THE HIGH COURT

[2024] IEHC 31

[Record No. 2020/780JR]

BETWEEN

MILLBOURNE RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

RYBO PARTNERSHIP

NOTICE PARTY

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 24th day of January 2024

1. These proceedings began life as a challenge by the applicant to the decision of An Bord Pleanála (hereinafter referred to as "the Board") to grant planning permission to the notice party that had been refused by the planning authority. The applicant sought judicial review on six grounds including the Habitat Directive, the Environmental Impact Assessment Directive, material errors of fact in relation to identifying allegedly alternative public open space and material contravention of the County Development Plan (hereinafter referred to as "CDP") in relation to public open space. The applicant in its affidavit grounding the Statement of Grounds, described the grounds relating to the preservation of public open space as the "*main issue*" (para. 4 of Anthony Lynn's affidavit of 26 October 2020).

2. The Board has agreed to an order of *certiorari* on the basis of ground (1) concerning Appropriate Assessment under the Habitats Directive. The court will therefore make an order

of *certiorari* quashing the Board's decision to grant planning permission which will be made by consent.

3. The notice party says the court can, should and must remit the matter to the Board. The applicant says the Board no longer has jurisdiction to deal with this matter because a new CDP has been introduced since the original decision of the planning authority and the notice party says this means it is unlawful to remit to the Board and that it should therefore either not be remitted or be remitted to the planning authority. The Board is neutral on whether the matter should be remitted to it or not, but it has made submissions on why it considers there is no legal preclusion on the matter being remitted to it, as has been claimed by the applicant.

4. For reasons set out below, I am remitting the matter to the Board for further consideration by it in accordance with its statutory powers.

Statutory provisions

5. 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."*

Section 50A(9A) of the Planning and Development Act 2000 as amended by s. 22 of the Planning and Development Maritime and Valuation (Amendment) Act, 2022 provides:

> *"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."*

Section 37(1)(a)(b) and (2)(a) of the 2000 Act states:

> *"37.—(1) (a) An applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the permission regulations and on payment of the*

appropriate fee, may, at any time before the expiration of the appropriate period, appeal to the Board against a decision of a planning authority under section 34.

(b) Subject to paragraphs (c) and (d), where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and subsections (1), (2), (3) and (4) of section 34 shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority…

(2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates."

Submissions Made

6. The applicant says a remittal to the Board will lead to a decision that was made by the planning authority pursuant to one CDP being determined by the Board pursuant to a different CDP. The applicant submits the Board has no jurisdiction to make such a determination and therefore, a remittal would not be lawful and the court must, pursuant to s. 50A(9A), decline to remit at all. Because of the new CDP the applicant submits it would be appropriate (as per s. 50A(9A)) to remit to the planning authority.

7. The applicant relies on s. 37(2)(b)(a) in submitting that the Board has no jurisdiction to invoke that section as there is no decision of the planning authority in relation to a material contravention of the current CDP. As the Board cannot lawfully engage in the machinery of s. 37(2)(b), it cannot have jurisdiction for the purpose of section 37.

8. The applicant also relies on what it says is the absence of public participation on the impact or relevance of the CDP on this application. Therefore the applicant says the court should either refuse remittal and the notice party developer can submit a new application taking account of the current CDP, or if there is a remittal, it should be to the planning authority so that the planning authority can consider the new CDP and allow the Board, if appropriate, to properly exercise its jurisdiction if there is any further appeal to the Board on the decision of the planning authority.

9. Both the notice party and the Board dispute that a remittal would not be lawful and say that the matter can be remitted to the Board. The notice party assert that it should be so remitted and that the type of circumstances in which the court might exercise its discretion not to remit do not exist here.

Discussion

10. The bar to refuse a remittal has been set high by s. 50A(9A) which requires the court to remit "*unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so.*" This subsection was described by Holland J. in *Crofton Buildings Management CLG v. An Bord Pleanála* [2022] IEHC 704 as "*a statutory expression and reinforcement of the principles and presumption in favour of remittal generally discernible in the cases.*" Remittal should only be refused where the court is positively satisfied that it would be unlawful to remit (*Crofton Buildings Management CLG* at para. 16).

11. The principles on remittal in planning cases have been summarised in a number of recent cases, including *Barna Wind Action Group v. An Bord Pleanála* [2020] IEHC 177 where the court noted, at para. 22:

> *"All parties were agreed that the principles governing the issue of remittal in the context of a judicial review of a planning decision of the Board are those set out in the judgment of Barniville J. in Clonres v. An Bord Pleanala [2018] IEHC 473 as applied more recently in Fitzgerald v. Dun Laoghaire Rathdown County Council [2019] IEHC 890. Those principles (which represent a careful and comprehensive distillation of pre-existing case law) may be summarised as follows:*
>
> > *(a)The court has an express power to remit under O. 84, r. 26 (4); (b)The court has a wide discretion to remit. The governing criteria in any decision to remit are fairness and justice.*
> >
> > *(c) In considering the question of remittal, the court should aim to undo the consequences of any wrongful or invalid act but should go no further.*
> >
> > *(d)Where the process undertaken by the Board has been conducted in a regular and lawful way up to a certain point in time, active consideration should be given by the court as to whether there is any good reason to start the process from the outset again. The court should endeavour to avoid an unnecessary reproduction of a legitimate process.*

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

(f)The court should treat the Board as a disinterested party which has no stake in the commercial venture being pursued by a developer. In cases where the Board, as the statutory decision maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it, the court should not lightly override that view.

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

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

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

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

12. Unless there is a specific legal preclusion to remittal to the Board, then it should be remitted to the Board and the Board should be permitted to consider the remitted application in accordance with its statutory powers. Those powers include the power to request submissions from the public (at s. 131), to request further information from a person (s. 132) and require relevant material or information to be made available for inspection (s. 146). What the applicant seeks from this court, in effect, would pre-empt the manner in which the Board may exercise its statutory power.

13. I am not positively satisfied that it would be unlawful to remit this matter to the Board. Any remitted application will be determined by reference to the new CDP. The applicant's concern is that the planning authority's decision related to the old CDP. There is nothing in the legislation or the authorities suggesting that both decisions (of the planning authority and the Board) must be determined in relation to the same CDP. The applicant relies on s. 37(2)(b), but that section never applied in the circumstances of this case as

there was no decision by the planning authority that there had been a material contravention of the CDP. The planning authority's finding was of a contravention, which is a different finding to a material contravention, as confirmed by O'Malley J. in *Nee v. An Bord Pleanála* [2012] IEHC 532 where she confirmed an important distinction between a material contravention and a contravention and held that if "*material*" is omitted from a finding that a development plan has been contravened, "*this must have been by deliberate choice*" (para. 42).

14. If the Oireachtas had intended to make such a significant change to the planning system, depriving the Board of jurisdiction to determine an application to it where the development plan had changed between the decision of the planning authority and when the application came before the Board, I believe this would have been expressly stated by the Oireachtas. This is supported by the Presumption Against Radical Amendment, a principle that was expressly endorsed by the Supreme Court in *DPP v. Davitt & Attorney General* [2023] IESC 17 where Dunne J., at para. 100, referred with approval to Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional, 2008) at para. 4-110 which states:

> *"It is presumed that the legislature does not intend to make any radical amendment to the law beyond what it declares, either in express terms or by clear implication. Where provisions give rise to plausible alternative constructions, one of which is a narrow interpretation and one of which is a wider interpretation that radically changes the law, the narrow interpretation may be preferred. It is considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intentions with irresistible clarity. It is presumed that the legislature does not intend to change the law beyond the immediate scope and object of an enactment. The more radical a change, the more weight may be assigned to the presumption. There are many examples of this presumption being applied in Ireland."*

15. I am not positively satisfied that there is a preclusion in law to the Board dealing with this matter on remittal. The applicant has failed to rebut the presumption of s. 50A(9A) in favour of remittal. I am satisfied that the matter should be remitted to the Board. I am concerned that a remittal to the planning authority could be an inappropriate usurpation of the Board's statutory function and in any event, I am not satisfied that the introduction of

the new CDP since the decision of the planning authority is sufficient to allow a remittal to the planning authority even if such power exists pursuant to the subsection although it seems more likely that the reference to the planning authority is to cover the situation where a judicial review is taken in relation to their decision.

16. I am not in favour of directing the point at which the Board should take up its consideration of the matter, once remitted to it, as I consider that to be a matter more properly determined by the Board particularly given the introduction of a new CDP since its now impugned decision was made.

17. I will make an order of *certiorari* quashing the decision of the Board for the reasons conceded by the Board and remit the matter to the Board.

18. I will put the matter in before me at 10.30am on 6 February 2024 for the making of final orders. Any written submissions on the content of those orders that any party wishes to make should be lodged with the court at least 48 hours in advance of the matter coming back before me.

Counsel for the applicant: James Devlin S.C., John Kenny B.L.

Counsel for the notice party: Damien Keaney B.L.

Counsel for respondent: Aoife Carroll B.L.