[2019] IEHC_890

THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2019 No. 151 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED

BETWEEN

ORLA FITZGERALD

APPLICANT

AND

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

TUDOR HOMES LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 20th day of December, 2019

Introduction

1. This judgment deals with a number of issues which arose in the course of judicial review proceedings which were commenced by the applicant in March, 2019 and in which the applicant seeks various reliefs arising from a decision of the first named respondent, Dun Laoghaire Rathdown County Council (the "Council"), dated 18 January, 2019 to grant permission to the notice party, Tudor Homes Limited, for a substantial residential development in Brennanstown, Dublin 18, within the Cherrywood Strategic Development Zone. The applicant challenged the Council's decision on a number of grounds. The proceedings were entered in the Commercial List on the application of the notice party in April, 2019. In early June, 2019, the Council wrote to the applicant (and the other parties) indicating that it was prepared to consent to an order of *certiorari* quashing the decision on a particular basis and to an order remitting the notice party's application to the Council on certain terms as well as conceding the costs of the proceedings up to the date of its letter. The terms of that concession were not accepted by the applicant. A hearing was directed as to whether orders should be made on the terms proposed by the Council. This is my judgment on that question.

2. This judgment, therefore, deals with the terms of the order of *certiorari* which the Council has conceded should be made and the question as to whether the notice party's application for permission should be remitted to the Council and, if so, the point in time in the process to which such remittal should be made.

3. In considering those issues, I will first outline the nature of the notice party's application for permission, the decision by the Council on the application and the challenge brought by the applicant to that decision. I will then outline the relevant statutory provisions before turning to the submissions advanced by the parties in respect of the order of certiorari and the terms of the remittal proposed by the Council. Finally, I will set out the relevant legal principles before providing my conclusions on the contested issues.

The notice party's application for permission

4. On 9th March, 2018 the notice party made an application to the Council for permission for a residential development consisting of the construction of 367 residential units and associated works on a site of approximately 6.57 hectares at Lehaunstown Lane, Brennanstown, Dublin 18. The proposed development is intended to be carried out within the Cherrywood Strategic Development Zone which is an area designated as a strategic development zone ("SDZ") under Part IX of the Planning and Development Act, 2000 (as amended) (the "2000 Act"). In April, 2014, a planning scheme for the Cherrywood SDZ was approved by An Bord Pleanála (the "Board"), pursuant to s. 169 of the 2000 Act. The notice party's application for permission for the development at issue was made pursuant to s. 34 of the 2000 Act, subject to the provisions of s. 170 of that Act which applies to applications for permission in respect of developments in a SDZ.

5. Several submissions or observations were made by interested parties in respect of the notice party's application. Many came from local residents, including the applicant whose family home shares a boundary with part of the site of the proposed development. A separate submission was made by the applicant's husband. The main issues raised in the submissions and observations made in respect of the notice party's application were summarised in a document exhibited at Tab 6 of exhibit "*OF1*" to the affidavit sworn by the applicant on 14th March, 2019 for the purpose of grounding her application for judicial review. The document is a Council document entitled "*Record of Executive Business Chief Executive's Order*" and it was stated by the Council in correspondence with the applicant that the document constitutes the decision of the Council on the notice party's application.

6. The issues raised by the applicant in her observations in respect of the notice party's application concerned the effect the development would have on the privacy of her home, the boundary delineation, the extent and timing of the construction works, the impact of dust and dirt, noise pollution, the height of one of the apartment blocks included within the development and issues in relation to the removal of hedgerows.

7. Having considered the observations made, reports from statutory bodies and internal reports from different sections of the Council, the Council decided to seek further information from the notice party on 2nd May, 2018. Further information was provided by the notice party on 14th December, 2018. The Council considered that the further information provided by the notice party contained significant additional data which required the publication of further notices by the notice party. According to the decision, new public notices were considered necessary as a result of certain alterations to the application including a change in the number of overall units proposed (a reduction from 367 units to 364 units) and an alteration of the boundary of part of the site as well as certain other changes in the application. A further site notice and further advertisements were placed by the notice party informing the public that significant further information and revised plans in relation to the application had been furnished to the Council and were available for inspection or purchase and that submissions or observations in relation to the further information and revised plans could be made in writing to the Council, not

later than two weeks after receipt of the newspaper notice and site notice by the Council. Those notices were received by the Council on 14th December, 2018. The notices were placed on the site and in the newspapers on the same date.

8. Further submissions and observations were received on foot of those notices. They were mainly from local residents, including the applicant and her husband. The applicant's further observations were received by the Council on 7th January, 2019. In addition to these further observations, an updated report was received by the Council from Inland Fisheries Ireland dated 20th December, 2018. Further internal reports were provided by (*inter alia*) the Cherrywood Development Agency Project Team, (received 9th January, 2019), the Transportation Section (received 16th January, 2019), the Housing Section (received 31st December, 2018), the Biodiversity Officer (received 14th January, 2019), the Conservation Officer (received 3rd January, 2019), the Environmental Enforcement/Waste Management Section (updated report received 19th December, 2018), Irish Water (updated report received 7th January, 2019) and Transport Infrastructure Ireland (report received 8th January, 2019).

The Council's Decision

9. Having recorded receipt of those further observations and reports and having summarised their contents, the decision then set out under the heading "*Planning Application Assessment*" (on p. 113 of 145 of the decision) in the Council's assessment of the application. What is particularly relevant for present purposes is what the decision stated under the sub-heading "*EIAR Screening*" as follows:

> *"Having regard to the nature and scale of the development which consists of a residential scheme in a fully serviced urban location which is a Strategic Development Zone, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required. It is noted that a number of relevant surveys, reports etc. have been submitted with the application both initially and at a further information stage. With regard to appropriate assessment it is noted that the updated Biodiversity Officer's report states that 'The Screening for Appropriate Assessment Report has been reviewed and [it] is considered, in the opinion of the Biodiversity Officer, that it provides sufficient information in support of the conclusion of no significant effects'".*

10. The decision then recorded the Conclusion and Recommendation of the Council. The Recommendation was to grant permission for the development subject to 45 conditions. The decision was signed off by a senior planner and endorsed by a senior executive officer. The order made by the Council was contained on the final page of the document. It was signed on 18th January, 2019 by an approved officer. The order recorded as follows:

"A decision, pursuant to s. 34(8) of the Planning & Development Act, 2000, for Register Reference DZ18A/0208, to GRANT PERMISSION for the above proposal subject to the (45) condition(s) as set out above is hereby made.

As this proposal is in the Cherrywood Planning Scheme, April, 2014, in accordance with s. 170(4) of the Planning and Development Act, 2000, a GRANT PERMISSION is hereby given on this day."

11. Notification of the Council's decision to grant permission was provided to the notice party's agents on 21st January, 2019.

12. Before turning to the judicial review proceedings commenced by the applicant, I should make reference to the time period within which the Council was required to make a decision on the notice party's application. Since the Council considered that the further information provided by the notice party contained significant additional data which required publication of further notices by the notice party and since a two week period was permitted for the public to make observations on the further information (Article 35(1)(a)(v) of the Planning and Development Regulations 2001 (as amended) (the "2001 Regulations")) and the Council had four weeks to make its decision beginning on the day on which notice of the publication of the further notices by the notice party was given by the Council (under s.34(8)(b)(ii) of the 2000 Act), the final date for the submission of observations was, having regard to the excluded period over Christmas by virtue of s.251 of the 2000 Act, 7th January, 2019. The Council had a further period of two weeks thereafter to make its decision. The Council, was therefore, required to make its decision by 21st January, 2019. The consequences of any failure to do so by that date are considered later in this judgment.

13. As can be seen from the brief summary of the planning history in respect of the notice party's application set out earlier, observations were received from the applicant and from others by 7th January, 2019. The Council made its decision on the notice party's application on 18th January, 2019 and notified that decision to the notice party's agents on 21st January, 2019.

The applicant's challenge by way of judicial review

14. On 25th March, 2019 the applicant was granted leave by the High Court (Meenan J.) to bring judicial review proceedings challenging the Council's decision.

15. The reliefs sought by the applicant were, in summary, as follows:

    (1) An order of *certiorari* quashing the Council's decision to grant permission to the notice party in respect of the development.

    (2) A declaration that the Council's decision was granted in breach of Directive 2014/15/EU (the "EIA Directive") and Directive 92/43/EC (the "Habitats Directive").

(3) If necessary, a declaration that Part IX of the 2000 Act and, in particular, s.170 thereof is contrary to the Constitution, fair procedures and natural and constitutional justice.

(4) Various other reliefs, including costs.

16. In her statement of grounds and in the affidavit which she swore for the purpose of grounding her application for judicial review, the applicant repeated many of the concerns expressed by her in her earlier observations to the Council as part of the planning process concerning, in particular, the potential overshadowing of her property and the potential interference with her hedgerow by reason of the proposed development.

17. The grounds upon which the applicant sought these reliefs in the judicial review proceedings can be summarised as follows. First, the applicant claimed that no reasons were given by the Council for its decision to grant permission. She contended that the document described by the applicant as the "planner's report" (being the document described by the Council as its decision) contained inadequate reasons for recommending a grant of the permission sought. Second, it was alleged that the Council's decision was irrational on the grounds that it appeared to suggest that permission for the proposed development had to be granted as it was to be carried out within the Cherrywood SDZ. Third, the applicant contended that the decision was irrational and void for uncertainty on the basis that it did not address how the boundary between the applicant's property and the proposed development was to be treated. Fourth, it was asserted that the decision failed to record any proper screening for either environmental impact assessment (EIA) or appropriate assessment (AA) was, therefore, in breach of the EIA Directive and/or the Habitats Directive.

18. The applicant's judicial review proceedings were entered in the Commercial List on 29th April, 2019 on the notice party's application. Thereafter, the judge of the Commercial List (Haughton J.) case managed the proceedings. Two significant developments occurred before any opposition papers were delivered by the respondents or by the notice party.

19. The first concerned the applicant's request for confirmation from the other parties that the costs of the proceedings would be covered by the provisions of s.50B of the 2000 Act. This was the subject of correspondence between the applicant's solicitors and solicitors for the other parties. It was agreed at an early stage of that correspondence by the notice party's solicitors and by solicitors acting for the State respondents that, as far as those parties were concerned, the special costs provisions contained in s.50B (and elsewhere) applied to the proceedings brought by the applicant. However, there remained some disagreement as between the applicant and the Council as to the extent of the application of s.50B to the proceedings. A motion was then issued on behalf of the applicant on 17th May, 2019 seeking orders declaring that the costs of the proceedings in their entirety were subject to the provisions of s.50B. Agreement was ultimately reached as to the extent of the application of s.50B to the proceedings, in correspondence between the applicant's solicitors and the Council's solicitors (see the Council's solicitors' letter of 4th July, 2019).

20. The second significant development was the concession and the remittal proposed by the Council to which I now turn.

Concession / remittal proposed by Council

21. In a letter dated 4th June, 2019, the Council's solicitors wrote to the applicant's solicitors (and copied the letter to the other parties) confirming what had been stated to Haughton J. earlier that morning, namely, that the Council was prepared to consent to various orders being made in the proceedings.

22. The letter stated that the Council was prepared to consent to an order of certiorari quashing the Council's decision to grant permission to the notice party in respect of the proposed development on a particular ground, namely, that the decision failed adequately to record the reasons for the Council's conclusions based on its preliminary examination of the development under Article 103 of the 2001 Regulations.

23. The Council also indicated that it was prepared to consent to an order remitting the notice party's application to the Council on particular terms. Those terms were that:

> *"…such remittal to take effect from the point in time immediately before the [Council] commenced its Planning Application Assessment after it had received Further Information from the [notice party] on 14th December, 2018 and all subsequent valid submissions, observations and reports including submissions received on foot of the Public Notices of Significant Further Information."*

24. Finally, the Council was prepared to consent to an order for costs in favour of the applicant up to the date of the letter to be taxed (or now, adjudicated under the new costs regime) in default of agreement.

25. In order to understand the nature and extent of the concession offered by the Council, both in terms of the order of *certiorari* to which it was prepared to consent and in terms of the remittal which it was proposing, it may be helpful to outline here how the Council subsequently explained the rationale for its concession and the proposed remittal.

26. In terms of the order of *certiorari* proposed, the Council explained in written and oral submissions at the hearing that the proposed development is of a type identified in Part 2 of Schedule 5 to the 2001 Regulations. That schedule lists classes of development which fall within the scope of the EIA Directive and which may require an environmental impact assessment report (EIAR) to be prepared by the planning authority in the course of its consideration of an application for permission for a development falling within one of those classes. While the residential development the subject of the notice party's application is of a class specified in Part 2 of Schedule 5 of the 2001 Regulation, it does not equal or exceed the quantity or the limit specified in that part. Paragraph 10 in Part 2 of Schedule 5 of the 2001 Regulations refers to "*infrastructure projects*". Among those projects are developments consisting of the construction of more than 500 dwelling units (para. 10(b)(i)). The notice party's proposed development is for less than 500 dwelling units and is, therefore, sub-threshold development. The Council's position was that in

considering an application for permission for sub-threshold development, the planning authority is required to carry out a "*preliminary examination*" in respect of such development under the terms of s.172(1)(b) of the 2000 Act and Article 103 of the 2001 Regulations (as most recently amended by the European Union (Planning and Development) (Environment Impact Assessment) Regulations 2018) (the "2018 Regulations"). The Council stated that if it is concluded on the basis of such *"preliminary examination*" that there is "*no likelihood of significant effects on the environment*", the carrying out of an EIA is not required.

27. The Council maintained that, based on its "*preliminary examination*", it concluded that there was "*no real likelihood of significant effects on the environment*" arising from the proposed development and that the need for an EIA could, therefore, be excluded and also that a screening determination was not required. However, the Council has conceded that its decision contained an error on the face of the record in that the decision does not adequately record the reasons for its conclusion, reached on the basis of its preliminary examination, that an EIA or screening determination was not required in respect of the notice party's application. That was the only ground on which the Council was conceding that an order of *certiorari* should be made in the proceedings.

28. As regards the terms of the remittal to which the Council was consenting, correspondence was exchanged between the parties as to the precise terms of, and basis for, the proposed remittal and the point in time in the process to which the Council was seeking to have the application remitted. In a letter dated 21st June, 2019, the Council's solicitors expanded on the basis for the remittal sought in the earlier letter of 4th June, 2019. They contended that there was no statutory impediment to the court remitting the matter back to the Council and giving a direction that the time within which the Council had to make a decision under s.34 of the 2000 Act should expire at a particular point in time in respect of the remitted application. The Council's solicitors referred to ss. 34(8)(f)(v) and (vi) of the 2000 Act and to the circumstances in which provision for a "*deemed decision*" is disapplied under the legislation. The Council's solicitors referred to a previous judgment of the Court in *Clonres CLG v. An Bord Pleanála & Ors.* [2018] IEHC 473 ("Clonres"), which they contended had found that there was no statutory impediment to the court giving a direction that the time to make a decision under s.34(8)(b) of the 2000 Act should expire at a particular point in time in respect of the application remitted. They stated that they were seeking an order similar to that made in *Clonres* deeming that the time period set out in s. 34(8)(b) of the 2000 Act should, in respect of the application remitted to the Council, expire two weeks from the date of the perfection of the order to remit.

29. I understand the Council's position in respect of this two week period, to be as follows. The Council's request for further information was complied with when further information was provided by the notice party on 14th December, 2018. Thereafter, public notices of receipt of significant further information by the Council were published. After that there was a two week period for interested parties to make observations or submissions on the further information received (under Article 35(1)(a)(v) of the 2001 Regulations). The

final date for the making of those observations, in light of the Christmas period, was 7th January, 2019. The Council had a further period of two weeks from 7th January, 2019 within which to make its decision (in light of the four-week period provided for in s.34(8)(b)(ii) of the 2000 Act). The Council contended that the application should be remitted to the point in time in the process at which the Council had received all submissions or observations on foot of the public notices of the significant further information and that a remittal of the application to that point would allow the Council a two week period from the date of perfection of the order within which to make its decision. This, it said, would ensure that the planning application was remitted no further back in the process than was necessary taking account of the conceded deficiency in the decision.

30. The applicant did not accept the terms of the order of *certiorari* proposed by the Council or the proposed remittal. Her objections were set out in a letter from her solicitors dated 28th June, 2019. In summary, the applicant's position was that the order of *certiorari* proposed was too narrow and that the court did not have jurisdiction to remit the application to the Council to the point in time proposed, having regard to the various time limits contained in the 2000 Act. The applicant was also unhappy with other aspects of the terms of the remittal proposed. She expanded upon her objections in the course of the hearing.

31. In the absence of agreement between the parties on the form of order proposed and on the proposed remittal, Haughton J. directed that those issues be determined by me.

Relevant Statutory Provisions

32. In order properly to understand the basis upon which the Council and the notice party contended that an order of *certiorari* quashing the Council's decision on the conceded ground should be made as well as an order remitting the notice party's application to the Council at the particular stage in the process for which those parties contend, and in order to understand the basis for the applicant's objection to that course of action, it is necessary to outline briefly the statutory provisions applicable to the notice party's application to the Council.

33. As noted earlier, the development the subject of the notice party's application is situated within the Cherrywood SDZ. A planning scheme in respect of the Cherrywood SDZ was approved by the Board in 2014 under the provisions of s.169 of the 2000 Act.

34. The notice party's application to the Council for permission in respect of the development was made pursuant to s.34 of the 2000 Act. Section 170(1) of the 2000 Act provides that where an application is made to a planning authority under s.34 for development in a SDZ, s.34 (and any relevant regulations) apply, subject to the other provisions of s.170. Section 170(2) provides that subject to the provisions of Part X (dealing with EIA) or part XAB (dealing with AA) of the 2000 Act or both of those Parts as appropriate:

> "…a planning authority shall grant permission in respect of an application for development in a strategic development zone where it is satisfied that the

development, where carried out in accordance with the application or subject to any conditions which the planning authority may attach to a permission, would be consistent with any planning scheme in force for the land in question, and no permission shall be granted for any development which would not be consistent with such a planning scheme."

35. Section 170(3) provides that no appeal shall lie to the Board against a decision of a planning authority on an application for permission in respect of a development in a SDZ.

36. Section 34 of the 2000 Act applied to the notice party's application to the Council, subject to the provisions of s.170. Particularly relevant for the purposes of the notice party's application to the Council is s.34(8). Section 34(8)(b) sets out the period within which a planning authority is required to make its decision on an application for permission in circumstances where the planning authority has sought further information from the applicant for the permission. Where the further information given or evidence produced on foot of a notice served by the planning authority is considered by the authority to contain *"significant additional data*" which requires the publication of a further notice by the applicant for permission and gives notice accordingly to that applicant, the planning authority is required to make its decision on the application within four weeks beginning on the day on which notice of that publication is given by the applicant to the planning authority (s.34(8)(b)(ii)). That is what happened in the case of the notice party's application. The Council served a notice seeking further information from the notice party. Further information was provided by the notice party on 14th December, 2018. The Council considered that the further information contained "*significant additional data*" and required the notice party to publish further notices. The notices provided that if further observations were to be made on foot of the significant further information, such observations had to be made within two weeks after receipt of the relevant notices by the Council (Article 35(1)(a)(v) of the 2001 Regulations. Taking account of the Christmas holiday period in accordance with s.251 of the 2000 Act, any such observations or submissions had to be made on or before 7th January, 2019. That left a further two weeks (of the four-week period referred to in s.34(8)(b)(ii)) within which the Council had to make its decision on the notice party's application.

37. The next relevant paragraph of s.34(8) is s.34(8)(f). Section 34(8)(f) provides that where a planning authority has failed to make a decision in relation to an application within the period specified in (*inter alia*) s.34(8)(b) (which is referred to as the "*first period*") and becomes aware that it has failed to make a decision within that period, the authority "*shall proceed to make the decision notwithstanding that the first period has expired"*. Section 34(8)(f)(ii) provides that where a planning authority fails to make a decision within the "*first period*", it shall pay the "*appropriate sum*" to the applicant for the permission. The "*appropriate sum*" is defined in s.34(8)(f)(viii) as being a sum equal to the lesser amount of three times the prescribed fee paid by the applicant to the planning authority in respect of the application for permission or €10,000.

38. Section 34(8)(f)(iii) provides for what is referred to as a "*deemed decision*". A "*deemed decision*" arises where the planning authority fails to make a decision within a period of twelve weeks after the expiry of the "*first period*". In such a situation, a decision to grant permission will be regarded as having been given on the last day of that twelve week period. Section 34(8)(f)(iv) permits a person who has made submissions or observations in relation to an application to appeal the deemed decision.

39. Significantly, for the purpose of this application, s.34(8)(f)(v) provides that the provisions of sub-paragraphs (i) to (iv) (including provision for the payment by the planning authority of the "*appropriate sum*" and the "*deemed decision*" provision) shall not apply where there is a requirement under Part X or part XAB, the parts concerning EIA and AA, *"to carry out an environmental impact assessment, a determination whether environmental assessment is required, or an appropriate assessment, in respect of the development relating to which the authority has failed to make a decision*." In other words, there is no requirement to pay the "*appropriate sum*" under sub-paragraph (ii) and no provision for a "*deemed decision*" where the planning authority is required under Part X or Part XAB of the 2000 Act to carry out an EIA, a determination as to whether an EIA is required or an AA in respect of the relevant development. Provision as to what is to happen where the planning authority fails to make a decision in relation to such development within the "*first period"* is made in s.34(8)(f)(vi). It is unnecessary to outline that provision in full. Suffice to say, however, that notwithstanding such failure by the planning authority, s.34(8)(f)(vi)(I) provides that the authority "*shall proceed to make the decision notwithstanding that the first period has expired*". Section 34(8)(f)(vi)(II) separately requires the planning authority to pay the "*appropriate sum"* to the applicant for their permission. Provision is made for the planning authority to make a number of payments of the "*appropriate sum*" depending on the length of time, after the expiry of the "*first period*", it takes the planning authority to make its decision. However, the number of such payments is capped at five (s.34(8)(f)(vi)(V)). There is also provision for what must happen in terms of the publication of additional notices where the decision of the planning authority in relation to an application is to be made more than one year after the expiry of the "*first period*".

40. Much of the debate between the parties in terms of the remittal proposed by the Council centred on interpretation and application of these various sub-paragraphs of s.34(8)(f) of the 2000 Act.

41. The next relevant provision of the 2000 Act to which it is necessary to refer is s.172. Under s.172(1)(a), the planning authority (or the Board, as the case may be) is required to carry out an EIA in respect of an application for consent for a proposed development where the proposed development would be of a class specified in Parts 1 and 2 of Schedule 5 of the 2001 Regulations where the development would equal or exceed any relevant quantity, area or other limit specified in Part 1 or Part 2 of Schedule 5 or where no quantity, area or other limit is specified in that part in respect of the development concerned. The second situation in which an EIA must be carried out by the planning authority (or the Board, as the case may be) is under s.172(1)(b) where (i) the proposed

development would be of a class specified in Part 2 of Schedule 5 of the 2001 Regulations but does not equal or exceed, as the case may be, the relevant quantity, area or other limit specified in that part, and:

"(ii) it is concluded, determined or decided as the case may be, -

(I) by a planning authority, in exercise of the powers conferred on it by [2000] Act or the [2001 Regulations],…

that the proposed development is likely to have a significant effect on the environment."

In other words, where a development of a class specified in Part 2 of Schedule 5 of the 2001 Regulations is under the threshold specified in that Part (i.e. it is a sub-threshold development), where the planning authority decides that the proposed development is *"likely to have a significant effect on the environment*", the authority must carry out an EIA in respect of the application.

42. The last relevant statutory provision is Article 103 of the 2001 Regulations (as amended by the 2018 Regulations). Article 103(1)(a) provides: -

"Where a planning application for sub-threshold development is not accompanied by an EIAR, the planning authority should carry out a preliminary examination of, at the least, the nature, size or location of the development".

Article 103(1)(b) provides for what is to happen where the planning authority carries out the "*preliminary examination*" of "*at the least, the nature, size or location of the development"* which it is required to carry out under Article 103(1)(a). If the planning authority concludes, based on such "*preliminary examination*", that there is *"no real likelihood of significant effects on the environment*" arising from the proposed development, the planning authority is required to conclude that an EIA is not required. (Article 103(1)(b)(i)). Where the planning authority concludes, based on that "*preliminary examination",* that there is *"significant and realistic doubt*" in regard to the likelihood of significant effects on the environment arising from the proposed development, the planning authority must require the applicant for the permission to submit to the authority the information specified in Schedule 7A for the purposes of a screening determination unless it has already provided such information (Article 103(1)(b)(ii)). Finally, where the planning authority concludes, based on its *"preliminary examination*", that there is a "*real likelihood of significant effects on the environment*" arising from the proposed development, the authority is required to conclude that the development would be likely to have such effects and to require the applicant for the permission to submit an EIAR to the authority and to comply with the requirements of Article 105.

43. There was much debate between the parties as to the interpretation of Article 103 and as to the operation of that provision by the Council in the context of the notice party's application. The applicant also queried the application of Article 103 at all, in

circumstances where it was introduced into the 2001 Regulations by the 2018 Regulations which were made on 26th July, 2018 and, with some minor exceptions, came into operation on 1st September, 2018 (some months after the notice party made its application for permission in respect of the proposed development). However, it seems clear from Article 3(1) of the 2018 Regulations that the 2001 Regulations, as amended by the 2018 Regulations, apply to determinations made by a planning authority (or the Board) under s.172(1)(b) of the 2000 Act where the Authority "*initiated making such determination"* after 16th May, 2017 (Article 3(1)(a) of the 2018 Regulations). In the present case, the Council's decision (and any determination it may have made under s.172(1)(b) in the period between March, 2018 and January, 2019 inclusive), was made after the 16th May, 2017 date. Article 103 of the 2001 Regulations (as amended by the 2018 Regulations) did, therefore, apply to the Council's consideration of the notice party's application in circumstances where that application was made in March 2018 and was not accompanied by an EIAR.

Respective contentions of the parties

44. I now turn to consider the contentions advanced by the applicant in disputing the scope of the order of *certiorari* proposed by the Council and the remittal proposed by it and twice advanced by the Council and by the notice party on those issues in response .

45. The State Respondents were joined to the proceedings by reason of the declaration of unconstitutionality sought by the applicant in relation to Part X of the 2000 Act and, in particular, s.170 thereof. The State Respondents adopted a neutral position on the *certiorari* and remittal issues and did not advance any substantive submissions on those issues.

The applicant's submissions

46. The applicant opposed the order of *certiorari* put forward by the Council and the terms of the remittal proposed by it. In brief summary, the applicant did so on the following grounds. First, she contended that the proposed order and the findings conceded were too narrow and left unresolved many of the grounds of challenge advanced by her. Second, she contended that the court had no jurisdiction to remit the notice party's application on the terms proposed. Third, the applicant contended that, in any event, the nature of the proposed remittal was unclear.

47. With respect to the first ground of objection advanced by the applicant, namely, that the order of *certiorari* proposed by the Council on the basis of its concession was too narrow, it is fair to say that counsel for the applicant refined the applicant's position in relation to this ground of objection during the course of his oral submissions to the court. It was initially maintained on behalf of the applicant that the proposed order of *certiorari* on the basis of the concession made by the Council, that the decision failed adequately to record the reasons for the Council's conclusions based on its preliminary examination of the development under Article 103 of the 2001 Regulations (as amended) was far too narrow and failed to address the other grounds of challenge advanced by the applicant in respect of the decision. If an order were to be made on the basis proposed by the Council, no determination would have been made in respect of those other grounds of challenge. In

particular, the applicant submitted that there would have been no findings made in respect of the applicant's case concerning the general obligation on the Council to give reasons and the particular obligation upon it to give reasons in respect of its assessment of the position for the purposes of the EIA Directive and the Habitats Directive. Nor would there have been any determination by the court in relation to the other issues which the applicant had raised in her proceedings

48. In the course of his oral submissions, counsel for the applicant accepted that it would not be appropriate to request the court to require the respondents and the notice party to deliver opposition papers and, thereafter, to conduct a hearing in relation to the other grounds of challenge advanced by the applicant. While ultimately accepting that the court could make an order of *certiorari* on the basis of the narrow concession advanced by the Council, the applicant maintained that there was serious legal deficiencies in the Council's decision in terms of the absence of adequate reasons for the decision.

49. The second ground of objection advanced by the applicant was a more fundamental one. The applicant contended that the court does not have jurisdiction to remit the notice party's application to the Council to the stage in the process proposed by the Council. Initially, in its letter of 4th June, 2019, the Council proposed that the remittal take effect from the point in time immediately before the Council commenced its *"Planning Application Assessment*" after it had received further information from the notice party on 14th December, 2018 and all subsequent valid submissions, observations and reports including those received on foot of the further notices published in December, 2018 following receipt of the further information from the notice party. In its letter of 21st June, 2019, the Council proposed that an additional order should be made, in similar terms to the order made in Clonres, deeming that the time period set out in s. 34(8)(b) of the 2000 Act shall, in respect of the remitted application, expire two weeks from the date of the perfection of the order to remit. The applicant maintained that the court has no jurisdiction to make an order in those terms, in circumstances where the time periods for the making of the decision by the Council have expired. In particular, the applicant pointed out that the "*first period*" for the making of the decision by the Council referred to in s. 34(8)(b), expired four weeks after the publication by the notice party of the further notices required to be published following the provision of the further significant information to the Council. The applicant also noted that the further period of twelve weeks after the expiry of the "*first period"* referred to in s. 34(8)(f)(iii) following which a "*deemed decision*" was regarded as having been given, had also long since expired. The applicant submitted that those periods could not now be re-opened or reset and that the court had no power, therefore, to remit the application back, in effect, to 7th January, 2019 (being two weeks before the expiration of the "*first period*" referred to in s. 34(8)(f)).

50. The applicant sought to distinguish the decision in *Clonres* on two bases. The first was that the court was dealing with different statutory provisions in *Clonres* to those at issue in the present case and that it was not at all clear in this case that a "*deemed decision"* had not arisen in accordance with the statutory provisions applicable to the notice party's

application. The second point of distinction suggested was that the court in *Clonres* had not fully explored the jurisdictional issues which arose in respect of the proposed remittal in that case.

51. In essence, the applicant maintained that whether or not a "*deemed decision*" arose by virtue of the expiry of the relevant twelve-week period referred to in s. 34(8)(f)(iii) or whether the Council became liable to pay the relevant "*appropriate sum*" to the notice party in accordance with s. 34(8)(f)(ii), were questions which arose on the basis of the application of the relevant provisions of the statute and the court did not have jurisdiction effectively to "*reset the clock*". Even if the court were to remit the notice party's application back to the Council at the particular point in time proposed by the Council (notwithstanding the applicant's objections), the applicant contended that the consequences provided for in the various sub-paragraphs of s. 34(8)(f) would nonetheless apply, in that the Council would be obliged to pay the relevant "*appropriate sum*" to the notice party (under s. 34(8)(f)(ii)) and/or a "*deemed decision*" would arise in the circumstances provided for in s. 34(8)(f)(iii).

52. The applicant did not accept that the provisions of s. 34(8)(f)(v) applied to the notice party's application in circumstances where, she contended, the Council did not carry out an EIA, a determination of whether an EIA ought to be required or an AA in respect of the development proposed by the notice party. The applicant submitted, therefore, that the Council and the notice party were not entitled to rely on the provisions of that subparagraph of s. 34(8)(f) of the 2000 Act. Even if they were, the provisions of s. 34(8)(f)(vi) would still apply under which, while no "*deemed decision*" would arise and while the Council would still be required to make the decision notwithstanding that the "*first period*" had expired, the Council would have a liability to pay the "*appropriate sum"* in the circumstances provided for in that paragraph. In those circumstances, it was submitted that the court did not have jurisdiction to make the remittal sought and that any such remittal would be procedurally unworkable and would inevitably result in further proceedings.

53. The third ground of objection advanced by the applicant was that the nature of the proposed remittal was unclear having regard to the allegedly confused and unclear manner in which the Council made its decision on the notice party's application. The applicant was very critical of the process adopted by the Council and of the record of the Council's decision. The applicant referred to the "*Record of Executive Business Chief Executive's Orders"* as the "*planner's report*" (which the Council explained was the decision itself) as being "*somewhat rambling in nature*" and "*appears to record a rolling assessment of the application*" and records the making of the decision by the Council "*in phases*" (para. 15 of the applicant's written submissions). Insofar as the Council was seeking to remit the notice party's application to a point in time two weeks prior to the expiry of the "*first period*" referred to in s. 34(8)(b), the applicant maintained that the Council had already made up its mind before that point and had done so by the time it requested the provision of further information on 2nd May, 2018. The applicant noted that (as appears from the record of the Council's decision itself) as of that date the

Council had described the proposed development as being "*welcomed*" (p. 44 of 145 of the decision). The applicant submitted that whatever preliminary examinations were being carried out for the purposes of EIA and AA had occurred by that stage. In those circumstances, it was submitted that a remittal back to the point in time proposed by the Council would amount in effect no more than a rewording of the Council's decision.

54. It was further submitted that it was unclear on the basis of the remittal proposed whether the entire decision would be revisited by the Council or whether the Council would merely revisit the particular issue, the subject of the concession made by it, namely, the failure adequately to record the reasons for its conclusion based on a "*preliminary examination*" of the development under Article 103 of 2001 Regulations (as amended). The applicant maintained that it was unclear as to whether it would simply be a case of the Council rewording the reasoning of its decision which would be unacceptable in respect of a decision already made.

55. In that regard, the applicant relied upon the judgment of Simons J. in *Damer v Kildare Co. Council* [2019] IEHC 505 ("*Damer*"). In that case, having held that the decision of the Board challenged in that case, even when read in conjunction with the inspector's report, failed to meet the required standard of reasoning outlined by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453. The court made an order setting aside the decision of the Board and remitted the matter to the Board for reconsideration in light of the findings of the court. The applicant relied on the fact that Simons J. stated that the objective of the remittal in that case was not so that a "*proper statement of the main reasons and considerations be produced on an ex-post facto basis*" but rather the appeal was to be reconsidered in its entirety (para. 44). The applicant submitted that a full reconsideration of the notice party's application would not be possible if the application was remitted to the point in time proposed by the Council.

56. The applicant also sought to rely on the recent judgment of Simons J. in *Southwood Park Residence Association v. An Bord Pleanála & Ors.* [2019] IEHC 504 ("*Southwood*). In that case, the court quashed a decision of the Board to grant permission on the grounds that the applicant for the permission failed to comply with the requirements of the relevant regulations applicable to the application. The decision was quashed *simpliciter*. No remittal order was made. The applicant relied on aspects of that judgment in support of the application that the court should quash the Council's decision and effectively require the notice party to start the process all over again.

57. It is fair to say that the applicant was extremely critical of the Council's decision on the notice party's application and of the decision making process adopted by the Council in respect of that application. The applicant was particularly critical of the reliance by the Council (and by the notice party) on the "*preliminary examination*" carried out by the Council for the purposes of Article 103 of the 2001 Regulations (as amended). She was also extremely critical of the stated intention of the Council to complete the required examination and consideration of the application within the two week period from the point of remittal proposed by the Council. While counsel maintained the position that the

applicant should not be put in a position whereby she would be forced to bring further proceedings in respect of any decision taken by the Council following its remittal, it is clear from the applicant's submissions that further proceedings are at the very least a possibility, in the event that the Council were to proceed to grant permission for the notice party's development following a remittal of the application.

The Council's Submissions

58. In contending for the order of *certiorari* on the terms conceded and for the remittal on the terms proposed, the Council relied on the jurisdiction conferred by O.84, r, 27(4) RSC (as amended) and the principles discussed and applied in my judgment in *Clonres* and in the various cases to which I referred in that judgment.

59. As regards the terms of the order of *certiorari* proposed by the Council, it submitted that an order for *certiorari* should be made on the basis of the concession made by the Council and that it would not be appropriate for the court to proceed to embark upon a hearing on the other grounds of challenge advanced by the applicant. The Council submitted that it was appropriate for the court to exercise judicial restraint (and relied in that regard on the approach adopted by Kelly J. in *Usk & District Residence Association Limited v. An Bord Pleanála* [2007] IEHC 86 ("*Usk*"), which I adopted in *Clonres*).

60. Insofar as the applicant contended that the Council was not entitled to carry out a "*preliminary examination*" of the development in order to consider the likelihood or otherwise of significant effects on the environment arising from the proposed development, it was submitted on behalf of the Council that the Council was empowered to carry out such a "*preliminary examination*" by Article 103(1) of the 2001 Regulations (as amended). The Council further submitted that Article 103 of those regulations applied to the notice party's proposed development in circumstances where the notice party's application was made after the 16th May, 2017, the date referred to in Article 3(1)(a) of the 2018 Regulations and the Council's decision was made on 18th January, 2019. As I stated earlier, I agree with the Council that Article 103(1) did apply to the notice party's application.

61. The Council relied upon the provisions of O.84, r, 27(4) RSC and the principles set out *Clonres* (and in the earlier judgments referred to in that case) in support of its contention that the court should make the order of *certiorari* on the terms proposed by the Council and should remit the notice party's application on the terms proposed. Applying the principles set out in *Clonres*, the Council submitted that good reason would have to be given in order to require that the entire process be started again which would be necessary if the decision were not remitted to the Council and were simply quashed. The Council contended that the principles in *Clonres* are directly applicable to the present case. The Council pointed to the statutory provisions at issue in *Clonres* and compared them to those at issue in the present case. Specific reference was made to s.9(13) (a) of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the "2016" Act) which applied to the application at issue in *Clonres*. Under that provision, where the Board failed to make a decision under the section within the specified period, it was nonetheless required to proceed to make the decision notwithstanding that the period had

expired. The Council referred to the identical statutory imperative in s. 34(8)(f)(vi) of the 2000 Act. The Council contended that that provision was applicable by reason of the provisions of s.34(8)(f)(v) and that it did determine whether an EIA was required on the basis of a "*preliminary examination*" as required under Article 103 of the 2001 Regulations (as amended).

62. As regards the contention that the court should not remit the application on the terms proposed by the Council as further proceedings would be virtually certain, the Council noted that a similar submission had been made in *Clonres* and not accepted in the judgment in that case.

63. The Council submitted, therefore, that not only was there a jurisdiction to remit the application on the terms proposed but also the court should, in the exercise of its discretion, remit the application on those terms. It submitted that no good reason had been offered by the applicant to the contrary. The Council sought to distinguish the judgment of Simons J. in *Damer* on the basis that that judgment was delivered following a full review of the Board's decision and not on the basis of any concession made by the Board whereas the Council had conceded that an order of *certiorari* should be made on a limited basis. Therefore, the relief should be tailored to take account of that conceded ground.

64. As regards the proposal that the notice party's application be remitted to the particular point in time in the process proposed by it, the Council contended that the court had made a similar order and direction in *Clonres* on the basis of almost identical statutory provisions. Under the statutory provision at issue in *Clonres* (s.9(13)(a) of the 2016 Act), the Board was required to proceed to make the decision notwithstanding that the relevant period had expired, but was subject to an obligation to pay the relevant "*appropriate sum*" to the applicant for that permission (under s.9(13)(b) of that Act). The Council contended that almost identical provisions apply to the Council's consideration of the notice party's application in the present case. The Council relied on s.34(8)(f)(vi) under which, notwithstanding the fact that the decision in relation to a development was not made within the required period, the Council was nonetheless required to proceed to make the decision and was also subject to an obligation to pay the relevant "*appropriate sum*" to the applicant for that permission. While maintaining that the failure to make the decision within the relevant period (i.e. the "*first period*") had no consequence for the validity for the planning application and did not give rise to a default permission or "*deemed decision*" (as was also the case in *Clonres*), the Council submitted that a decision made within the relevant statutory period, even if subsequently found to be invalid, is nonetheless a decision (relying on *State (Abenglen Properties Limited) v. An Bord Pleanála* [1984] IR 381 ("*Abenglen"); Swords Cloghran Properties Limited v. Fingal County Council* [2006] IEHC 433("*Swords Cloghran"), and McCallig v. An Bord Pleanála & Ors*. [2013] IEHC 6 ("*McCallig*").

Notice party's submissions

65. The notice party supported the position adopted by the Council. It submitted that the court should proceed to make the orders of *certiorari* on the terms put forward by the

Council and that the court had jurisdiction to remit the application on the terms proposed by the Council and ought to exercise its discretion to do so.

66. The notice party agreed with the Council that the court had jurisdiction under O. 84, r. 27(4) RSC to remit the matter and that the principles governing the exercise by the court of its discretion to remit were they are summarised in *Clonres*. The notice party contended that those were the principles applicable to the exercise by the court of its discretion to remit the notice party's application to the Council on the terms proposed.

67. In response to the applicant's contention that the court does not have jurisdiction to remit the application on the basis that the time limits for making the decision on the application had expired and that the court had no power to "*turn back time*" or to "*reset the clock*", the notice party submitted that that ground of objection was based on a fundamental misreading of the applicable statutory provisions. The notice party submitted that the Council is empowered by virtue of those provisions to make a decision at any time after the expiry of the "*first period*" (in s. 34(8)(b)), subject only to a requirement that it pay a financial penalty to the applicant for the permission for the delay in making the decision. The notice party relied on the provisions of s. 34(8)(b) and ss. 34(8)(f)(v) and (vi). It agreed with the Council that by virtue of s. 38(4)(f)(v) the provisions of ss. 34(8)(f)(i) to (iv) did not apply to the notice party's application and that no "*deemed decision*" could arise in respect of that application having regard to the provisions of s. 34(8)(f)(vi). Under that provision, the notice party submitted, the planning authority is under an ongoing obligation to make a decision, and has jurisdiction to do so indefinitely, subject only to an obligation to pay the relevant "*appropriate sum*" to the planning authority in respect of every twelve-week period that expires (capped at a maximum of five payments of the "*appropriate sum*"). It pointed to the fact that provision is made in that sub-paragraph for cases where a decision on an application is not made for more than one year after the expiry of the "*first period*", where certain other requirements must be satisfied that no provision was made for a "*deemed decision"* even in those circumstances.

68. The notice party agreed that the provisions of ss. 34(8)(f)(v) and (vi) applied in circumstances where the Council did carry out a determination as to whether an EIA was required and that such determination was made on foot of the "*preliminary examination"* carried out by the Council under Article 103(1) of the 2001 Regulations (as amended). The notice party submitted, therefore, that the statutory provisions applicable to the notice party's application did not impose a "*hard and fast statutory deadline".* It submitted that the applicable statutory provisions were directly comparable with those under consideration in *Clonres*. Therefore, it is submitted that the approach taken by the court in *Clonres* was equally applicable to the facts of the present case. The notice party did, like the Council, submit that even if there were a "*hard and fast statutory deadline*" after which the Council could not make a decision on the application or where a "*deemed decision*" arose, it did not accept that the application could not be remitted to the Council since the Council had made its original decision (even if subsequently quashed) before the statutory deadline expired. It too relied on *Abenglen*. The notice party contended,

however, that this issue did not arise as the jurisdiction of the Council to determine the applicant's application was unaffected by the expiry of the "*first period*" or subsequent periods referred to in s. 34(8)(f)(vi). It submitted therefore that the court had precisely the same jurisdiction to make the remittal order and directions sought as were made in *Clonres*.

69. In considering whether the court should exercise its discretion to make the remittal order on the terms proposed, the notice party again relied on the judgment in *Clonres*. It drew attention to the process already undertaken in respect of the applicant's application in which further information was requested following the submission of its application and significant further information was provided giving rise to a further round of public consultation. If the application were not remitted, and the decision simply quashed, without more, then the entire procedure would have to be recommenced from the start. The notice party contended that that would be entirely inappropriate in circumstances where all of the grounds of challenge advanced by the applicant of the decision centred on the reasons given by the Council for its decision and the interpretation given by the Council to s. 170 of the 2000 Act in reaching its decision on the notice party's application.

70. The notice party did not accept that the nature of the remittal proposed is unclear or that the point in time to which it was being proposed that the application should be remitted was too short to allow anything other than a mere rewording of the decision to take place. The notice party contended that if the decision is quashed on the conceded basis, and if remitted on the terms proposed, the Council will not merely be revisiting the EIA aspect of the application or rewording its decision. The decision will have been quashed. The Council will be required to make a fresh decision on the application. The Council could reach a different conclusion on the application in its decision, if remitted. Alternatively, the Council could reach the same decision but could correct the conceded deficiency in its original decision. I observe here that the Council accepted that that is so.

71. The notice party also sought to distinguish the judgment of Damer from the present case. In Damer, the applicant succeeded in her challenge to the Board's decision following a full hearing. It was understandable in the circumstances, therefore, that the court Damer directed the Board to reconsider the application in its entirety and suggested that the Board might wish to arrange to have a further inspector's report prepared. In the present case the notice party contended that, the terms of the remittal should take account of the basis on which it was conceded by the Board that the order should be quashed and that the terms proposed do just that.

72. The notice party also sought to distinguish the judgment in Southwood from the present case. In that case, the court had apparently indicated that it might be prepared to consider remitting the application to a particular point in the process but the notice party developer seemingly did not want that to be done. The notice party submitted that Southwood is not authority for the proposition that it is not open to the court to make a remittal order on terms such as those in *Clonres*.

Assessment of the issues

A. Order of *certiorari*

73. The first issue to be addressed is whether an order of *certiorari* should be made in respect of the Council's decision on the terms conceded by the Council. It will be recalled that in its letter of 4th June, 2019 the Council indicated that it was prepared to consent to an order of *certiorari* quashing the decision on the ground that the decision failed adequately to record the reasons for the Council's conclusions based on its preliminary examination of the development under Article 103 of the 2001 Regulations (as amended).

74. While the applicant initially adopted the position that the terms of the proposed order of *certiorari* were too narrow and did not properly take account of the other grounds of challenge advanced by her in the proceedings, the applicant adopted the reasonable and realistic position during the course of the hearing that she would not press for the delivery of opposition papers and for a hearing to be conducted in relation to those other grounds of challenge and for the court to deliver judgment on those grounds.

75. In my view, the appropriate approach to adopt is that outlined by Kelly J. in *Usk* where he made an order of *certiorari* on the particular ground conceded by the Board in that case. That was also the approach which I adopted in *Clonres*. In *Usk*, in a passage which I adopted and applied in *Clonres*, Kelly J. stated:

> *"Whilst the applicant raises other questions which might arguably provide additional grounds for granting certiorari, it is not in anybody's interest that the public time of the court or the expensive time of the litigants and their advisers be expended on such an exercise. Judicial restraint dictates that the court should confine itself to facts and findings necessary to support the order of certiorari. It should not go beyond them*." (per Kelly J. at p. 9).

76. I agreed with those observations in *Clonres*. I reiterate my agreement in this judgment. I am satisfied that while the applicant in the present case has advanced grounds of challenge which might arguably provide additional grounds for an order of *certiorari* in respect of the Council's decision, it is not in the interests of the applicant or of the notice party or of the Council that the resources of the court or of the parties themselves or others should be expended on hearing and determining those other grounds of challenge. This is a case in which, in my view, it is appropriate to exercise judicial restraint. Court time is valuable and precious and should not be taken up in the hearing of issues which it is unnecessary to determine in light of a concession made by one or more of the parties to proceedings.

77. In those circumstances, I am satisfied that it is sufficient to note the Council's concession that its decision on the notice party's application failed adequately to record the reasons for the Council's conclusions based on its preliminary examination of the development under Article 103 of the 2001 Regulations (as amended) that there is no real likelihood of significant effects on the environment arising from the proposed development and that the need for an EIA could, therefore, be excluded at the preliminary examination stage and that a screening determination was not required. On the basis of that concession made by the Council, I make a finding to that effect. Having made that finding, I will,

therefore, make an order of *certiorari* quashing the Council's decision on the terms set out at para. (1) of the Council's letter to the applicant's solicitors dated 4th June, 2019.

78. I do, however, wish to make clear that that is the only basis on which I am making the order of *certiorari*. I have not adjudicated upon or determined any of the other grounds of challenge advanced by the applicant in the proceedings. Since I have not adjudicated upon or determined any of those issues, no question of *res judicata* or issue of estoppel arises by virtue of the order of *certiorari* which I have decided to make. As I made clear in my judgment in *Clonres*, if the applicant decides to commence fresh proceedings arising out of any decision which the Council may proceed to make in light of the order of *certiorari* (and the remittal order which I propose to make), the applicant will be free to advance all or any of the grounds which she has advanced in these proceedings which the High Court (Meenan J.) has already decided are "*substantial grounds*" when granting the applicant leave to bring the proceedings on 25th March, 2019. As I noted in *Clonres*, in the event that the applicant is dissatisfied with the decision which the Council will now have to make on the notice party's application and wishes to bring further judicial review proceedings in respect of that decision, the applicant will have to establish that she has "*substantial grounds*" on any application for leave to bring those further proceedings. For present purposes, it is sufficient to record that the order of *certiorari* which I have decided to make on the terms conceded by the Council does not preclude the applicant from seeking to bring any such further proceedings and to advance in those proceedings all or any of the grounds advanced by her in these proceedings together with such other grounds as may be available to her.

B. Remittal

79. The Council's proposal that the notice party's application be remitted to it to a particular stage or point of time in its assessment of the application, has given rise to the greatest level of controversy between the parties. The applicant contests not only the jurisdiction of the court to remit but also the appropriateness of the court making a remittal order in the particular circumstances of this case. I have set out above the essential arguments advanced by the applicant and by the other parties to the proceedings on this issue.

80. I must first be satisfied that the court has jurisdiction to remit the notice party's application to the Council. If the court does not have that jurisdiction, then the only order which can be made is an order of *certiorari* quashing the decision on the basis of the concession made by the Council. However, I am quite satisfied that the court does have jurisdiction to remit an application which is the subject of a decision which has been quashed to the decision maker. The court is given an express power to remit under O. 84, r. 27(4) RSC which provides as follows:

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

81. I am satisfied, therefore, that the court has express power to remit the notice party's application to the Council and to give directions in relation to such remittal. The court may well also have an inherent jurisdiction to remit a matter to remit the application to the Council although it is unnecessary for me to express a concluded view on that question in this case.

82. There are a number of judgments which consider the approach which a court should adopt in deciding whether to exercise that power and to remit a matter to a decision maker and, if so, the terms upon which such a remittal should be made. The leading judgments on the issue are those of Kelly J. in *Usk*, Clarke J. in *Christian v. Dublin City Council* [2012] IEHC 309 ("*Christian*") and Peart J. in *O'Grianna v. An Bord Pleanála* [2015] IEHC 248 ("*O'Grianna*"). I attempted to draw together the principles to be derived from those judgments in *Clonres*.

83. I summarised those principles at para. 44 of my judgment in *Clonres* 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 (*Usk*, p. 12). The court may also have an inherent jurisdiction to remit a decision although it is not necessary to express a concluded view on the existence of such an inherent jurisdiction (*Usk*, p. 13). Order 84, rule 26(4) RSC states:-

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

(2) The court has a wide discretion to remit. That discretion ' *must be exercised both judicially and judiciously with the overall objective of achieving a just result' (Usk,* pp. 13 and 15). The court should decide whether or not to remit a decision to a decision-maker in the event of an order of *certiorari* being made ' *on the basis of fairness and justice' (O'Grianna,* para. 10).

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

(4) Where a particular process has been conducted in a regular and lawful way up to a certain point in time, '*the court should give consideration as to whether there is any good reason to start the process again', ' active consideration should be given to the possibility of remitting the matter back to the decision-maker or 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' (Christian* para. 4.8). Further, *' the court should endeavour to avoid an unnecessary reproduction of a legitimate part of the process' (Christian* para. 4.12).

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

(6) In considering whether to remit an application to the Board, the court should treat the Board as a ' *disinterested party'* which has ' *no stake in the commercial venture being pursued by [the developer]' (O'Grianna* para. 9). Further, where the Board, as the statutory decision-maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it for a fresh decision, the court ' *should not lightly reject such an application to remit in favour of simply quashing the decision simpliciter with the result that the application goes back to square one' (O'Griannapara.9)*. That would have *' the potential to be wasteful in terms of delay and cost'* and the court ought not to adopt a course which is ' *unnecessarily onerous upon the developer' (O'Grianna* para. 9).

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

(8) If the applicants are not satisfied with the further decision taken by the Board following remittal of the application to it, the applicants will be entitled again to seek leave to challenge the decision (*O'Grianna* para. 10).

(9) Where the court remits or refers a matter back to the decision-maker, such as the Board, the court has an inherent jurisdiction to give directions as to the process to be followed following such remittal (*Christian* para. 4.17). The court should in giving such directions, ' *attempt to replicate, insofar as it may be practicable, the legal requirements that would apply, whether under statute, rules or the like, to the making of decisions of that type'* while recognising that it may not always be possible to ensure ' *exact compliance with the relevant regime' (* Christian para. 4.17).

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

84. The Council and the notice party urged me to adopt and apply those principles in remitting the notice party's application to the Council to the point in time in the process proposed by the Council. The applicant did not strongly dispute that those principles applied although it did seek to distinguish the facts of this case from *Clonres*. In particular, the applicant argued that different statutory provisions apply to this case as applied in *Clonres* and that the judgment in *Clonres* did not address that the submission made by the applicant here, that the court could not remit the application in circumstances where the effect of such remittal would be to "*reset the clock"* in terms of the relevant statutory periods having regard to the consequences of a failure to make a decision on the notice party's application within the statutory periods at issue.

85. I am satisfied that the principles derived from the earlier judgments which I identified and summarised in *Clonres* apply to the remittal proposed by the Council in the present case. Applying those principles and the considerations underlying them, it would, in my view, be an appropriate exercise of my discretion to remit the notice party's application to the Council. I have reached that conclusion in light of the overall objective of achieving a "*just result*" which is the ultimate touchstone for the exercise by the court of its discretion to remit.

86. In my view, it is clearly appropriate to take into account the expense and inconvenience which would be caused by making an order of *certiorari* without more and requiring the notice party to re-apply for permission for its development. It would in my view give rise to "*inevitable and disproportionate delay*" (per Kelly J. in *Usk* at pp. 16-17) in having the matter dealt with were the notice party to be sent back to the start of the process and to be required to re-apply for permission in respect of its development. This is particularly so in circumstances where the proposed development is within a SDZ where a particular statutory procedure applies and where it is clearly intended that such applications will be dealt with expeditiously and without significant delay. That is demonstrated by the fact that s. 170(3) of the 2000 Act removes the right of appeal from the decision of the planning authority to the Board in respect of a decision of the authority on an application for permission in respect of a development in a SDZ.

87. The notice party's application has already been the subject of two rounds of public consultation. The first took place following the initial making of the application in March, 2018 and again following the publication of the notices of significant further information in December, 2018. Twenty-three submissions or observations were received following the initial application and eight submissions or observations were received on foot of the

publication of the notice of significant further information. In addition, reports were received from various statutory bodies and from sections or departments of the Council itself. Bearing in mind the nature of the conceded defect in the Board's decision, it would in my view be disproportionate, wasteful in terms of delay and cost and unnecessarily onerous for the notice party were I simply to make an order of *certiorari* without remitting the application back to the Council to be dealt with effect from a particular point in time in the process.

88. I am required, in accordance with the principles derived from the earlier judgments to which I have referred, to give careful consideration as to whether there is "*good reason*" to start the process again. I am also required actively to consider whether the application should be remitted back to the Council so that it may continue the process from a particular point in time. I also bear in mind that the 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*" (per Clarke J. in *Christian* at para. 4.8) and that the court should "*endeavour to avoid an unnecessary reproduction of a legitimate part of the process*" (per Clarke J. in *Christian* at para. 4.12). I must also attempt "*in as clinical a way as is possible to undo the consequences of any wrongful or invalid act but to go no further*" (per Clarke J. in *Christian* at para. 4.6).

89. I acknowledge that in the present case I have not proceeded to hear the applicant's application in full and have not adjudicated upon all of the grounds of challenge advanced by the applicant but have decided, in the exercise of the required judicial restraint, to make an order of *certiorari* based on the defect in the decision conceded by the Council. Notwithstanding that, it seems to me that I should attempt, as far as is possible, to tailor the terms of the remittal such that the Council can proceed to reconsider the notice party's application from the point in time at which the conceded defect arose or crept in. In trying to identify what that point was, it is necessary to bear in mind that the conceded defect is in the recording by the Council of the reasons for its conclusions based on its preliminary examination of the development under Article 103 of the 2001 Regulations (as amended).

90. Having decided that it would be appropriate in the exercise of my discretion to remit the notice party's application back to the Council so that it may proceed to make a decision on the application without the conceded defect, the challenge for the court is to attempt to identify the point in time in the process to which the application should be remitted. That point in time should be as close as possible to the point at which the infirmity in the Council's decision started to creep into the process (based on the conceded defect). I appreciate that it is difficult to pinpoint that point in time with absolute precision.

91. The Council initially proposed simply that the application be referred back to the point in time "*immediately before the* [Council] *commenced its Planning Application Assessment after it had received further information from the applicant for the permission on 14th December, 2018 and all subsequent valid submissions, observations and reports including*

submissions received on foot of the public notices of significant further information" (para. (2) of the Council's letter to the applicant's solicitor of 4th June, 2019). The Council attempted to refine the point of the remittal in its subsequent letter to the applicant's solicitors of 21st June, 2019 by proposing that an order similar to that made in *Clonres* would be made deeming that the time period set out in s. 34(8)(b) of the 2000 Act would, in respect of the remitted application, expire two weeks from the date of perfection of the order to remit. In effect, that would bring the application back to the point it was at on or about 7th January, 2019. At that point, the Council had received the submissions and observations in response to the notices of significant further information and had received some additional reports from the statutory bodies and some of the Council's internal departments and sections. Some of those reports were received on 14th January and 16th January, 2019. The notice party indicated that it had no reason to second guess the view of the Council that such an order or direction would provide the Council with sufficient time to make a decision on the remitted application in accordance with law although it accepted that this was ultimately a matter for the court and that the court might consider a different period appropriate.

92. Before finally deciding on the terms of the remittal and the point of time to which the notice party's application for permission for the development should be remitted to the Council, I should address the applicant's contention that the Court is precluded from remitting the notice party's application to the Council at the point and time for which the Council contends.

93. I have summarised earlier the arguments advanced by the applicant on this point. There is a significant dispute between the applicant, on the one hand, and the Council and the notice party, on the other, as to which of the particular subparagraphs of s. 34(8)(f) of the 2000 Act applied to the Council's consideration of the notice party's application and which of those subparagraphs will apply in the event that the application is remitted to the Council on the terms proposed. The applicant's position is that the provisions of subparas. (i) to (iv) of s. 34(8)(f) apply and impose an obligation on the planning authority to pay the "*appropriate sum*" to the applicant for the permission in the event that the planning authority fails to make a decision within the "*first period"* and make provision for a "*deemed decision*" to arise in the event that the decision is not made within 12 weeks after the expiry of the "*first period".* The Council and the notice party contend that those provisions do not apply having regard to the provisions of subpara. (v) of s. 34(8)(f). Their contention is that the applicable subparagraph of s. 34(8)(f) is subpara. (vi). They maintain that subparas. (i) to (iv) did not apply to the notice party's application in circumstances where there was a requirement to make a determination as to whether an EIA was required in respect of the development and that such a determination was made when the Council carried out a "*preliminary examination*" of the development for the purposes of Article 103 of the 2001 Regulations (as amended). I have already concluded that Article 103 applied to the notice party's application and to the Council's consideration of that application, having regard to the provisions of Article 3 of the 2001 Regulations (as amended). I accept the submissions by the Council and by the notice party that in purporting to carry a "*preliminary examination*" of the

development for the purposes of Article 103, the Council was endeavouring to comply with the requirement to determine whether an EIA was required for the purposes of s. 34(8)(f)(v) of the 2000 Act. I express no view whatsoever on the manner in which the Council went about that exercise save to record the Council's concession, and my findings on the basis of that concession, that it failed adequately to record the reasons for its conclusions as part of the exercise. However, for the purpose of determining which of the relevant subparagraphs of s. 34(8)(f) applied to the Council's consideration of the notice party's application is concerned, I am satisfied that the Council and the notice party are correct in their contention that subparas. (i) to (iv) did not apply and subpara. (vi) did apply.

94. The consequence of this is that no "*deemed decision*" arose under s. 34(8)(f)(iii) when the Council failed to make a decision within a period of 12 weeks after the expiry of "*first period*". Nor did an obligation to pay the "*appropriate sum*" to the notice party arise under s. 34(8)(f)(ii).

95. The applicable subparagraph of 34(8)(f) was subparagraph (vi) under which the planning authority was required to proceed to make the decision not withstanding that the "*first period*" within which the decision was required to be made may have expired and under which the authority was under an obligation to pay the "*appropriate sum*" to the applicant for the permission in the event that it failed to make a decision within the "*first period"* (subject to a cap on the number of such payments with which might have to be made).

96. The consequence of all of this is, therefore, that the applicable provisions of s. 34(8)(f) are very similar to the statutory provisions which were at issue *Clonres*, namely, ss. 9(13)(a) and (b) of the 2016 Act. No question of a default permission or "*deemed decision*" arose in *Clonres*. Nor does such arise under the statutory provisions applicable to the Council's consideration of the notice party's application in the present case. Section 9(9)(a) of the 2016 Act which specified the time period within which the Board was required to make its decision on an application for permission in respect of a strategic housing development, which was at issue in *Clonres*, is similar in structure and intent to s. 34(8)(b) of the 2000 Act which sets out the "*first period*" within which the Council was required to make its decision on the notice party's application. In those circumstances, I am satisfied that I can adopt a similar approach to that which I took in *Clonres* in terms of a remittal of the application back to the Council to a particular point in time in the process so that the Council can proceed to make its decision following the remittal.

97. In my view, the particular point in time proposed by the Council (and agreed to by the notice party) represents a fair and reasonable balance between the respective interests of the applicant and those of the notice party (the Council being a *"disinterested party*" in the process and has "*no stake in the commercial venture being pursued by*" the notice party to adopt the words used by Peart J. in *O'Grianna* at para. 7 of his judgment in that case). In doing so, I am making no finding as to whether or not the Council is under an obligation to pay the "*appropriate sum*" to the notice party under s. 34(8)(f)(vi) or, if it is, the number of such payments it might have to make. I adopted the same approach in

Clonres and made no finding on whether such an obligation arose in that case. What I am doing is remitting the application back to the Council to a point in time in the process which roughly equates to the point in the time the Council commenced its assessment of the submissions, observations and reports which were provided following the notices published in December, 2018 and which would leave a period of two weeks from the perfection of the order for the Council to make a decision on the notice party's application. Whether or not the Council is under any of the obligations referred to in s. 34(8)(f)(vi) of the 2000 Act is not a matter which I have definitively to decide on this application.

98. I am satisfied, therefore, that the Court has jurisdiction to remit the notice party's application to the Council and to direct that the application be remitted to a particular stage in the process to enable the Council to proceed to make its decision on the notice party's application. I am also satisfied that the Court has the power to do as was done in *Clonres*, namely, to direct that the point of time to which the application should be remitted is the point of time at which the Council commenced its planning application assessment after it had received further submissions and observations from interested parties on foot of the notices of significant further information and after it had received further submissions, observations and reports and to a direct time period set out in s. 34(8)(b) of the 2000 Act, in respect of the application remitted to the Council, should be deemed to expire two weeks from the date of the perfection of the order. That is very similar to the order and direction made in the *Clonres* case.

99. I wish to make a number of final observations before concluding this judgment. The first is that even if I am wrong in taking the view that the subparagraph of s. 34(8)(f) of the 2000 Act which applied to the Council's consideration of the notice party's application (and which will apply when the application is remitted to the Council) was subpara. (vi) and if, therefore, the provisions of subparas. (ii) and (iii) of s. 34 (8)(f) applied, nonetheless it is likely that a court would take the view, similar to that expressed by Walsh J. in *Abenglen*, that a decision, even if subsequently quashed by a court, is nonetheless a "*decision*" for the purposes of any default or deeming provision or for the purposes of any obligation on the part of the planning authority to make a payment to an applicant for permission (see also: *Swords Cloghran* and *McCallig*). While it is unnecessary for me to express a concluded view on this point and I expressly refrain from definitively deciding the point, it does on the face of it appear that the statement of principle made by Walsh J. in *Abenglen* would apply to the circumstances arising here.

100. Second, while the Council conceded that the decision was invalid on the particular basis that it had not adequately recorded the reasons for its conclusions, and while the notice party's application is to be remitted to the Council at the particular point in time in the process referred to, it is open to the Council to make whatever decision it decides is appropriate to make, provided that it proceeds in accordance with law. The Council's hands are not tied by the orders I have decided to make in terms of the ultimate decision which it may decide to make on the notice party's application. Provided it does so in accordance with law, the Council may decide to reach the same ultimate decision to grant

the permission sought by the notice party or it may reach a different decision. The fact that the notice party's application is being remitted to the Council does not, therefore, mean that the only role or function of the Council is to rewrite its decision but inevitably to reach the same result as it reached the first time round. The Council remains free to reach whatever decision it decides is appropriate provided that its decision is made in accordance with law.

101. Finally, while the applicant places some reliance on the recent judgments of Simons J. in *Damer* and *Southwood*, it does not seem to me that these cases are of direct relevance to the issues I have to decide in the present case. In *Damer*, the court found for the applicants following a full hearing of their challenge and remitted the matter back to the Board to reconsider its decision in light of the court's findings. The court specifically directed that the appeal was to be reconsidered in its entirety. The court was not dealing with a situation where it was conceded by the decision maker that the decision made was defective and could be quashed on a particular basis. Nor was the court dealing with the situation which arose in *Clonres*, and again in this case, which raised to issues in relation to the various time periods within which decisions had to be made and the consequences of the failure to make those decisions within the relevant time periods. I do, not, therefore, believe that there is anything in the judgment in *Damer* which would preclude me from making the orders which I propose to make in the present case.

102. As regards *Southwood*, it does not seem to me that the judgment of Simons J. in that case would preclude me from making those orders either. In that case, having heard a preliminary issue in the proceedings, Simons J. concluded that a breach of the requirements of the regulations applicable to the planning application was fatal to the validity of the planning permission granted on foot of that application. The court decided to make an order setting aside the decision to grant permission on the particular grounds adjudicated upon by the court. The judgment in *Southwood* does not address the question of remittal at all still less the point in the process to which the application might have been remitted. Indeed, that is perfectly understandable where the defect found by the Court was a failure to comply with the applicable regulations by reason of the omission of a required document as part of the application. There well may well have been no benefit to remitting the application to the Board in those circumstances. However, in any event, as I understand it, the developer did not seek to have the application remitted. In those circumstances, there is nothing in Southwood which would preclude me from making the orders which I propose making in the present case.

Conclusions

103. In conclusion, for the reasons set out in this judgment, subject to further discussing what follows with Counsel, I propose making orders in the following terms:

(1) An order of *certiorari* quashing the decision of the first named respondent, Dun Laoghaire Rathdown County Council, dated 18th January, 2019 (Record of Executive Business Chief Executive's Orders P/0129/19) to grant permission for planning application register reference DZ18A/0208 (the "decision") on the ground that the decision failed adequately to record the reasons for the first named

respondent's conclusions based on its preliminary examination of the development under Article 103 of the Planning and Development Regulations 2001 (as amended).

(2) An order remitting planning application register reference DZ18A/0208 to the first named respondent, such remittal to take effect from the point in time immediately before the first named respondent commenced its planning application assessment (the recording of which commences at p. 113 of 145 of the decision) after it had received further information from the applicant for the permission on 14th December, 2018, and all subsequent valid submissions, observations and reports including those received on foot of the public notices of significant further information.

(3) An order deeming that the time period set out in s. 34(8)(b) of the Planning and Development Act 2000 (as amended) shall, in respect of the application remitted herein, expire two weeks from the date of the perfection of the orders made herein.

(4) An order for the applicant's costs as against the first named respondent, at least up to the date of the first named respondent's letter dated 21st June, 2019, to include all reserved costs, to be adjudicated upon in default of agreement.

(5) Such further or expanded order for the applicant's costs as may be made by the Court following such further submissions as may be required or as may be agreed between the parties.

104. I will discuss further with counsel the precise terms of the above orders or of any further orders as may be necessary once the parties have had the opportunity of considering the terms of this judgment.