hearing"*.

- Second, it argued that *"Under no possible circumstances, would the statutory criteria envisage an oral hearing being held in the current circumstances after a remittal."* In this respect, Crofton cited s.18 of the 2016 Act to the effect that, in deciding whether to hold an oral hearing as to an SHD planning application, the Board:

  > (i) *"shall have regard to the exceptional circumstances requiring the urgent delivery of housing as set out in the Action Plan for Housing and Homelessness, and*
  > (ii) *shall only hold an oral hearing if it decides, having regard to the particular circumstances of the application, that there is a compelling case for such a hearing."*

  Crofton observe that these criteria tell generally against oral hearings and in favour of the expedition undoubtedly prioritised by the 2016 Act. I should add that Fitzwilliam argued that if[24] the 2022 Development Plan applied, the fair procedures case for an oral hearing was indeed "compelling" - I agreed.

- Third, it argued that *"such an approach would not cure the issues with the application documentation and public notices (and associated public participation rights) insofar as same all related to the 2016 Development Plan, as opposed to the 2022 Development Plan.*" These broadly are issues I sought to address in my directions.

34. It seems to me that a decision of this issue in favour of Crofton on appeal could well contribute to a determination in Crofton's favour of the question whether remittal could occur. I take that view as the logic of my decision on remittal is that an oral hearing provides the only viable process (it was the only one suggested by the Board and Fitzwilliam) in which fairness can be achieved in a remittal of a quashed SHD decision for re-decision. This is in circumstances in which the development plan has been replaced since the making of the quashed SHD decision. I took the view that the direction to hold an oral hearing provided a footing on which to give directions of the kind which I gave in the present case. I did so in the exercise of the flexibility as to replication of statutory processes on remittal identified in the remittal judgment.[25] If, as I must assume for present purposes, my decision to direct an oral hearing was wrong and that my other directions given on the footing of an oral hearing were also wrong, it is at least foreseeable that on appeal Crofton could successfully resist remittal. On that view, this point of law could well determine the issue which was the subject of the remittal judgment.

35. As to the other Glancré criteria for certification, it seems to me that the reasons applicable to the two points of law I have already certified apply equally to this point. Accordingly, I will certify it – but confine it to the issue of the power to direct the Board to hold an oral hearing. That will focus the point on the circumstances of the present case while allowing elucidation of any significance in the concept of "absolute discretion".

24 Contrary to its submission.
25 §§19, 22, 23, 24, 28, 34, 183, 193, 198, 204 & 205.

The Scope Of The Remitted Decision

36. The other point requiring further consideration is as follows:

> ***(vi)*** *"Where the Board has conceded proceedings only on a specific error and/or ground (relating to building height), does the scope of such concession limit the scope of directions which might be made by the Court on remittal under s.50A(9A) of the 2000 Act, as being confined to only addressing issues relating to that specific error?"*

37. Crofton submits that I have, by my remittal order, incorrectly gone further than seeking to address the Board's specific error in deciding that the building height of the Proposed Development was not in material contravention of the 2016 Development Plan in that my directions dealt not simply with that error but with the fact that the development plan has changed.

38. The Board submits that *"the proposed point of law seems to suggest that remittal should be confined to the ground on which the proceedings were conceded."* By this, I understand the Board to submit that this point of law proposed by Crofton suggests that, on remittal, the Board must be confined to considering only the issue on which the proceedings were conceded. The Board submits that Crofton's proposition is not supported by authority. I can readily see that this issue is one of potentially considerable general importance in the law of judicial review.

39. I observe that my judgment held that, as a matter of law, the remitted decision had to be decided having regard to the 2022 Development Plan. It is difficult to see that a lawful remitted decision could materially contravene the 2022 Development Plan in respects other than as to building height without the Board's considering the issue and invoking s.9(6)(c) if appropriate. Nor, assuming that Crofton had, in these proceedings, good grounds for judicial review other than that conceded by the Board, do I see any basis on which the Board should be, artificially and to no good purpose, trapped by the terms of a remittal order into repeating error. And, as I held, the correct statement of the legal position immediately prior to the Board's error is not that the planning decision was to be made in light specifically of the 2016 Development Plan but that it was to be made in light of the Development Plan current at the date of the decision – whenever that date might be. Inevitably, given remittal, that date will have changed as between the Quashed Decision and the re-decision on remittal and so, in the circumstances of this case, the applicable development plan will have also changed. However, these remarks are obiter as I must take the posited point at its height for Crofton.

40. Notably, Crofton seeks no certification for appeal of a point of law as to my decision that the 2022 Development Plan must apply in any remitted decision. Importantly, Crofton argued at trial of the remittal issue that

- statute requires that planning decisions be based on the development plan current at the date of the decision.
- the 2016 Development Plan no longer exists.
- the 2022 Development Plan was the only possibly applicable plan.

I should add that Crofton argued that the fact that the 2022 Development Plan was the only possibly applicable plan demonstrated the impossibility of remittal - essentially for the fair procedure reasons which my directions sought to address. However as, rightly or wrongly and effectively or ineffectively, my directions sought to solve the fair procedures difficulty, the logic of Crofton's position at trial is that the 2022 Development Plan does indeed apply on a remitted decision. It does not seem to me that Crofton can now not merely abandon but impugn its own logic.

41. In any event, and as set out in the Board's submissions, Crofton did not argue at the remittal hearing that the Board should be confined on remittal to considering the single issue arising out of the ground on which it conceded certiorari. Accordingly, it is not something which arises from the judgment on the issue of remittal. That the point of law of which certification is sought must arise from the judgment which it is sought to appeal is essential to certification – see **MRRA**.

42. On these bases, while appreciating that the point of law in question might well in an appropriate case merit certification, I respectfully decline to certify this point of law for appeal in this case.

CONCLUSION

43. Accordingly, I will certify the following points of law for purposes of **s.50A(7) PDA 2000:**

a. To what extent, if at all, can the High Court, when granting remittal in accordance with section 50A(9A) of the Planning and Development Act, 2000 as amended, in respect of an application for planning permission made pursuant to section 4 of the Planning and Development (Housing and Residential Tenancies) Act, 2016, as amended, make directions for the processing of that application to include the exercise of powers which are not normally available to An Bord Pleanála under the statutory scheme?

b. To what extent, if at all, can the High Court, when granting remittal in accordance with section 50A(9A) of the Planning and Development Act, 2000 as amended, in respect of an application for planning permission made pursuant to section 4 of the Planning and Development (Housing and Residential Tenancies) Act, 2016, as amended, make directions for

the processing of that application to include the exercise of powers which are available under the statutory scheme but are varied to facilitate remittal or are powers which supplement those statutory powers in the interests of justice?

c. Does the power of the Court to make directions on remittal under s.50A(9A) of the 2000 Act allow a Court to make directions that the Board must exercise its powers to convene an oral hearing where the statute confers on the Board an absolute discretion as to whether and/or what manner it may exercise such power?

44. I will list this matter for mention only on 22 May 2023.

David Holland
16/5/23