[2018] IEHC 473

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000 AND THE RESIDENTIAL TENANCIES ACT, 2016

[2018 No. 426 J.R.]

BETWEEN

CLONRES CLG

APPLICANT

AND

AN BORD PLEANÁLA AND MINISTER FOR CULTURE, HERITAGE AND THE GAELTACHT

RESPONDENTS

AND

CREKAV TRADING GP LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

[2018 No. 422 J.R.]

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DUBLIN CITY COUNCIL AND CREKAV TRADING GP LIMITED

NOTICE PARTIES

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

[2018 No. 423 J.R.]

BETWEEN

JOHN CONWAY AND LOUTH ENVIRONMENTAL GROUP

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CREKAV TRADING GP LIMITED AND THE LEGAL AID BOARD

NOTICE PARTIES

JUDGMENT of Mr. Justice David Barniville delivered on the 31st day of July, 2018

Introduction

1. The above three sets of judicial review proceedings have been dealt with by me in the Strategic Infrastructure Development ("SID") list as the proceedings concern the decision of An Bord Pleanála, (the "Board") which is a respondent to each of the proceedings, made on 3rd April, 2018 to grant permission for the development of 536 residential units at lands which previously formed part of St. Anne's Park and subsequently part of St. Paul's College in Raheny, Dublin 5. On 14th June, 2018 I granted leave to each of the applicants to bring proceedings by way of judicial review seeking various reliefs in connection with that decision. The return date for the motions in each of those proceedings was 28th June, 2018.

2. On that return date, I was informed by counsel on behalf of the Board that the Board was accepting that there was an error on the face of the record in terms of the recording of the test applied by the Board in carrying out an Appropriate Assessment ("AA") for the purposes of the Habitats Directive in the Board's formal decision granting permission in respect of the development. It was indicated that the Board was prepared to consent to an order of *certiorari* in respect of the decision. The proceedings were adjourned to enable the parties to consider how best to proceed in light of the position adopted by the Board.

3. Correspondence was then exchanged between the parties' respective solicitors. The Board's solicitors circulated a draft form of order which it was proposing should be made in light of the concession made by the Board. Among the orders which the Board was proposing should be made was an order remitting the application for permission to the Board on a particular basis. The applicants did not agree with the terms of the proposed order and, in particular, did not agree that the application should be remitted to the Board on the basis proposed or at all.

4. The terms of the order to be made and the question as to whether the application should be remitted to the Board and, if so, the basis on which that should be done, were addressed by all of the parties in oral submissions before me on the 26th July, 2018. I reserved my judgment in respect of those issues to today.

5. I have concluded that the appropriate order to make is an order of *certiorari* and an order remitting the application to the Board on the particular basis set out in this judgment. I have reached that conclusion for the reasons set out below.

Procedural History

6. By a decision dated 3rd April, 2018, the Board decided to grant permission for a development of 536 residential units on lands which were formerly part of St. Anne's Park and subsequently part of St. Paul's College in Raheny. The applicant for the permission was Crekav Trading GP Ltd ("Crekav" or the "developer"). Crekav is a notice party to each of the three sets of proceedings. The application was for a strategic housing development and was made pursuant to s. 8 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the "2016 Act"). Applications for leave to seek judicial review in respect of the decision were made by the applicants in each of the above three sets of proceedings. On the basis that the development in question was a strategic infrastructure development under the Planning and Development Act 2000 (as amended) (the "2000 Act (as amended)"), the applications for leave were heard and determined by me in the SID list in accordance with Practice Direction HC74 – Judicial Review Applications in respect of Strategic Infrastructure Developments, made by the President of the High Court on 2nd February 2018.

7. On 14th June, 2018 I gave leave to the applicants in each of the proceedings to seek various reliefs by way of judicial review in respect of the Board's decision of 3rd April, 2018 on the grounds set out in the statement of grounds in each of the proceedings. Each of the applicants raised a large number of grounds in their respective proceedings. While there was a considerable degree of overlap between the grounds raised by each of the

applicants, the grounds were not identical in each case. For example, in his case, Mr. Sweetman advanced an alternative case that the State had failed properly to transpose the provisions of Council Directive 92/43/EEC (as amended) (the "Habitats Directive") into Irish law. In their proceedings, Mr. Conway and the Louth Environmental Group raised grounds which affected the State and the Legal Aid Board (which was named as a notice party to those proceedings) asserting a failure by the State to comply with obligations relating to legal aid under EU law and/or under the Aarhus Convention and/or under Article 47 of the Charter of Fundamental Rights and Freedoms and on other grounds. These grounds did not form part of the case sought to be made by Clonres in its proceedings.

8. In any event, having considered the papers and having heard submissions on behalf of each of the applicants, I concluded that the grounds sought to be advanced by each of the applicants were "*substantial grounds*" and I granted leave to the applicants to seek relief by way of judicial review on those grounds pursuant to s. 50A of the 2000 Act (as amended). I directed that a notice of motion in each case be issued and made returnable for 28th June, 2018 so that further directions could be made on that occasion with a view to ensuring a fair, just and expeditious hearing of the proceedings.

9. On the return date of the motions, counsel on behalf of the Board informed the court as follows (as appears from the transcript):-

> *"We have now had an opportunity to take instructions and it is the case that there is an error on the face of the record in terms of the recording in the Board's formal decision granting planning permission of the test applied by the Board in carrying out an appropriate assessment for the purposes of the Habitats Directive, and that is a point that is reflected in ground E32 of Mr. Sweetman's statement of grounds and at ground E34 of Clonres' statement of grounds. In those circumstances the Board is prepared to consent to an order of certiorari of the decision granting planning permission."*

10. The other parties to the proceedings had not been informed of this very recent development prior to the hearing on 28th June, 2018. Understandably, those parties sought time to enable them to consider their respective positions in light of the Board's concession. The proceedings were adjourned to 16th July, 2018 and, ultimately, for further hearing to 28th July, 2018.

11. In the meantime, correspondence was exchanged between the parties as to what the court should do in light of the Board's concession. I now turn to that correspondence.

Correspondence

12. In letters dated 29th June, 2018 the Board's solicitors wrote to solicitors for the applicants in each of the three sets of proceedings. The letters were sent in virtually identical terms. In those letters it was confirmed that the Board was:-

> *"[P]repared to consent to an Order of certiorari of its Decision made on 3 April 2018 in case File Ref. ABP-300559-18 on the basis that there is an error on the face of the record of its decision as regards the recording of the test applied by the Board in reaching its Appropriate Assessment conclusion."*

The letters stated that:-

> *"This is pleaded at ground E.32 of the [Sweetman] proceedings and at ground E.34 of the Clonres CLG proceedings …"*

It was proposed on behalf of the Board that an order of *certiorari* be made in Mr Sweetman's case as that was said to be first in time.

13. The Board's solicitors wrote again to solicitors for the applicants in each of the proceedings on 12th July, 2018. In those letters it was confirmed that the Board would consent to an order of *certiorari* of the Board's decision on Ground E.32 of the statement of grounds in the Sweetman proceedings. It was further stated that the Board would be seeking an order that the application for permission be remitted to the Board to be determined in accordance with law. It was noted that having regard to the time limits prescribed in s. 9 of the 2016 Act, the Board would be asking the court to give certain directions in relation to timing. The letters proposed that the Clonres proceedings and the Conway proceedings be struck out in light of the order which it was proposing should be made in the Sweetman proceedings. It was further proposed that in each case the Board would pay the applicants' costs (to include reserved costs) up to and including 16th July, 2018 to be taxed in default of agreement on the basis that final orders could be made on that date. (For reasons which it is not necessary to go into, it was not possible to deal with the issues on 16th or 19th July, 2018 and they were adjourned to 26th July, 2018).

14. The letters enclosed a draft proposed order to be made in the Sweetman case (the proposal being that each of the two other sets of proceedings would be struck out). The draft proposed order in the Sweetman case was as follows:-

> *"1. An Order of Certiorari quashing the decision of the First Named Respondent dated 3 April 2018 (Case Ref: PL29N.300559) to grant permission to the Second Named Notice Party for development on lands east of St. Paul's College, Sybil Hill Road, Raheny, Dublin 5 on the ground that the said decision contained an error on the face of the record for the reasons set out at paragraph (E)(32) of the applicant's statement of grounds.*
>
> *2. An Order remitting the application for permission to the First Named Respondent to be determined in accordance with law, such remittal to take effect from the point in time at which its Senior Planning Inspector signed her report.*
>
> *3. An Order deeming that the time period set out in section 9(9)(a) of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended,*

shall, in respect of the application remitted herein, expire four 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, to include reserve costs, to be taxed in default of agreement.

5. No further Order."

15. Solicitors for the applicant in the Clonres proceedings replied on 12th July, 2018. They asserted that the Board's decision was "*fundamentally flawed, being based on AA screening documents which wrongly assert that AA is not required for various aspects of the development*". It was contended that the reasons for those conclusions were bad in law and could not be fixed. It was further contended that the Natura Impact Statement ("NIS") was inadequate in various respects and could not form the basis of a valid decision. It was asserted that under s. 8(3) of the 2016 Act, the Board could refuse to deal with an application where a NIS was inaccurate or incomplete and that the Board could not grant permission on foot of such a NIS, had no power to give the developer an opportunity to mend its hand by submitting a revised NIS, had no power to take additional submissions on the matter and that any decision which the Board might make would breach the requirements of natural justice. In those circumstances it was contended that no purpose would be served by remitting the matter to the Board. Various other grounds were asserted in the letter in support of the contention that it would not be appropriate to remit the matter to the Board and that no purpose would be served in doing so in circumstances where "*no valid grant could ever issue on foot of the present application*". In those circumstances, it was stated that Clonres was not consenting to the proposed order and that, unless the Board consented to an order quashing the decision simpliciter, Clonres would be asking the court to determine the other grounds raised in the proceedings and to fix the time for the filing of opposition papers. It was further asserted that the proposed order of *certiorari* should be made in the Clonres proceedings also.

16. The Board's solicitors replied on 13th July, 2018. In that letter it was noted that the Board had conceded the matter on a specified ground and was seeking to have the application remitted to it to be determined in accordance with law. The Board was not prepared to consent to an order quashing the decision simpliciter. In response to the indication that Clonres would be asking the High Court to proceed to hear its application for judicial review, the letter stated:-

> *"In circumstances where the Board has conceded the application for judicial review on a specified ground, such an approach is contrary to well-established principles and practice and would entail an unnecessary and inappropriate use of resources, including Court time, to determine what would, in effect, be a moot. Any such application by your client will therefore be vigorously opposed by the Board."*

It was further indicated that the Board had no particular difficulty in making a similar order in the Clonres proceedings to the order it was proposing in the Sweetman proceedings, although it did not consider that to be necessary.

17. The only further relevant item of correspondence was a letter from Mr. Sweetman's solicitors to the Board's solicitors dated 18th July, 2018. In that letter it was confirmed that Mr. Sweetman was not consenting (and had never consented) to the form of remittal proposed by the Board as set out in the draft proposed order. While Mr. Sweetman had no difficulty with the decision being quashed and with the order for costs being proposed, he did have *"significant difficulty with such a limited remittal which fails to adequately address the issues in the proceedings*".

Oral Submissions on 26th July, 2018

18. In oral submissions on 26th July, 2018, counsel for Clonres argued that an order of *certiorari* should be made in respect of the Board's decision. It was not contending that the court should proceed to hear the case (as had been urged in the letter from Clonres's solicitors of 13th July, 2018). However, counsel disagreed that the application should be remitted to the Board on the terms proposed by the Board or at all. He submitted that the application should go back to scratch, as it were, and should start again. He further objected to the manner in which the Board had communicated its position in the letter from its solicitors of 29th June, 2018 and submitted that this effectively amounted to the Board "*adding to, explaining or contradicting*" the decision in a manner precluded by the Supreme Court decision in *The State (Crowley) v. Irish Land Commission & Ors* [1951] I.R. 250 ("*Crowley*") (per O'Byrne J. at 264). He contrasted the position adopted by the Board in this case with the approach which it had taken in *Usk and District Residents Association Ltd. v. An Bord Pleanála* [2007] IEHC 86 ("*Usk*"). In that case, affidavits were sworn by members of the Board to explain the reason why the Board was conceding that an order of *certiorari* should be made in the case (on a ground which had not in fact been raised by the applicants in the case).

19. The essential point made by counsel on behalf of Clonres in opposing the remittal sought by the Board was that the complaint by Clonres was not that the Board's decision incorrectly *recorded* the test applied by the Board in carrying out the appropriate assessment and in reaching its conclusion on that assessment but rather that the Board had *applied* the incorrect test and that this error on the part of the Board tainted the entire process before the Board. It was not, therefore, possible for the court to remit the application to the Board to the point in the proceedings where the error was made as the entire process was tainted by the error and the application for permission was invalid *ab initio.*

20. As a fall back and alternative position, counsel for Clonres submitted that if the application was to be remitted to the Board it should be remitted to the point at which it appeared from the Board Direction (which was provided to the Court) that the error must have occurred, namely, at or around the time of the meeting of the Board held on 27th March, 2018 at which decisions were apparently made by the Board which were recorded in the Board Direction dated 28th March, 2018.

21. Counsel further submitted that it was not open to the court to give any direction in relation to the time limits within which the Board should make its decision in the event of a remittal as the time limits contained in the 2016 Act could not be complied with in respect of Crekav's application (although counsel did not elaborate on that submission in any detail).

22. Finally, counsel submitted that if the application were to be remitted to the Board, it should be remitted to a differently constituted Board. He relied on *Usk* in that regard where Kelly J. made "*suggestion*" that the application, having been remitted to the Board, should be dealt with and considered by members of the Board who had not considered the earlier application.

23. Counsel for Mr. Conway and Louth Environmental Group added some submissions to those made by counsel for Clonres. He objected to the terms of the order of *certiorari* proposed and to the remittal of the application to the Board although it was acknowledged that these applicants had not raised the particular point or a variant of it which had given rise to the concession made by the Board (in contrast to the position of Clonres and of Mr. Sweetman who had). Counsel referred to para. E34 of the statement of grounds in the Clonres case and noted that the ground advanced by Clonres was not that the decision of the Board contained an error on the face of the record in relation to the recording of the test applied by the Board in reaching its AA conclusion but rather that the decision of the Board was *ultra vires* as having adopted and applied the incorrect test for AA. He submitted (by reference to Hogan and Morgan, *Administrative Law in Ireland*, 4th Ed., (Round Hall, 2010), para. 10-158) that the case made by Clonres was not that there was an error on the face of the record but rather that the decision was *ultra vires* (which he submitted is not the basis for review in the case of error on the face of the record). Counsel further objected to the basis on which the Board had communicated its position in the form of the letter from its solicitors of 29th June, 2018 and contrasted what the Board did in *Usk* with what was done in this case. As noted earlier, in Usk affidavits were sworn on behalf of the Board to explain what had happened before the Board.

24. In reliance on the decision of Clarke J. in *Christian v. Dublin City Council* [2012] IEHC 309 ("*Christian*"), counsel submitted that if the matter were to be remitted, it should be remitted to a point no further back than is necessary to undo the consequences of the error. He submitted that the error conceded was an error in recording the test and that such recording took place on 28th March, 2018 (in the Board Direction). Therefore, the application should not be remitted to a point before that.

25. Finally, counsel stressed that the applicants for whom he acted were not abandoning any of the grounds which they had advanced in the statement of grounds for which leave had been obtained. Those grounds would be pursued in the event that fresh proceedings were necessary following any further decision by the Board on Crekav's application.

26. Counsel for Mr. Sweetman adopted the submissions made on behalf of the other applicants. He urged the court not to remit the application to the Board at all and submitted that if this were done it would give rise to even greater problems than had

already arisen. He submitted that if the application were remitted it was virtually certain that further proceedings would be brought. Counsel further submitted that the court had no power to give directions in relation to the time period proposed in the draft order put forward by the Board. He effectively submitted that the court had no power to alter or tamper with the time periods contained in the 2016 Act. He argued that the court had no power to enlarge the 16 week period referred to in s. 9(9) of the 2016 Act. He relied on a judgment of McKechnie J. in *Brooks v. Sligo County Council* (although no written judgment is apparently available) (it appears that this judgment concerned a default planning permission and is not directly on point). Counsel's main argument was that any permission emerging from the process following remittal would be challenged and, therefore, the most appropriate order for the court to make in its discretion was to quash the decision and require the applicant to start again.

27. In response, counsel for the Board rejected any criticism of the manner in which the Board had communicated the limited concession which it was prepared to make for the purposes of consenting to an order of *certiorari*. She distinguished the present case from Usk where affidavits were sworn by members of the Board (including its chairman) as the ground on which the Board was consenting to an order of *certiorari* in that case was not one which had been raised by the applicants and arose from facts not known to the applicants or to the court. In those circumstances, it was submitted that it was appropriate for the Board to swear affidavits setting out what had happened before the Board in that case. That was not so in the present case where the Board's solicitors' letter identified a legal error in the Board's decision which had been identified in the statement of grounds in the Clonres case and in Mr. Sweetman's case, albeit not in precisely the same terms in those cases. She referred to para. E32 of Mr. Sweetman's statement of grounds and to para. E34 of the statement of grounds in the Clonres case. The Board was conceding that the test which is recorded in the Board's decision as having been applied in the case of appropriate assessment is the wrong statutory test. In those circumstances, the Board was not defending the proceedings and was consenting to an order of *certiorari*. Counsel accepted that the question as to whether the Board did in fact apply the correct or incorrect test for appropriate assessment may be a matter for another day or other proceedings but that that question does not have to be determined in these proceedings. She accepted that the Board's concession and its consent to an order of *certiorari* would not give rise to any *res judicata* in subsequent proceedings.

28. As to the point in time to which the application should be remitted, the Board submitted that it should go back to the stage where it was immediately prior to the meeting held by the Board on 27th March, 2018 at which submissions in relation to the application and the Inspector's report (which was dated 23rd March, 2018) were considered (as appears from the Board Direction). Counsel submitted that if the decision of the Board is quashed by *certiorari*, the Board would have to make another decision and would have to meet or convene in order to make that decision.

29. Counsel for the Board further submitted that the court should give directions in relation to timing in light of the provisions of the 2016 Act which in s. 9(9) required the Board to

make its decision on the application within 16 weeks of the date on which the application was lodged with the Board (or within such other period as may be prescribed, something which does not arise in the present application). Counsel submitted that the deadline under the legislation for the Board to make its decision on this application expired on 12th April, 2018. The Inspector's report was finalised on 23rd March, 2018. Therefore, there were 20 days left from that date until the date the statutory period was to expire. The Board had met on 27th March, 2018, the Board's direction was dated 28th March, 2018 and the Board's decision was signed off on 3rd April, 2018. The Board requested that the matter be remitted to the point in time of the process at which the Inspector's report was finalised, namely, 23rd March, 2018. That would leave the Board with 20 days plus weekends and holidays (which are to be added back in by virtue of s. 251 of the 2000 Act (as amended) which is to be construed with the 2016 Act). Counsel submitted that a further nine days should be added to the 20 days by virtue of s. 251 and that would give rise to 29 days which the Board was rounding down to four weeks. It was on that basis that the Board was seeking in the order which it was proposing that the court should make an order deeming that the time period set out in s. 9(9)(a) of the 2016 Act should, in respect of the application at issue, expire four weeks from the date of perfection of the order. However, in light of the submission made by a number of the applicants that if the application were to be remitted to the Board, it would have to be dealt with by a differently constituted Board to that which made the impugned decision, counsel submitted that it might be necessary to seek an additional period of time. This was because the point had not been made on behalf of the applicants prior to the hearing and it had not been possible to obtain instructions from the Board as to whether there would be difficulty in the Board constituting itself with different personnel bearing in mind the time of the year. In those circumstances it might be necessary to extend the period of time from the four weeks originally sought in the proposed draft order.

30. Counsel for the Board rejected the submission made on behalf of Mr. Sweetman that s. 9 contains some form of guillotine which requires the Board to take a decision within the statutory period failing which the decision would be deemed to be refused or to have some such similar consequence. She submitted that s. 9(9) of the 2016 Act does not so provide. She further directed my attention to s. 9(13) of the 2016 Act where it is provided that if the Board has failed to make a decision within the period specified in s. 9(9)(a), the Board should proceed to make the decision notwithstanding that the period has expired. The consequence of such failure is that the Board will be required to make a payment (referred to as the "*appropriate su*m" in s. 9(13)(b) and (d)) to the applicant for the particular permission.

31. Further, counsel for the Board rejected the submission made on behalf of Mr. Sweetman to the effect that if the application had to start again from scratch it could be dealt with within 16 weeks which would only be 12 weeks more than the period provided for in the draft order proposed by the Board. Counsel pointed out that that submission ignored the fact that if the application had to go back to the start it would have to comply with the provisions of ss. 5 and 6 of the 2016 Act requiring Crekav, the developer, before making an application to request the Board to enter into consultations in relation to the proposed

application and that such consultations are a pre-condition to making the application. Therefore, if the application had to start from scratch it would take considerably longer than 16 weeks to be decided, when the statutory pre-application consultation requirements are taken into account.

32. Finally, counsel for the Board referred to the decision of Peart J. in *O'Grianna v. An Bord Pleanála* [2015] IEHC 248 ("*O'Grianna*") and to the court's description of the Board in that case as a "*disinterested party*" which does not have a vested interest in the outcome of a development one way or the other in the context of the court's consideration as to the appropriateness or otherwise of remitting an application back to the Board. In those circumstances, the Board submitted that I should make an order on the terms proposed with the possible provision for additional time for the Board to determine the application following its remittal.

33. Counsel for the State supported the Board's submissions and stressed that the 2016 Act envisages an expeditious process. In those circumstances, the State supported the remittal of the application to the Board. Counsel for the Legal Aid Board appeared but in light of the fact that any issues concerning legal aid did not now arise in the proceedings, he had nothing to add to the Board's submissions.

34. Counsel for the developer, Crekav, also supported and adopted the submissions made by the Board and made some additional submissions in support of the draft order proposed by the Board. First, counsel submitted that the present case was significantly different to *Usk*. In *Usk*, the Board could not stand over the decision but not for any of the reasons advanced by the applicants in that case. It was in those circumstances that the Board felt it necessary to swear affidavits explaining the basis on which it was consenting to an order of *certiorari*. Second, counsel submitted that there was no reason why, if the application were remitted to the Board on the basis proposed by the Board (namely, on the basis of an error on the face of the record), the Board would have to constitute itself differently in deciding the application again following the remittal. He submitted that the present case is different to *Usk* in that in *Usk* there were affidavits from the applicants complaining about the procedure and stating that they had lost faith in the ability of the particular Board members properly to determine the application. Third, counsel rejected the contention that the correspondence from the Board in some way infringed any rule or principle identified in *Crowley* on the basis that in that case the Supreme Court was concerned with an attempt to expand upon a decision and to draw in other material on which the decision-maker was attempting to rely to supplement the written decision. That does not arise in the present case. Fourth, counsel submitted that an order of *certiorari* is appropriate in circumstances where the Board has conceded an error on the face of the record and that it does not matter whether the decision could be said to be *ultra vires* or not as a consequence of that concession since it is clear that *certiorari* can in any event lie in respect of a decision affected by an error on the face of the record. In circumstances where none of the applicants were seeking to persuade the court to embark on a hearing of all of the other issues in the case, counsel submitted that it was appropriate for the court to make an order of *certiorari* on the terms proposed by the Board. Fifth, he

submitted that if such an order is made, the court should remit the application to the Board to allow the Board to "*pick the matter up again*" from the point at which the error is accepted to have occurred, which counsel submitted was the point in time proposed by the Board.

Certiorari

35. The Board is consenting to an order of *certiorari* on the basis of its concession that the decision to grant permission in respect of the development contained an error on the face of the record as regards the recording of the test applied by the Board in reaching its conclusion on appropriate assessment under the Habitats Directive. That is the only basis on which the Board is conceding that an order of *certiorari* should be made. That concession by the Board was initially made in correspondence and was confirmed by its counsel in open court.

36. The first issue which arises in this context is the complaint raised by a number of the applicants in relation to the manner in which the Board made that concession. Counsel for Clonres and for Mr. Conway have objected to the manner in which that concession was made in the letter from the Board's solicitors dated 29th June, 2018. Reliance was placed on the comments of O'Byrne J. in the Supreme Court in *Crowley*. There is no basis for those complaints. In *Crowley*, the applicants sought to quash by *certiorari* a judgment and orders of the respondents. The respondents sought to supplement the judgment and orders by reference to an affidavit sworn by the Lay Commissioners. The Supreme Court held that it was not open to the respondents to have recourse to such an affidavit. O'Byrne J. stated that:-

> *"The determination of the Lay Commissioners appears in, and must be gathered from, the formal orders made by them and the affidavit cannot be utilised for the purpose of adding to, explaining, or contradicting their written orders."*

37. I do not see the Board's solicitors letter of 29th June, 2018 which set out the basis of the Board's concession as being an attempt to add to, explain or contradict the Board's decision of 3rd April, 2018. The letter set out the terms in which the Board was conceding that an order of *certiorari* could be made. That concession does not, in my view, in anyway add to, explain or contradict the terms of the Board's decision. In the circumstances, I do not accept that there was anything wrong or improper with the Board's solicitors communicating with the solicitors for the other parties the basis on which the Board was prepared to concede that an order of *certiorari* could be made. The letter repeated and confirmed a concession already made by the Board's counsel in open court on 28th June, 2018 and that concession was re-confirmed by counsel in open court on 26th July, 2018.

38. Nor do I accept the further submission made on behalf of a number of the applicants that the Board ought to have set out the basis for its concession in the form of an affidavit or affidavits by members of the Board. The circumstances of this case are quite different to those which arose in *Usk*. In that case, the Board was conceding that an order of *certiorari* should be made in respect of its decision on grounds which had not been raised

or pleaded by the applicants and were completely unknown to them. In those circumstances, it was particularly appropriate that affidavits be sworn by the relevant members of the Board. In the present case, the applicants in two of the proceedings were advancing grounds directed to the appropriate assessment carried out by the Board (para. E34 of the statement of grounds in the Clonres proceedings and para. E32 of the statement of grounds in the Sweetman proceedings). One of those applicants (Mr. Sweetman) was expressly making the case that the decision of the Board (where it refers to the appropriate assessment carried out by it) was "*wrong on its face*" (para. E32 of Mr. Sweetman's statement of grounds). In my view, it was appropriate, lawful, pragmatic and cost effective for the Board to communicate its concession by way of a letter from its solicitors and it was not necessary for it to swear an affidavit or affidavits setting out the basis and reasons for that concession. I should make clear, however, that it would have been open to the Board to swear an affidavit or affidavits setting out the basis and reasons for its concession and this would not, in my view, have contravened any principle identified or applied by the Supreme Court in *Crowley*.

39. I am satisfied that it is appropriate to make an order of *certiorari* on the terms proposed by the Board. The Board has made a limited concession that an error on the face of the record was made. That error, as conceded by the Board, was the recording of the test apparently applied by the Board in reaching its conclusion on appropriate assessment under the Habitats Directive. A decision which contains an error of law on the face of the record is amenable to an order of *certiorari* (notwithstanding that the basis for the court's power to review on that ground may not be based on the doctrine of *ultra vires*). (Hogan and Morgan, *Administrative Law in Ireland*, 4th Ed., (Round Hall, 2010), p. 497, para. 10-158; see also *Solomon v. Nicholson* [2006] IEHC 29.)

40. While many grounds have been advanced by each of the applicants in these three sets of proceedings, and while the Board has conceded that an order of *certiorari* can be made on one ground raised directly by one of the applicants (Mr. Sweetman) and indirectly or peripherally by another applicant (Clonres), it has not been suggested by any of the applicants that the court should require the delivery of opposition papers in respect of all of the other grounds raised and should proceed to conduct a hearing and deliver judgment on all of those other grounds. It would, in my view, be inappropriate, in light of the concession made by the Board, to take such a course. I adopt the approach taken by Kelly J. in *Usk* where he granted an order of *certiorari* solely on the ground conceded by the Board in that case. Kelly J. went on to state:-

> *"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).

41. I agree with those observations. I will, therefore, make an order of *certiorari* in the terms set out in para. 1 of the draft order proposed by the Board.

42. I should make clear however that that is the only basis on which I am making the order of *certiorari*. I have not adjudicated on or determined any of the other grounds advanced by the applicants in any of these three sets of proceedings. No issue of *res judicata* or issue estoppel arises by virtue of the order of *certiorari* which I have decided to make on the basis of the limited concession made by the Board. Should the applicants decide to commence fresh proceedings arising out of any further decision which the Board may make in light of the order of *certiorari*, they will be free to advance all or any of the grounds which they have advanced (and on which I had previously found to be "*substantial grounds*") in those proceedings. This is, of course, subject to the applicants persuading the court in the event of such further proceedings being brought that "*substantial grounds*" arise in respect of a challenge to any further decision which the Board may make on foot of Crekav's application.

Remittal

43. The next issue which arises is whether I should remit the application to the Board and, if so, the point in time at which it should be remitted or whether I should simply make the order of *certiorari* so that the application would have to start again from scratch if the developer wishes to pursue it. Further issues arise in the event that I were to decide to remit the application to the Board. They include the directions (if any) which ought to be made in the event of such remittal in relation to the timing of the decision which would have to be made by the Board and in relation to the composition of the Board in making any such decision.

44. There are a number of relevant authorities on the question of remittal and the basis on which the court should exercise its jurisdiction to remit. The most significant authorities in this context are the decisions of Kelly J. in *Usk*, Clarke J. in *Christian* and Peart J. in *O'Grianna*. The following principles can be discerned from those decisions:-

"(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. 27(4)(formerly r. 27(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 27(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'Grianna* para.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).

45. While some of the principles summarised above may not be directly applicable to the present case, where I have decided to make an order of *certiorari* on the basis of the limited concession made by the Board that the decision contained an error on the face of the record, most of the principles are readily applicable. In light of those principles and the considerations underlying them, I have decided that it would be appropriate for me to remit the application to the Board rather than to make an order of *certiorari* simpliciter. If I were not to exercise my discretion to remit the application to the Board, it would give rise to an unnecessary and disproportionate delay in finalising the statutory process and would be unnecessarily and disproportionately onerous on the developer. I bear in mind the observations in all of the cases mentioned earlier that the court should give careful consideration to whether it is possible to remit a decision to the decision-maker and should lean in favour of doing so. I am also conscious of the observations of Clarke J. in *Christian* and in *Tristor* that, in the event of a remittal, the court should not remit the matter back excessively far in time in the process and should seek to ensure that the process can re-commence at the latest point in time consistent with the legality or invalidity found or, in this case, conceded by the decision-maker. In exercising my discretion to remit in the present case, I will endeavour to remit the application no further back in the process than is necessary to undo the consequences of the conceded invalidity so that the process can resume before the Board as far as possible immediately before the unlawful or invalid step which has given rise to the order of *certiorari*.

46. I bear in mind the reliance placed by the applicants in the Clonres proceedings and in the Conway proceedings on the Board Direction, which is dated 28th March, 2018, and their contention that the Direction sets out (or records) an incorrect test for the purposes of

appropriate assessment and that if the matter were to be remitted (contrary to their principal contention that it should not be so remitted), it would have to be remitted back in the process to the point where the Board met to consider the submissions and the inspector's report (which was finalised on 23rd March, 2018). That meeting was held on 27th March, 2018 (according to the Board Direction). I have also taken into account the reasonable acceptance by counsel for Mr. Conway that there could be no difficulty with the Board having another meeting if the matter were remitted to it should the Board deem it necessary to have such a meeting.

47. In light of all of these considerations, and bearing in mind that it is necessary to attempt to achieve some precision as to the point in time to which the matter should be remitted, it seems to me that the appropriate order to make in the exercise of my discretion is to refer the application back to a point immediately after the Inspector finalised her report on 23rd March, 2018. While I considered whether or not it would be possible to frame the terms of the remittal in such a way as to send the application back to the Board to take it up again at the point of any meeting which the Board may feel necessary to convene to reach a decision on the application, I found it difficult to frame the terms of the remittal precisely enough to ensure certainty and to avoid excessive interference with the discretion of the Board in the exercise of its functions. In those circumstances, doing the best that I can, I have concluded that the appropriate point in time to which to remit the application is the point immediately after the Inspector finalised her report on 23rd March, 2018.

48. Bearing in mind the limited nature of the concession made by the Board which is the basis on which the order of *certiorari* is made, it should be stressed that I have not determined any of the other grounds which have been raised by the applicants in these three sets of proceedings and on which I previously found the applicants had satisfied the test of raising "*substantial grounds*" for the purpose of obtaining leave to seek judicial review in respect of the Board's decision. No issue estoppel or *res judicata* arises in respect of any of those grounds. In the event that proceedings are brought by the applicants in respect of any further decision which the Board may make on foot of the application following its remittal, it remains open to the applicants to raise any of these grounds in any such further proceedings (subject, of course, to persuading the court in any such further proceedings that those grounds amount to "*substantial grounds*" for the purpose of challenging any such further decision which the Board may make on the application).

Directions

49. As is clear from the authorities discussed above, it is open to the court when remitting an application to the Board to give directions. It is also open to the court to make recommendations, or suggestions short of directions. The court's discretion is very wide in that regard. The Board has requested that directions be given in relation to the time period within which the Board should make its decision on the application following its remittal. I agree that it is open to me to give such directions. In doing so, I bear in mind the observations of Clarke J. in Christian (at para. 4.17) that I should attempt to replicate, insofar as may be practicable, the legal requirements which would apply under

statute in respect of the making of the decision by the Board (subject, of course, to there being no statutory impediment to such directions).

50. I am satisfied that it is appropriate to make a direction along the lines proposed by the Board at para. 3 of the draft proposed order save that I will vary the proposed direction to replace the period of four weeks referred to in the draft with a period of six weeks for reasons which I will explain shortly. I referred earlier in my judgment to the parties' respective submissions in relation to the timing directions sought by the Board. In my view, it is appropriate in the interest of certainty and in the interest of fairness for all parties (including the applicants and the developer) that I should give directions in relation to the timing of the Board's decision. I am satisfied that it is open to me to do so and that I am not precluded by virtue of any provision in the 2016 Act or otherwise from giving such directions. In that regard, I accept the Board's submission in relation to the provisions of ss. 9(9)(a) and 9(13) of the 2016 Act. Section 9(9)(a) does not provide, in the event that the Board fails to make a decision within the 16 week period referred to therein, that the application is to lapse. Nor does it specify any other consequence for the validity of the application in the event that the Board fails to make its decision within the 16 week period. The only consequence appears to be that contained in s. 9(13) which is that the Board must proceed to make its decision notwithstanding that the period has expired and will be subject to an obligation to make a payment to the developer in such circumstances. I am satisfied, therefore, that there is no statutory impediment to me giving a direction that the time set out in s. 9(9)(a) of the 2016 Act should expire at a particular point in time in respect of the application remitted to the Board.

51. Before finalising what that period of time should be, I should address the submission made on behalf of some of the applicants that in the event of a remittal, I should direct that the application be considered by a differently constituted Board to that which made the original decision. Having considered the submissions of the parties on this issue, I do not propose to give a direction to the Board that a differently constituted Board should consider the application following its remittal. The Board has conceded that it made a legal error in the manner in which it recorded the test for appropriate assessment in the decision. It may or may not have made other legal errors both in relation to the test for appropriate assessment which it applied or otherwise. I am not making any decision in relation to any other alleged error or errors by the Board. However, insofar as the conceded error is concerned, it would not, in my view, justify me giving a direction that the Board should ensure that the members who consider the application following its remittal should be different to those who were involved in the original decision. It is a matter for the Board to decide what members should be involved. That said, it may well be prudent for the Board, if it is practically and administratively possible, to try to ensure that members who were involved in the original decision are not involved in the decision following its remittal. However, that is a matter for the Board and I will not make any direction or recommendation in that regard.

52. Recognising that the Board may decide itself to constitute its membership differently when considering the application following its remittal, and bearing in mind that this point

was made for the first time by counsel for some of the applicants in their oral submissions on 26th July, 2018 in circumstances where it was not possible for counsel or solicitors to obtain instructions from the Board and bearing in mind the August holiday period, it would be appropriate to slightly vary the time period referred to in the proposed direction in relation to timing from four weeks to six weeks.

53. I will, therefore, make an order in terms of para. 3 of the draft proposed order but will replace the period of four weeks referred to in the draft by a period of six weeks.

Costs

54. While the Board has conceded in correspondence that it will pay the costs of the applicants (to include reserved costs) up to 16th July, 2018, I will direct that the Board pay the costs of the applicants in the three sets of proceedings (to include reserved costs) up to the date of the delivery of this judgment. In my view, it was reasonable for the applicants to tease out the basis on which the order of *certiorari* was being conceded and to address the question of remittal and the terms of any such remittal. In those circumstances, I will make an order for the applicants' costs in each of the three sets of proceedings as against the Board (to include reserved costs) up to the date of delivery of this judgment to be taxed in default of agreement.

Orders

55. I will make orders in the following terms for the reasons set out earlier:-

(1) An order of *certiorari* quashing the decision of the first named respondent dated 3rd April, 2018 (Case Ref:- PL29N.300559) to grant permission to Crekav Trading GP Limited for development on lands east of St. Paul's College, Sybil Hill Road, Raheny, Dublin 5 on the ground that the said decision contained an error on the face of the record as regards the recording of the test applied by the Board in reaching its appropriate assessment conclusion.

(2) An order remitting the application for permission to the first named respondent to be determined in accordance with law, such remittal to take effect from the point in time immediately following the time at which its Senior Planning Inspector signed her report on 23rd March, 2018.

(3) An order deeming that the time period set out in s. 9(9)(a) of the Planning and Development (Housing) and Residential Tenancy Act 2016 (as amended) shall, in respect of the application remitted herein, expire six weeks from the date of the perfection of the orders made herein.

(4) An order for the applicants' costs as against the first named respondent, to include reserved costs, up to the date of delivery of this judgment on 31st July, 2018, to be taxed in default of agreement.

(5) No further order.

56. The above orders are to be made in each of the three sets of proceedings.