THE HIGH COURT

COMMERCIAL
JUDICIAL REVIEW

[2019 No. 318 J.R.]

BETWEEN

BARNA WIND ACTION GROUP

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENTS

AND

CORK COUNTY COUNCIL

ARRAN WINDFARM LIMITED

BARNA WIND ENERGY (B.W.E) LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 17 April, 2020

1. The issue to be decided in these judicial review proceedings is whether a remittal order should be made pursuant to O. 84, r. 26 (4) of the Rules of the Superior Courts. The parties are agreed that an order of *certiorari* should be made but the applicant contends that this is not an appropriate case in which a remittal should be ordered.
2. In this case, the Respondent ("the Board") initially delivered a comprehensive statement of opposition in which it fully contested the applicant's claim for orders quashing the Board's decision dated 2nd April, 2019 to grant permission to the third

named notice party ("the developer") for the construction of a windfarm at Terelton, Co. Cork together with its decision of the same date granting permission to the second named notice party ("Arran") for the construction of an associated electricity sub-station compound. However, following the decision of the Supreme Court in *Balz v. An Bord Pleanala* [2019] IESC 90, the Board decided to consent to the orders of *certiorari* sought. In *Balz,* the Supreme Court ruled that the Board had erred in failing to pay adequate regard to submissions made to it that the Wind Energy Development Guidelines 2006 ("the 2006 Guidelines") were outdated and should not be followed. The Supreme Court concluded that the inspector appointed by the Board, was incorrect in rejecting the submissions in relation to the 2006 Guidelines without giving any consideration to those submissions. In turn, the Board's decision was held to be invalid as it had adopted the inspector's report. In the present case, a similar approach was taken by the inspector who, having summarised the submissions made in respect of the 2006 Guidelines, concluded that: *"the national guidance prevails and it would be unacceptable for the Board to pursue any alternative".* The inspector's approach was followed by the Board.

3. A draft court order was prepared by the Board which was circulated to all of the parties in which, in addition to providing for the orders of *certiorari,* it was also proposed that the court would remit both of the underlying applications for permission to the Board to be determined in accordance with law. The proposal to remit the matters to the Board is supported by the developer but is strongly opposed by the applicant although the applicant, very properly, accepts that the court has jurisdiction to remit the applications to the Board pursuant to O. 84 r. 26 (4) of the Superior Court Rules.

4. The applicant submits that, having regard to the length of time which has elapsed since the applications for planning permission were first made, it would be wholly inappropriate to remit the matter to the Board. The applicant submits that remittal is particularly inappropriate in circumstances where Directive 2011/92/EU ("the 2011 EIA Directive") has been amended significantly in the intervening period by Directive 2014/52/EU ("the 2014 Directive") which was implemented by the State on 1st September, 2018 by virtue of the European Union (Planning & Development) (Environmental Impact Assessment) Regulations 2018 (S. I. No. 296 of 2018) ("the 2018 Regulations").

5. In order to understand the concerns of the applicant in relation to the proposal to remit, it is necessary to outline the relevant underlying facts.

Relevant Facts

6. The planning applications for the sub-station and windfarm were initially lodged with the first named notice party ("the Council") on 26th September, 2014 and 19th December, 2014 respectively. The sub-station application was not accompanied by an environmental impact statement ("EIS") but was accompanied by an environmental report. An EIS was submitted with the application for permission in respect of the windfarm. That EIS was prepared in accordance with the requirements of the 2011 EIA Directive which, in its unamended form, was the governing EU law measure at that time. Under the transitional provisions set out in Article 3 of the 2014 Directive, applications which were initiated prior to 16th May, 2017, continue to be subject to the 2011 EIA Directive in its unamended form.

7. Following requests for further information in respect of both applications, the Council granted permission for the sub-station on 13th January, 2015 and for the windfarm on 3rd November, 2015. Both decisions were appealed to the Board which granted

permission for the windfarm on 8th July, 2016 and for the sub-station on 11th July, 2016. In turn, both of those decisions were the subject of judicial review proceedings (*Larkin v. An Bord Pleanala* 2016 No. 614 JR) brought by members of the applicant. In those proceedings, the Board, on 1st November, 2016 consented to an order of *certiorari* in respect of both of its decisions. I am informed that this was on fair procedures grounds in circumstances where there had been a failure to circulate a submission made by the developer in the windfarm appeal. Although that failure arose in the windfarm appeal, the Board consented to a similar order in respect of the sub-station appeal on the basis that its decision in that appeal was taken at the same meeting as its decision on the windfarm. By order made on 1st November, 2016, the court quashed both decisions of the Board and remitted the matters pursuant to O. 84, r. 26 (4).

8. According to the applicant, in the subsequent consideration of the appeals by the Board, submissions were requested from the applicant and both Arran and the developer responded to those submissions. Counsel for the applicant highlighted that, at no stage, during that process, was an updated or revised EIS submitted notwithstanding that the EIS dates from 2014. Nor was any updated environmental report submitted in respect of the sub-station.

9. On 28th December, 2018, the inspector appointed by the Board completed her report in respect of the sub-station appeal. Subsequently, on 18th January, 2019 she completed her report in respect of the windfarm appeal. In both reports, she recommended that permission should be granted by the Board. In turn, the appeals were considered by the Board at its meeting on 14th March, 2019. As recorded in two Board directions dated 15th March, 2019, the Board decided to grant permission in respect of both developments *"generally in accordance with the Inspector's*

recommendation". These judicial review proceedings were then commenced pursuant to an order made by the court on 27 May, 2019 on foot of a statement of grounds dated 24 May, 2019 supported by a verifying affidavit sworn by Mr. Denis Buckley on the same day.

The position taken by the applicant in relation to remittal

10. I had the benefit of extensive and very helpful written and oral submissions made by counsel for the applicant. It was submitted that, having regard to the passage of time since the applications for permission were first made and having regard to the changes to the 2011 EIA Directive which have come into force in the intervening period, it would be inappropriate to remit the matter to the Board at this stage.

11. Counsel strongly urged that it cannot be assumed that, in the period which has elapsed since the 2014 EIS was compiled, the local environment has remained unchanged. It was also submitted that the changes to the regulatory regime made by the 2014 Directive and the 2018 Regulations were significant such that it would be wrong that the applications would now be assessed in 2020 by reference to requirements of the 2011 EIA Directive in its unamended form.

12. It was also argued that, if the matters were remitted to the Board at this stage, there would be no opportunity available to the public to make submissions in relation to relevant changes in the local environment which have arisen since the applications for permission were first made in 2014. If, however, the planning process started afresh with new applications being made to the Council, there would be all of the usual opportunities for the public to participate in the process and to raise all relevant environmental concerns.

13. In addition, the applicant contended that, if the applications are remitted to the Board, they will fall to be decided in accordance with the 2006 Guidelines which the

applicant submits are out of date and unfit for purpose in respect of windfarm noise. The applicant also highlighted that it will be put to additional trouble and expense if the matter is remitted to the Board for a second time. The case was also made that a remittal would deprive the applicant of the "fruits of its labours" in these proceedings and would not achieve a just result.

14. The applicant has sought to rely on the *obiter* observations of Simons J. in *Ardragh Wind Farm Limited v An Bord Pleanala* [2019] IEHC 795 at para. 66 in which he suggested that remittal in that case would be contrary to the spirit of the EIA Directive (with its requirement for timely decision making) where it would have the effect of reviving a planning appeal determined 5 years previously.

The position taken by the Board

15. Very helpful written and oral submissions were made by counsel for the Board. It was submitted on behalf of the Board that, in circumstances where the Board was solely responsible for the errors that arose, it would be unfair to the developer if remittal were not ordered. With regard to the applicant's concerns about the effect of the passage of time, it was submitted that it would be appropriate that this should be addressed by the Board following remittal. It was also argued that the observations of Simons J. in *Ardragh* should be distinguished on the basis that, there, the applicant developer had been guilty of significant delay in prosecuting the judicial review proceedings. The 4.5 year delay on the part of the developer, in seeking a hearing date, was described by Simons J., in para. 4 of his judgment, as inordinate.

16. Counsel for the Board argued that the effect of quashing the decisions of the Board to grant permission for the windfarm and sub-station meant that, under the transitional provisions applicable under the 2014 Directive, the applications for permission would

fall to be considered by the Board under the EIA Directive in its unamended form. He suggested that this was consistent with a reading of Recital 39 to the 2014 Directive.

17. In answer to a question from me, counsel accepted that, if the court was minded to make a remittal order, this could be made subject to a direction that an updated EIS should be required. However, he submitted that it would be unwise and potentially inappropriate for the court to make such a direction since it would unduly trammel the discretion of the Board as the expert body entrusted by the Oireachtas to make final planning decisions. Counsel suggested, by way of example, that such a direction would prevent the Board from coming to the conclusion that the length of time which has elapsed since the applications were first made is simply too great to allow the Board to safely conclude that permission should be granted.

The position taken by the developer

18. Although the developer did not submit written submissions as directed by order of Barniville J. made on 3rd March, 2020, I heard comprehensive and helpful oral argument from counsel for the developer at the hearing of this issue on 10th March, 2020. Counsel submitted that it would be unfair and unjust if the developer, through no fault of its own, was forced to restart the planning process from the outset. He suggested that the developer would suffer an obvious prejudice if remittal was not ordered. In contrast, he suggested that it was difficult to see what prejudice would arise for the applicant.

19. Counsel for the developer also submitted that, in the event of remittal, the Board would be free to request further information or a new or updated EIS. He agreed with counsel for the Board that this is a matter that would be best left to the expertise of the Board rather than built into the terms of a remittal order. He also adopted the submissions of counsel for the Board, more generally.

20. In response to the applicant's submissions, counsel for the developer noted that the issue in relation to the age of the EIS does not feature in the applicant's statement of grounds or in the verifying affidavit sworn by Mr. Denis Buckley, on behalf of the applicant, on 24th May, 2019. Counsel also highlighted that the permission sought is of 10 years duration and he suggested that this means that the EIS therefore, of necessity, has an element of *"future proofing"* built into it.

21. With regard to the concerns expressed by the applicant in relation to the changes made by the 2014 Directive, counsel acknowledged that Article 1 (3) of the 2014 Directive amends Article 3 (1) of the EIA Directive to expressly require (*inter alia*) that an environmental impact assessment ("EIA") should address the direct and indirect effects of a proposed development on population and human health. However, he suggested that these considerations were within the contemplation and spirit of the 2011 EIA Directive in its unamended form. In its original form, article 3 (a) of the 2011 EIA Directive requires that an EIA should address potential impacts on human beings. He emphasised that impacts on human health have always been considered in the context of an EIA carried out under the 2011 EIA Directive in its unamended form. He submitted that factors such as the impact of noise on nearby residents arising from the construction and operation of a windfarm have regularly been addressed in the EIA of proposed windfarm developments and that the changes made by the 2014 are not as significant as the applicant suggests.

Discussion and analysis

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.

23. As noted in para. 2 above, the reason why the Board has conceded that its decisions should be quashed is that, in this case, the inspector (whose approach was followed by the Board) fell into the same error as occurred in *Balz*. The view was taken that the 2006 Guidelines had to be applied notwithstanding the submission made by the applicant that those guidelines were out of date and unfit for purpose. As the applicant's statement of grounds and the verifying affidavit of Mr. Buckley make clear, this submission was grounded on extensive materials including a report from a well known acoustic expert, Mr. Dick Bowdler who identified that the 2006 Guidelines do not address a particular type of noise which he suggested is associated with wind turbines namely amplitude modulation or *"blade swish"*. As the judgment of O'Donnell J in *Balz* shows, Mr. Bowdler had also acted as expert in that case.

24. In light of the similarity between the facts of this case and the facts underlying the decision in *Balz,* it is unsurprising that the Board should now be prepared to concede that its decisions in respect of the windfarm and sub-station cannot be allowed to stand. This concession on the part of the Board is in the interests of all parties and in the interests of the efficient administration of justice.

25. At this point, it should be noted that the issue in relation to the 2006 Guidelines represents a substantial element of the applicant's pleaded case as set out in its statement of grounds. Of the 31 paragraphs (running from para. 38 to 68 inclusive)

setting out the legal grounds on which the applicant seeks relief, the claim in relation to the 2006 Guidelines takes up 8 paragraphs. The case made in paras. 57 to 64 is that the Board and its inspector failed to consider or give adequate regard to the submissions in relation to the 2006 Guidelines and, in doing so, erred in law and acted in breach of its obligations under the EIA Directive. The issue is also extensively addressed in Mr. Buckley's affidavit to which he also exhibits Mr. Bowdler's report together with a large number of appendices. I believe it is fair to say that the issue of noise and the manner in which noise was addressed by the Board and its inspector represents a matter of great concern to the applicant. Thus, as a consequence of the Board's concession on this ground, the applicant will, to paraphrase the argument made by its counsel in their submissions to the court, reap the fruit of its labours. If the matter is remitted to the Board, the applicant will know that the Board will be required, in accordance with the principles established in *Balz,* to address the comprehensive submissions previously made by it in relation to the issue of noise. In considering the question of justice or fairness, that is a significant factor to be weighed in the balance.

26. In addressing the question of justice or fairness, it is also important, in my view, to consider the other elements of the case made by the applicant in its statement of grounds. One of the striking features of the case made by the applicant in its statement, is that, save in one respect (addressed in para. 29 below), no complaint is made about the EIS submitted in 2014. In particular, no complaint is made about the adequacy of the EIS or about its fitness for purpose notwithstanding that 4.5 years had already elapsed between the date of its submission and the date of commencement of these proceedings. I return to this issue in para. 29 and paras. 31 to 33 below.

27. In paras. 38 to 48 of the statement of grounds, the applicant makes the case that the Board failed to carry out or to record an EIA in relation to the windfarm development. This case is advanced primarily on the basis that there is no evidence or record that the Board itself carried out an EIA. The point is made in para. 43 that the Board order does not state that the Board adopted the EIA carried out by its inspector. In para. 46, the point is made that the Board order likewise does not record any factors that the Board took into account in carrying out an EIA and that it does not record the significant effects (direct or indirect) the development will have on the environment and whether those effects will be satisfactorily mitigated. Notably, no complaint is made (other than in relation to noise) that the EIA carried out by the inspector was deficient in any respect.

28. The next element of the case advanced by the applicant is pleaded at paras. 49 to 54. The case made here is that the Board failed to provide reasons for its EIA in relation to the windfarm development. The nub of the case is that the Board did not adopt the conclusions reached by the inspector and accordingly it is argued that the Board cannot rely on the inspector's report. Again, it is notable that no complaint is made here about the adequacy of the EIA exercise carried out by the inspector.

29. The third element of the applicant's case is pleaded in paras. 55 to 56 of the statement of grounds. These are the only paras. that raise an issue in relation to the EIS in respect of the proposed windfarm. The case made here is simply that there has been a failure to comply with the requirements of s. 172 (1D) of the Planning and Development Act 2000 ("the 2000 Act"). Under s. 172 (1D), the Board is required to consider whether the EIS adequately identifies and describes the direct and indirect effects on the environment of the proposed development. In para. 56, the applicant notes that, while the inspector records the view in her report that the information in

the EIS is sufficient, there is no adoption by the Board of her view and no other evidence in the Board order to suggest that the Board addressed its mind to this issue. As noted in para. 26 above, no case is made that the EIS is deficient or out of date.

30. The final element of the case made by the applicant is pleaded in paras. 65 to 68 of the statement of grounds. There, the applicant, under the heading *"project splitting"*, alleges that the Board failed to carry out an EIA in respect of the entire project comprising both windfarm and sub-station. The applicant contends that there was a failure to carry out a cumulative assessment.

31. In light of the nature of the debate that arose in relation to the application to remit, it is noteworthy that no case is made in the statement of grounds that the EIS is deficient in any way or that it is out of date. Nor is any case made that it is contrary to the spirit of the EIA Directive (as amended by the 2014 Directive) that the Board decided the appeals by reference to the 2011 EIA Directive in its unamended form. In this context, it must be borne in mind that these proceedings were commenced on 27th May, 2019. At that point, 4.5 years had already passed since the application for permission for the windfarm had been made to the Council on 19th December, 2014 accompanied by the EIS. That is the same period of time that led Simons J. to make the observation noted above in para. 66 of his judgment in *Ardragh*. It is also the case that, at the time of commencement of these proceedings, the amendments made by the 2014 Directive had come into effect as of 16th May, 2017 and that the 2014 Directive had been implemented in Ireland by virtue of the 2018 Regulations. Accordingly, at the time of commencement of these proceedings, the applicant could have raised the point now ventilated by it at the hearing on 10th March, 2020, that the EIS was out of date and that it was contrary to the spirit of the EIA Directive (as amended by the

2014 Directive) for the Board to have decided the appeals by reference to the old regime under the unamended EIA Directive.

32. It is true that, by the time the Board, at a hearing before Barniville J. on 18th February, 2020, intimated its intention to consent to an order of *certiorari,* a further period of 9 months had passed. However, given the passage of time which had elapsed, as of the date of commencement of these proceedings, since the EIS was submitted in 2014, I am not sure that this additional 9 month period can adequately explain the shift in position taken by the applicant in relation to the adequacy of the EIS. As noted above, the applicant raised an issue in relation to the EIS in the statement of grounds by reference to s. 172 (1D) of the 2000 act. Yet, it chose to raise no complaint of the kind argued by it so strongly at the hearing before me on 10th March or to raise any other complaint about the adequacy of the EIS submitted in 2014.

33. Accordingly, while I do not suggest that the concern about the passage of time should not be weighed as an important factor in considering where the balance of justice lies, I do not believe, in the particular circumstances of this case, that it can be said to be a determining factor. It is one of several factors that must be borne in mind.

34. A further factor to bear in mind, is the ability of the Board, in the event of a remittal, to seek updated information on the existence and impact of any relevant changes in the local environment. I have considered whether I should, in the event of remittal, direct the Board to request such additional information. I have come to the conclusion that it would not be appropriate to do so. As counsel for the Board submitted, to do so would significantly trammel the Board's discretion in the exercise of its expert assessment of the issues. That said, it seems to me that it would be wise for the Board to request updated material. While I stop short of directing the Board to do so, I

would, in accordance with the *Clonres* principles, recommend that, in the event of remittal, the Board should take that course given the passage of time which has elapsed since the EIS was submitted to the Council in 2014.

35. A concern was voiced by the applicant at the hearing that, in the event that further information is requested by the Board, there would be no opportunity for public participation. However, if additional significant information is received by the Board in response to such a request, the Board will be required to publish notices informing the public of the existence of the information, the availability of inspection facilities and the opportunity to make submissions in relation to it. Such a requirement exists both under Regulation 113 of the Planning and Development Regulations 2001 (as amended) and also under Regulation 113 of the 2018 Regulations. Thus, whichever of those two regimes apply, any additional significant information submitted in relation to environmental issues will be subject to public scrutiny and participation. For that reason, this concern on the part of the applicant does not appear to me to carry significant weight.

36. For completeness, it should be noted that a debate took place at the hearing on 10th March as to whether, in the event of remittal, the pre-existing regime under the unamended 2011 EIA Directive and implementing regulations would apply or whether the Board would be obliged to apply the provisions of the 2018 Regulations implementing the changes made by the 2014 Directive. I do not believe that it would be appropriate for me, on an application of this kind, to make any final determination on that issue. That seems to me to be a matter that would require more extensive legal debate following the exchange of the usual judicial review pleadings. I merely observe that the *prima facie* position appears to be that, if the decisions of the Board are quashed, the appeals would fall to be considered under the unamended 2011 EIA

Directive and relevant implementing national provisions. That seems to follow from the transitional provisions of Article 3 of the 2014 Directive. I stress that I make no determination to that effect. This seems to me to be an issue that will have to be considered by the Board in the event of a remittal and any decision by the Board will be subject to challenge in due course by the applicant or any other party with the necessary *locus* to challenge the Board's decision.

37. Nonetheless, in considering the issue of justice and fairness, I must bear in mind the fact that an issue arises as to whether the amendments made by the 2014 Directive will apply to any future consideration of the appeals in the event of remittal. In this context, I agree with the applicant that it is inherently undesirable that an application for permission made as long ago as 2014 should be determined in 2020 by reference to legal provisions which have since been the subject of significant overhaul. However, the force of that concern is diluted to some extent, in this case, by the fact that the applicant has not pointed to any specific aspect of the changes in the law which would significantly affect the outcome for the specific developments in issue here. While the issue of noise is, undoubtedly, of concern to the applicant, nothing in the 2014 Directive has been identified which materially changes the legal position with regard to noise. Moreover, as counsel for the developer observed, in the course of his submissions, the noise impacts of a proposed development on those living in the surrounding area has long been a feature of EIA in Ireland. In these circumstances, I do not believe that this factor, although relevant, can be said to be determinative.

38. In accordance with the *Clonres* principles, I must also bear in mind the expense and inconvenience that will inevitably arise for the developer by sending the matter back to the drawing board. Unlike *Ardragh,* the developer here has not been responsible for the delay which has ensued. In particular, the developer has not been responsible for

any of the missteps that have been taken by the Board. Thus, I believe that, unlike in *Ardragh,* the issue of prejudice to the developer is a factor to which I must also have regard.

39. I fully appreciate and accept that the developer is not the only party who is likely to incur further cost as a result of a decision on the issue of remittal. The applicant has also made the case that, if the matter is remitted, it will suffer additional cost and expense in dealing with the matter for a third time before the Board. However, it is important to keep in mind that the applicant will be entitled to its costs of these proceedings at least up to the hearing of the application in relation to remittal on 10th March. In so far as noise is concerned, it has already incurred all of the cost of the preparation of Mr. Bowdler's report and detailed appendices. A remittal is therefore unlikely to increase its cost and expense in relation to the issue of noise which, as previously noted, is obviously an issue of great concern to the applicant. It is true that it is likely to incur further cost and expense in addressing any additional issues which may arise in the course of the Board's consideration of the appeals. For example, if the Board seeks updated environmental information, there may be a need for the applicant to make further submissions as envisaged by Regulation 113. That said, if the developer is sent back to the drawing board and has to submit a fresh application for permission to the Council, the additional cost and expense likely to be incurred by the applicant will be substantially higher. For that reason, I am not persuaded that the cost to be incurred by the applicant, in the event of remittal, is a significant factor in the overall assessment of justice and fairness.

40. Thus, on the one hand, weighing in favour of remittal, there is an obvious prejudice to the developer who has not caused any of the errors made by the Board. Also weighing in favour of remittal is the consideration evident in the *Clonres* principles, that the

court should endeavour to avoid an unnecessary reproduction of a legitimate process. In addition, it is relevant that remittal will bear significant fruit for the applicant since it will require the Board to consider the very detailed submissions made on its behalf with regard to noise and in particular with regard to the adequacy of the 2006 Guidelines. Also weighing in favour of remittal, is the fact that the Board (which, in accordance with the *Clonres* principles, should be treated as a disinterested party) has taken the view that it can carry out its statutory functions in the event that a remittal is ordered. It is clear from *Clonres* (and the authorities cited by Barniville J.) that the court should not lightly disregard that view.

41. On the other hand, weighing against remittal, there are the concerns about the passage of time, the uncertainty as to whether the amendments made by the 2014 Directive will apply to the future conduct of the appeals, the undesirability of assessing the 2014 applications for permission by reference to the pre-existing legal position (if it continues to apply) and the concern in relation to public participation. While these considerations may well carry very considerable weight in other cases, I do not believe that they are of sufficient weight in this case to displace or outweigh the factors in favour of remittal summarised in para. 40 above. I have come to that conclusion for the reasons outlined in paras. 31 to 34 and 37 above.

42. For the reasons described in paras. 31 to 33, it is clear that the concerns expressed by the applicant at the hearing in March 2020 were not regarded by it as significant when these proceedings were launched less than a year ago. In such circumstances, those concerns do not carry as much weight as they might otherwise do.

43. Furthermore, for the reasons described in para. 34 above, it will be open to the Board to seek further information to address changes in the environment which have taken place since the applications were first made in 2014 (and I am recommending to the

Board that it should take that course). If that step is taken, and if it results in significant additional information coming to light, this will trigger further public scrutiny and participation. If the Board does not take that course, its decision will be subject to challenge in the future. While I appreciate that any such challenge (should it be necessary) will add to the expense incurred by the applicant, I must bear in mind that, if successful, the applicant is likely to be able to recover a just proportion of its costs in accordance with the principles laid down in the Legal Services Regulation Act 2015 and O. 99 R.S.C.

44. I also bear in mind that, as noted in para. 37 above, the applicant has not identified any significant changes in the new regulatory regime introduced by the 2014 Directive which would have a major impact on the specific developments proposed here. It is clear from the statement of grounds, that the noise impacts of the proposed developments are of particular concern to the applicant. However, if the unamended regime continues to apply, the impact of noise arising from the proposed developments on humans will still have to be addressed as part of any EIA to be conducted by the Board. In the course of the hearing on 10th March, nothing has been identified in the amendments made by the 2014 Directive that would substantially improve the applicant's position in so far as noise is concerned. Furthermore, if the matter is remitted, the detailed submissions on behalf of the applicant in relation to noise (in particular, the submission made under cover of its solicitors' letter dated 29th January, 2019 which is exhibited to Mr. Buckley's affidavit) will have to be addressed by the Board afresh.

45. In expressing the views set out in para. 44 above, I am conscious that, as the applicant argued in its written submissions, Article 5 of the EIA Directive (as amended by the 2014 Directive) now expressly prescribes (by reference to the new form of Annex IV)

more extensive detail to be included in an Environmental Impact Assessment Report ("EIAR") than was formerly prescribed in Annex IV to the 2011 EIA Directive in its unamended form in respect of the content of an EIS. This includes the requirement to provide a description of the relevant aspects of the *"current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the project as far as natural changes from the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental; information and scientific knowledge"*. However, this does not seem to me to be any material assistance to the applicant in so far as noise is concerned. Moreover, it seems to me that, if the Board concludes that the appeals, following remittal, are to be assessed under the 2011 EIA Directive in its unamended form, the issue of changes to the receiving environment can be addressed by the Board (as recommended by me) making a request of the kind summarised in para. 34 above. In this context, it would be unwise for me to stipulate that such a request should take any particular form. I will leave that to the expert determination of the Board. However, it seems to me that the Board should be able to proceed in a manner that will appropriately address the passage of time since the EIS was first submitted to the Council in 2014.

Conclusion

46. In light of the considerations discussed in paras. 40 to 45 above, I have come to the conclusion that it is just and fair, in all the circumstances of this case, to make a remittal order pursuant to O. 84, r. 26 (4). In making that order, I recommend to the Board that it should seek further material to address changes in the receiving environment in the intervening period since the EIS was prepared but I will leave it up to the Board to decide for itself how it should proceed.

47. Accordingly, in addition to an order of *certiorari* quashing the two decisions of the Board (Ref. PL04.248153 and Ref. PL04. 248152) both dated 2nd April, 2019, I will also make an order that the subject matter of both decisions be remitted to the Board pursuant to O. 84, r. 26 (4) to be determined in accordance with law. It seems to me to follow that the applicant must be entitled to its costs of the proceedings (but excluding pending further submissions, the costs of the application to remit), to include reserved costs, such costs to be adjudicated by the Legal Costs Adjudicator in default of agreement.

48. In my view, the grounds on which *certiorari* should be granted are those set out in paras. 57, 63 and 64 of the statement of grounds. If any party has any difficulty with this suggestion, they can address me by way of written submission by email addressed to the registrar (copied to all other parties) within 14 days from today, following which I will rule on the issue.

49. In so far as the costs of the application to remit are concerned, I will direct, in light of the ongoing Covid-19 outbreak, that, in the absence of agreement between the parties to be notified by email to the registrar within 7 days from today as to how those costs are to be dealt with, all parties who participated in the hearing on 10th March, 2020 should furnish their submissions on the costs of the application to remit by email to the registrar not later than 14 days from today, following which I will rule in writing on the question of the costs of the remittal application.