APPROVED **[2024] IEHC 633**

THE HIGH COURT

PLANNING AND ENVIRONMENT

JUDICIAL REVIEW

2021 648 JR

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

BETWEEN:

WATERSIDE BLOCK 9 DEVELOPMENTS LIMITED

Applicant

-and-

AN BORD PLEANÁLA

Respondent

-and-

DUBLIN CITY COUNCIL

Notice Party

JUDGEMENT of Mr Justice Nolan delivered on the 7th day of November 2024

Introduction

1. This is a judgment concerning what directions, if any, should be given by the court when a matter is being remitted to the Respondent following an order of *certiorari* pursuant to Section 50 A (9) of the Planning and Development Act 2000 ("*PDA 2000"*), as amended.

2. On the 7th of February 2020 and the 7th of July 2020, the Applicant and the Respondent held pre-application consultations pursuant to Section 5 of the Planning and Development (Housing) and Residential Tenancies Act 2016 ("*PDA 2016*"), as amended. The Respondent subsequently issued notification in July of 2020 that it was of the opinion that the documents submitted with the request to enter into consultations required further consideration and amendment to constitute a reasonable basis for an application for strategic housing development.

3. On the 29th of January 2021, the Applicant lodged an application with the Respondent for a strategic housing development consisting of the construction of 1,005 residential units with balconies and winter gardens on all elevations arranged in three blocks ranging in height from eight number storeys to 45 number storeys over a triple-level basement including mezzanine plant level at City Block 9, North Wall Quay and Mayor Street Upper, Dublin 1.

4. By Order dated the 20th of May 2021, the Respondent refused permission for the proposed development on the basis that it considered that it was precluded from granting permission based on the judgment in *Dublin City Council v An Bord Pleanála and Spencer Place Development Company Ltd (Notice Party)* [2020] IEHC 557 *("Spencer Place")*, in which the High Court held that the Respondent did not have the jurisdiction to grant permission for a development that materially contravened the North Lotts Planning Scheme.

5. The proceedings were issued on the 8th of July 2021. The application for leave to apply for judicial review was moved on the 12th of July 2021 and leave was granted on that date. The

Applicant issued an originating Notice of Motion on the 20th of July 2021 with a return date of 26th of July 2021.

6. On the 26th of July 2021, the proceedings were adjourned to await delivery of judgment by the Court of Appeal in *Spencer Place.* On the 16th of June 2023, the Court of Appeal delivered judgment overturning the judgement of the High Court (*Spencer Place Development Company Ltd (Notice Party) and others* [2023] IECA 155).

7. On the 13th of November 2023, the proceedings were adjourned to await determination by the Supreme Court of Dublin City Council's application for leave to appeal the judgment of the Court of Appeal. The Supreme Court refused the application for leave to appeal in a Determination dated the 7th of February 2024.

8. The parties agree that the decision should be quashed, and that the planning application should be remitted back to the Respondent for reconsideration. However, the parties cannot agree as to the terms of the order regarding remittal. Therefore, the net question which this court has to decide is what point in the process should the matter be remitted to.

The Respondent's Direction

9. The Respondent's direction recorded that at a meeting held on the 18th of May 2021, where the Inspector's Report was considered, that certain matters were accepted and agreed**.** It records as follows:

> *"The proposed development materially contravenes the North Lotts & Grand Canal Dock SDZ Planning Scheme - 2014 in respect of height and density. However, having regard to the strategic and national importance of the development of this site for housing within an area earmarked for urban regeneration, as well as national policy contained in the NPF and Housing Action Plan, and section 28 Ministerial Guidelines, the Board is satisfied that in principle the proposed development would satisfy the*

requirements and criteria outlined in section 37(2)(b) of the PDA (as outlined in detail in the Inspector's assessment).

The Board accepted the Inspector's assessment and recommendation in respect of the potential impacts of the proposed development and agreed in full with his assessment and recommendation in this regard including that outstanding issues could be addressed by way of clarification and elaboration of the issues through the oral hearing process, in order to ensure adequate information is available to meet the Board's obligations in respect of the SPPR3 of the Urban Development and Building Height, Guidelines for Planning Authorities, 2018.

However, the Board, taking into account the findings in the judgement of Justice Richard Humphreys delivered on 12th November 2020, between Dublin City Council and An Bord Pleanála and Spencer Place Development Company Ltd (Notice Party) [2020 No:557 J.R.], considered that under the relevant provisions of the Planning & Development (Housing) and Residential Tenancies Act, 2016, the Board considered that it was precluded from granting permission for development, as under the Strategic Housing Development legislative provisions the Board does not have jurisdiction to materially contravene the North Lotts and Grand Canal Dock Planning Scheme."

10. Therefore, it was noted that having regard to the strategic and national importance of the development of this site for housing within an area earmarked for urban regeneration, as well as national policy contained in the National Planning Framework and Housing Action Plan, and Ministerial Guidelines, the Respondent was satisfied that in principle the proposed development would satisfy the requirements and criteria outlined in section 37(2)(b) of the PDA 2000 as outlined in detail in the Inspector's assessment. That is an important decision.

11. In the second paragraph, the Respondent accepted the Inspector's assessment and recommendation in respect of the potential impacts of the proposed development and agreed

with him in full that outstanding issues could be addressed by way of clarification and elaboration of the issues through the oral hearing process, in order to ensure adequate information was available to meet the Respondent's obligations in respect of the relevant statutory provisions.

Applicant's Submissions

12. Mr Galligan SC, counsel for the Applicant, submits that the matter should be remitted to the Respondent at the point in the board meeting on the 18th of May 2021, where it had accepted and agreed with the Inspector's recommendation to hold an oral hearing, that is to the point just before they decided to refuse permission following the decision in *Spencer Dock.* However, in point of fact the Respondent had not agreed to hold an oral hearing, only that outstanding issues could be addressed by way of clarification and elaboration of the issues through the oral hearing process, in order to ensure adequate information was available to meet the Respondent's obligations in respect of the relevant statutory provisions.

13. He points out that under the new statutory provision, section 50 A (9) of the PDA 2000, the court is required to remit the application to the Respondent where it is requested to do so by the Applicant for permission unless it is unlawful to do so. Furthermore, section 50 A (9) expressly provides that the court may make directions in respect of remittal where the court considers it appropriate to do so. In this case both parties are agreed that an order of *certiorari* should be made therefore the first requirement is met. The only remaining issue are whether the court should make directions sending the matter back to a certain point in time.

14. The Applicant relies on certain passages of the decision of the Supreme Court (Donnelly J.) in *Crofton v An Bord Pleanála* [2024] IESC 12, where it considered when directions should be made and the nature of any such directions, if any. Indeed, both parties

rely on this decision. In particular, the Supreme Court considered that the previous case law on remittal was still relevant to determining what directions could be given by the court. I will discuss that case in more detail below.

15. Accordingly, the Applicant says that there is no statutory impediment to the court giving a direction that the application be remitted to a particular stage in the process, provided that the direction does not expand the powers of the Respondent beyond those provided in the legislation.

16. The Applicant maintains that this is one such occasion and would be consistent with the reasons and considerations given by the Respondent in the Direction dated the 18th of May 2021 as set out above. Following the Court of Appeal's judgment in *Spencer Dock,* there is now no impediment to the Respondent proceeding with the course of action as proposed by the Inspector in his report and agreed to by the Board at the meeting on that date as per the second paragraph of the Direction**.**

17. The only aspect of the decision-making process that was invalid is the Respondent's conclusion, based on the High Court judgment in *Spencer Place*, that it could not grant permission for a strategic housing development which was a material contravention of the Planning Scheme. No issue arises as to the validity of any aspect of the planning assessment undertaken by the Inspector or the Respondent and the Respondent has not conceded the case on the basis of any infirmity in this regard.

18. The Applicant is not requesting the court to give a direction for the purposes of ensuring that the Board would act in a lawful or "*fairer*" manner. He summarises his client's position as being that he wants to ensure no uncertainty and does not want to roll the dice again.

19. In particular he relies upon two decisions of Clarke J. (as he then was), which supports this argument, the decisions being *Tristor Limited v The Minister for the Environment, Heritage and Local Government, and others [2012] IEHC ("Tristor")* and *Christian v Dublin City*

Council [2012] IEHC 309 ("Christian"), which he says remains the position even after *Crofton.*

The Respondent's Submissions

20. Ms. Carroll SC, counsel for the Respondent, says that her client's position is that an order of *certiorari* has been agreed between the parties quashing the decision to refuse planning permission *simpliciter,* the effect of which is to remit the matter to the Respondent to be determined in accordance with law.

21. She submits that what the Applicant really wants is an order from the court directing an oral hearing, which would be to decide the process and to pre-empt the substantial discussion and the decision-making functions of the Respondent. That is entirely inconsistent with the framework established by Section 50 A (9) and the analysis in *Crofton.*

22. Where the court decides to quash a decision, it must remit "*the matter"* for reconsideration. That includes all of the contents of the decision, including as regards the possibility of an oral hearing. She noted, as did Mr. Galligan, that the Respondent did not finally decide that an oral hearing should be held, only that outstanding issues could be addressed by way of clarification and elaboration of the issues through the oral hearing process.

23. The "*matter"* which is being remitted is the application made pursuant to section 4(1) of the 2016 Act. A consideration of that application will necessarily include a consideration of whether an oral hearing is required and whether the criteria in section 18 of the 2016 Act are met, having regard to the facts and circumstances which currently exist.

24. She submits that while the terms of Section 50 A (9) permit directions to be made, the power of the court to make such directions must be viewed in light of the sole decision which is being made by the High Court.

25. The reconsideration of the application necessarily includes the reconsideration of all procedural questions associated with that application and the Respondent must be free to determine whether the criteria in Section 18 of the PDA 2016 are met. She submits that the aim of the Applicant is to foreclose or limit the entitlement of the Board to consider that substantive question and instead, to have the High Court determine it in advance, which she says is not an appropriate exercise of the remittal jurisdiction.

26. She submits that *Crofton* does not support the contention that remittal should occur to a point, part of the way through a meeting, in circumstances where the parties are agreed that the outcome of that meeting should be subject to *certiorari*.

27. In oral submissions she points out that matters have changed. There is a differently composed board of the Respondent, that the development plan and the planning scheme have also changed. Therefore, she argues that the court does not have jurisdiction to make the orders sought.

28. But that depends on what order is being sought. I certainly agree that the court does not have the power to direct an oral hearing in this case (see Section 134(1) of the 2000 Act as amended by s. 18 of the 2016 Act), but I do not understand from the Applicant that that is what they seek. In fact, in reply Mr. Galligan concedes that if the matter is sent back to a certain point in time the Respondent could still decline to direct an oral hearing. Therefore, it seems to be that the court clearly does have jurisdiction to make an order with directions, as the section says.

29. Further she points out that the only decision made, wrongly as it transpires, was to refuse planning permission. That is what is being quashed by the agreed order. To do as the Applicant seeks is to micromanage the process, which was the very thing *Crofton* decided against.

Section 50A(9) of the 2000 Act and Remittal

30. Under the Act, the court is required to remit the application to the Board where it is requested to do section 50 A (9) of the 2000 Act, so by the applicant unless it is unlawful to do so. It reads as follows: -

> *"(9A) If, on an application for judicial review under the Order, the Court decides to quash a decision or other act to which section 50(2) applies, made or done on an application for permission or approval, the Court shall, if requested by the applicant for permission or approval, remit the matter to the planning authority, the local authority or the Board, as may be appropriate, for reconsideration, subject to such directions as the Court considers appropriate, unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so."*

Order 84, rule 27(4) of the Rules of the Superior Courts provides*:*

> *"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." (emphasis added)".*

31. The question to be asked is what type of directions does the court have jurisdiction to make following the decision of the Supreme Court in *Crofton*?

Discussion on the Caselaw

32. In *Tristor,* Clarke J**.** (as he then was), dealing with a similar matter, said:

> "*There will, of course, be a whole range of circumstances in which the courts may have to consider the knock on effect of a finding that a particular decision in the planning*

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

33. He reiterated this view in *Christian,* where he noted: -

"*the overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act but to go no further… and that '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."*

34. In *Crofton* the Supreme Court dealt with this very section, namely the meaning and application of the phrase "*shall… remit the matter... unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so*". The court also explored the extent to which, if at all, the High Court when making the remittal ought to give directions to the relevant planning decision-maker for the purpose of carrying out its lawful functions.

35. Donnelly J. quoted a decision of McDonald J., *Barna Wind Action Group v An Bord Pleanála* [2020] IEHC 177 *("Barna Wind Action Group")* at para. 22, where he said: -

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

(d) Where the process undertaken by the Board has been conducted in a regular and lawful way up to a certain point in time, active consideration should be given by the

court as to whether there is any good reason to start the process from the outset again. The court should endeavour to avoid an unnecessary reproduction of a legitimate process.

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

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

36. She went on to note that the presumption is that the Respondent will act lawfully at all times *(East Donegal Co-operative Ltd v Attorney General [1970] IR 317).* The Act does not confer upon the court a power to change the statutory duties or limitations imposed by law on the planning authorities or the Respondent.

37. She acknowledged *Christian* but added a word of caution that the phrase was: -

"*Subject to such directions as the court considers appropriate' preserves the jurisdiction of the court to give appropriate directions but that jurisdiction is now operated in the entirely different landscape where remittal is mandatory save in the very limited circumstances where it would not be lawful to do so. In my view the issue of what, if any, directions are appropriate for a court to give on remittal in the context of s. 50A(9A) must be viewed in the light of the sole decision that the court is making on remittal".*

38. She said it was not the role of the court to try and make the proceedings fairer. It must be presumed that the Respondent will act fairly.

39. However crucially she said:-

"This is not to say that there will never be occasions where directions are appropriate. The subsection provides this facility for a court where it is appropriate to give such

directions having regard to the circumstances of the case. It may be that on some occasions it will be appropriate to give specific directions to the Board as to how something ought to be done. For example, it may be appropriate, given the grounds on which the order of certiorari was made, to direct that a particular member of the Board must not be involved in the reconsideration of the remitted decision…It is not necessary to identify every or even any circumstance in which it is appropriate to give directions, it is sufficient to say that in the circumstances present here it is not appropriate to make them".

40. Dealing with the very issue which is before this court, namely at what stage to remit the matter to, she said:-

"The subsection directs that the matter is to be remitted for reconsideration by the Board. The matter to be remitted may well vary with the circumstances of the case. Where the order quashing the decision relates to a particular stage of the process, for example, a statutory pre-application stage as set out in the 2016 Act, then the matter for reconsideration must be the process commencing at that stage."

Discussion

41. The parties agree that an order of *certiorari* should be made and that the matter should be remitted to the Respondent. The only issue is to what point in the process it should be remitted to. The orders sought by the Applicant should not, in any way, prohibit or interfere with the jurisdiction of the Respondent in the planning process. The making of such an order in this case, not does not prescript the process. It is entirely open to the Respondent to decide to send the matter to an oral hearing or not. Further, it will be open to the Respondent in the event that there is an oral hearing to refuse planning permission, if the evidence points in that direction, after considering all matters.

42. I am persuaded by the views expressed by Clark J, (as he then was), in *Tristor* and *Christian* and reiterated by McDonald J in *Barna* and affirmed, in part, by Donnelly J. in *Crofton*, that the overriding principle ought to be that the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making. Insofar as it may be possible to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been, had the invalid decision not taken place.

43. By making the order sought in this case, the court is not in any way prohibiting the consideration of matters which may have changed since the Respondent last considered it. The court is not attempting to, nor does it wish to micromanage the process. The process and procedure are for the Respondent. *Crofton* noted that it would not be appropriate to give "*bespoke directions*". However, and importantly from the Applicant's preceptive, the court did acknowledge that there will be occasions where such directions are appropriate. This is one of those occasions.

44. In this case there was nothing wrongful or unlawful in the board's consideration up to the position where it felt that it was bound by the decision in *Spencer Place*. But since the Court of Appeal's decision, the Respondent is not obliged to refuse planning permission on that ground, and therefore the matter requires to be remitted to it.

45. I have taken into consideration the carefully crafted submissions of the Respondent, but I do not accept that by sending this matter back to the point in time just before it refused planning permission, is in anyway contrary to the new statutory provision, or the decision of the Supreme Court in *Crofton*, nor is it micromanaging the process.

46. As Clark J. (as he then was) said in *Christian*, the overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act but to go no further.

47. As I noted above, I do not accept that the court lacks jurisdiction to make the order sought. If that were the case, the statutory provision would not specifically allow for the making of directions. Those directions, however, should not be to direct the Respondent as to the manner in which it conducts its statutory functions and should be restricted to the unique circumstances of each case. I am not in any way fettering its decision-making process. By making the order sought, the court is quashing the decision and not the process. Therefore, it seems to me that it is appropriate to go back to the place where the mistake occurred, where the Respondent accepted the Inspector's assessment and recommendation in respect of the potential impacts of the proposed development and agreed in full with his assessment and recommendation including that outstanding issues could be addressed by way of clarification and elaboration of the issues through the oral hearing process, in order to ensure adequate information is available to meet the Board's obligations in respect of the SPPR3 of the Urban Development and Building Height, Guidelines for Planning Authorities, 2018 and to allow the process to continue from that point onwards.

48. In all the circumstances therefore, I will hear from counsel as to the precise order which should be made.