

**THE HIGH COURT**

**JUDICIAL REVIEW**

[2022] IEHC 231

[2018 No. 593 J.R.]

**IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING  
AND DEVELOPMENT ACT 2000**

**BETWEEN**

**CORK HARBOUR ALLIANCE FOR A SAFE ENVIRONMENT**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**INDAVER IRELAND LIMITED**

**FIRST NAMED NOTICE PARTY**

**AND**

**INDAVER NV T/A INDAVER IRELAND**

**SECOND NAMED NOTICE PARTY**

**JUDGMENT of Mr. Justice David Barniville delivered on the 26<sup>th</sup> day of April,**

**2022**

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#### **A. Introduction**

1. This is my judgment on an application by the applicant, CHASE, for leave to appeal to the Court of Appeal pursuant to s.50A(7) of the Planning and Development Act, 2000 (as amended) (the “2000 Act”), from a decision made by me in a judgment delivered on 1 October 2021. The application is somewhat different to other applications for leave to appeal under s.50A(7), as the applicant is the party seeking leave to appeal in circumstances where it obtained an order of *certiorari* quashing the relevant decision of An Bord Pleanála (the “Board”) and an order was then made, notwithstanding the applicant’s opposition, remitting the relevant planning application to the Board for further consideration and determination. None of the parties were able to point to any other case in which a party in the position of the applicant obtained leave to appeal. While obviously not determinative of the outcome of the application, it is noteworthy that, despite the enormous experience of counsel and solicitors for all of the parties involved, no one could point to another application for leave to appeal in circumstances like this.

2. The application the subject of this judgment has a complex and detailed factual and procedural background which it is appropriate now briefly to outline. The full background is set out in two of the previous judgments I have delivered in the proceedings. It is unnecessary to repeat much of that detail here.

3. In judicial review proceedings commenced in July 2018, the applicant challenged a decision of the Board dated 29 May 2018 (the “impugned decision”) to grant planning permission for the development of an incinerator at Ringaskiddy, County Cork to Indaver Ireland Limited, the first named Notice Party. The applicant succeeded on two of the eleven grounds of challenge for which it had obtained leave in a judgment which I delivered on 19 March 2021 ([2021] IEHC 203) (the “principal judgment”). The two grounds on which the applicant succeeded were: (a) Ground 4 (the impugned decision was vitiated by objective bias by reason of the involvement in the decision of one of the then members and the then Deputy Chairperson of the Board, Mr. Boland) and (b) Ground 1 (the correct interpretation of the relevant statutory provisions governing Strategic Infrastructure Development (“SID”) was that the person who applies for permission for a SID must be the same entity as the person who is referred to in those provisions as the “prospective applicant”, being the person who has engaged in the required pre-application consultation procedure with the Board. Neither the applicant nor any of the other parties sought leave to appeal from any aspect of the principal judgment.

4. The parties were unable to agree on the reliefs which the Court should grant in respect of the two grounds of challenge to the impugned decision on which the applicant succeeded. With respect to Ground 4 (the objective bias issue), it was agreed by all of the parties that the Court should grant an order of *certiorari* quashing the impugned decision. The applicant maintained that the Court should make the

order of *certiorari* without remitting the decision. The Notice Parties (referred to together as “Indaver”) contended that the Court should, having made the order of *certiorari* quashing the impugned decision, remit Indaver’s planning application to the Board to be considered and determined in accordance with the principal judgment. The Board’s position was that it would be in a position to exercise its statutory powers and to discharge its statutory obligations in the event that Indaver’s planning application was remitted to it. There was some divergence between the Board and Indaver as to the point in time in the process to which the application should be remitted. The applicant strenuously opposed the remittal of the planning application to any point in the process.

**5.** There was also a dispute between the parties concerning the relief which should be granted to reflect the applicant’s success on Ground 1 (the prospective applicant/applicant issue). That issue is not relevant to the issues addressed in this judgment as no leave to appeal has been sought by the applicant in respect of the Court’s decision on the relief to be granted on that issue.

**6.** I gave judgment on the remittal application on 1 October 2021 ([2021] IEHC 629) (the “remittal judgment”). While it will be necessary to refer in greater detail later to some aspects of the remittal judgment, at this stage, it should suffice to record that I concluded that, in respect of Ground 4 (the objective bias issue), the Court should grant an order of *certiorari* quashing the impugned decision and should exercise its discretion under O.84, r.27(4) to remit Indaver’s planning application to the Board to be further considered and determined by it. I was not satisfied that the applicant’s objections to the remittal of the application to the Board were well-founded. I also concluded that the point in time in the process to which the application should be remitted was immediately prior to the decision made by the

Board (which was made on its behalf by its former member and former Deputy Chairperson, Mr. Boland) on 23 October 2017 not to afford the applicant and others the opportunity of responding to the further information and submissions received by the Board from Indaver earlier that month. The reasons for my decision on the remittal issue are to be found at paras. 86-130 of the remittal judgment. A summary of those reasons is to be found at paras. 4-6 and 159 of the judgment.

**7.** In addition, having considered the wide range of statutory powers available to the Board under the relevant statutory provisions, including ss.37F(1) and 37F(2) and s.134 of the 2000 Act, as well as developments which had taken place in the period between the impugned decision and the date of the principal judgment, I concluded that it was not necessary for the Court to direct that the Board exercise any of these or other statutory powers. I did, however, recommend that the Board give proper consideration to exercising some or all of those powers and observed that a failure properly to do so could have adverse consequences for the Board (see, for example, paras. 6, 118 and 130 of the remittal judgment).

**8.** The applicant seeks leave to appeal from the remittal judgment, the effect of which is to remit Indaver's planning application to the Board to be considered and determined by it with effect from the point in time the process was at in October 2017.

**9.** The applicant has put forward four questions or points of law which it contends are points of law of exceptional public importance in respect of which it is desirable in the public interest that an appeal to the Court of Appeal should be permitted in accordance with s.50A(7) of the 2000 Act.

**10.** For reasons I set out in this judgment, I am not persuaded that the questions or points of law proposed by the applicant are points of law of exceptional public importance. Nor am I satisfied that it is desirable in the public interest that the

applicant should be permitted to mount an appeal to the Court of Appeal in respect of these points.

**11.** In reaching my decision on the applicant's application for leave to appeal I have considered and applied the relevant principles governing applications for leave to appeal under s.50A(7), as set out and applied in numerous judgments of the High Court. My decision to remit Indaver's planning application to the Board was made in the exercise of a wide discretion vested in the Court on the basis of the application of well-established principles governing the remittal of planning applications which were largely agreed by all of the parties and the application of well-established principles governing the importance of pleadings in judicial review proceedings and, in particular, in planning judicial review cases. I am not satisfied that there is any uncertainty with respect to those principles or their application to the particular facts and circumstances of this case. Nor can it be said that the law in either of these areas is evolving so as to create any potential uncertainty. Nor also can it be said that the intervention of the Court of Appeal is necessary to address or clarify any uncertainty in the daily operation of the law governing the remittal of planning applications in Judicial Review proceedings governing the pleading obligations in such proceedings. Most, if not all of the questions or points of law proposed by the applicant, are firmly rooted in the rather unusual facts presented by this case, where the condition of objective bias existed by reason of the involvement of a member and Deputy Chairperson of the Board who is no longer a member and who will, therefore, play no part in the Board's consideration and determination of the application following its remittal, and do not transcend these facts. Furthermore, at least two of the questions or points of law proposed by the applicant do not arise out of the remittal judgment itself (Question 1(iii) and Question 3). For these and other reasons discussed below, I

have concluded that questions or points proposed by the applicant are not points of law of exceptional public importance.

12. Strictly speaking, therefore, it is not necessary for me to consider the second part of the test under s.50A(7), namely, whether it is desirable in the public interest that the applicant be permitted to appeal to the Court of Appeal on those points of law. However, I have nonetheless considered the second part of the statutory test and am not satisfied that an appeal is desirable in the public interest in the particular circumstances of this case for various reasons. Those reasons include (a) the absence of any need to clarify any uncertainty in the law in the relevant areas, and (b) the fact that to permit an appeal by an applicant who has succeeded in obtaining an order quashing the planning decision and where the relevant planning application is remitted to be determined by the Board not including the person whose involvement gave rise to the objective bias would undermine the clear legislative policy that in general the decision of the High Court in judicial review proceedings challenging a planning decision is final. These considerations combined have led me to conclude that it is not desirable in the public interest that the applicant should be permitted to appeal from the remittal judgment to the Court of Appeal.

### **B. The Remittal Judgment**

13. The judgment from which the applicant seeks leave to appeal is the remittal judgment. I referred earlier to the circumstances in which that judgment was issued.

14. Having summarised the submissions of the parties on the question of remittal, I set out my decision and my reasons for the decision at paras. 86-130 of the remittal judgment. I noted, at para. 86, that there was no dispute between the parties, that an order of *certiorari* should be made quashing the impugned decision on the grounds of

objective bias. The dispute between the parties was whether I should go on also to make an order remitting Indaver's application to the Board. I noted, at para. 88, that there was general agreement between the parties as to the principles to be applied in determining whether the application should be remitted to the Board. I referred to the main judgments which set out those principles including *Usk & District Residents Association v. An Bord Pleanála*, [2007] IEHC 86 ("*Usk (No. 1)*"), *Tristor Ltd v. The Minister for the Environment* [2010] IEHC 454, *Christian & Ors. v. Dublin City Council* [2012] IEHC 309 and *O Grianna & Ors. v. An Bord Pleanála* [2015] IEHC 248. I observed that the principles in those cases were collated and summarised in *Clonres CLG v An Bord Pleanála* [2018] IEHC 473 and again in *Fitzgerald v Dun Laoghaire Rathdown County Council* [2019] IEHC 890, were further refined when summarised by McDonald J. in *Barna Wind Action Group v an Bord Pleanála* [2020] IEHC 177 ("*Barna*") and were recently applied in a number of cases including *Redmond v. An Bord Pleanála* [2020] IEHC 151 and *Kemper v an Bord Pleanála, Ireland and the Attorney General* [2020] IEHC 601 ("*Kemper*"). I reproduced the helpful summary of those principles provided by McDonald J. in *Barna*.

**15.** I then considered the arguments advanced by Indaver in support of remittal and those advanced by the applicant by way of opposition. I also considered the views of the Board on the question of remittal. I explained that having considered all of the relevant material I was satisfied that I should exercise my discretion to remit the application to the Board and that that approach was consistent with fairness and justice which, I noted, are the overriding governing criteria in any decision to remit. I then considered and then set out my conclusions on the various arguments raised for and against remittal of Indaver's application. I do not propose to reproduce those



reasons here but will touch on those which are particularly relevant to the issues which arise on the applicant's application for leave to appeal.

**16.** With respect to the principles governing remittal, the applicant argued that those principles were not set in stone and should be supplemented by a number of further principles including the necessity to protect the integrity of, and to preserve public confidence in, the Board's decision making process, particularly where the Court had made a finding of objective bias. I agreed with the applicant that the principles governing remittal were not set in stone and that the Court should at all times be conscious of the need to protect the integrity of, and to preserve public confidence in, the Board's decision-making process (para. 90). I stressed, however, that, in applying the principles to a particular remittal application, the Court had to be conscious of the case actually made by the successful applicant in the proceedings. I stated that it is not open to an applicant, in resisting an application to remit, to make a case which was not made in the pleadings and/or which did not form part of the argument advanced to the Court at the substantive hearing. I referred to several cases which stress the importance of pleadings in judicial review proceedings, including in environmental and planning cases (para. 91). I noted that there was significant disagreement between the parties as to whether the case which the applicant sought to make in response to Indaver's remittal application was a case which it was permitted to make on the basis of the pleadings and on the basis of the case made at the hearing.

**17.** I did not accept the applicant's contention that the remittal of Indaver's application would undermine the integrity of, and public confidence in, the Board's decision-making process and would be an inadequate remedy for the applicant (para. 93). I concluded that the applicant's success in the principal judgment on the objective bias issue preserved, protected and promoted the integrity of, and public

confidence in, the integrity of the Board's processes and procedures and that the applicant would be obtaining an order of *certiorari* quashing the impugned decision to reflect its success on that issue.

**18.** Among the reasons I gave for rejecting the applicant's contention that remittal would undermine the integrity of and public confidence in the Board were, first, the fact that the objective bias alleged was solely related to Mr. Boland's involvement in the impugned decision and that, since he had ceased to be a member of the Board at the end of December 2018, he would not, therefore, be involved in the further consideration and determination of Indaver's application once remitted to the Board (para. 95). Second, I also recommended that any member who was involved in the making of the impugned decision should not be involved in the consideration and determination of the remitted application (subject to the doctrine of necessity). Third, I saw no reason in principle why the Court should not remit the application in the particular circumstances where the person whose involvement gave rise to the objective bias was no longer a member of the Board. I made clear, however, that the position might be different in other factual circumstances (para. 97).

**19.** Fourth, I considered the applicant's reliance in opposing remittal on the involvement of Mr. Boland in the latter stages of the pre-application consultation process, in the SID decision itself in December 2015 and in decisions taken by the Board during its consideration of Indaver's planning application in the period between January 2016 and the making of the impugned decision in May 2018. I concluded, however, that in opposing remittal on that basis, the applicant was seeking to make a different case to that made in the pleadings and in argument before the Court at the substantive hearing. It was doing so on the basis of new and additional documents which it either had at the date on which the Court gave leave to bring the proceedings

or within a couple of days thereafter. The applicant did not seek to amend its pleadings to expand the grounds on which it was challenging the impugned decision or to challenge earlier decisions made during the pre-planning application process or during the application process itself. I concluded that, in relying on Mr. Boland's involvement in the pre-application process and in decisions taken in the course of the planning application process itself (apart from the impugned decision), the applicant was making a new case. I explained my reasons for that conclusion by reference to (a) the pleadings and affidavits sworn on behalf of the applicant in the substantive proceedings (paras. 100-104), (b) certain transcript references relied upon by the applicant and (c) certain portions of the principal judgment (paras. 105-106). I concluded that none of those references supported the contention that the applicant was relying on Mr. Boland's involvement in the pre-application process or in decisions made during the planning process (apart from the impugned decision itself) as making decisions taken during those processes legally questionable, as that was not a case made by the applicant.

**20.** With respect to the new and additional documents sought to be relied upon by the applicant, I considered those documents at paras. 108-110 but concluded that no issue had been raised by the applicant in its amended statement of grounds, in any of its affidavits or in submissions at the hearing concerning decisions taken by the Board in the pre-application process or in the planning application process itself, on the grounds of objective bias by reason of Mr. Boland's involvement. I concluded that the applicant was seeking to make a new case on the remittal application in reliance on the new and additional documents which it was not entitled to do (para. 112). Not having challenged the earlier decisions in the pre-application process and in the planning application process itself, I concluded that it was not open to the applicant to

resist remittal on the basis that those earlier decisions were also tainted by objective bias which could not be undone or remedied by the Board's consideration of the remitted application (para. 113).

**21.** Fifth, I rejected the applicant's contention that in deciding whether to remit the application to the Board, the Court should have to the forefront of its consideration the partisan or subjective concerns of the parties, including the applicant. I explained that in the principal judgment I applied the well-established legal principles governing objective bias and concluded that the impugned decision was tainted by objective bias and should therefore be quashed. I explained (at para. 115 of the remittal judgment) that that conclusion and the order of *certiorari* to be made in respect of the impugned decision, in my view, addressed the reasonable apprehension of bias on the part of a reasonable objective observer.

**22.** Sixth, I made clear (at para. 118) that Indaver's remittal application had to be determined by reference to the well-established legal principles which I have referred to earlier in the judgment in respect of which there was no real dispute between the parties. I noted that the ultimate governing criteria in determining the remittal application were fairness and justice. I considered whether an order of *certiorari* on its own or *certiorari* with remittal would be a proportionate remedy for the applicant to reflect its success on the objective bias ground. I was satisfied that an order of *certiorari* quashing the impugned decision with an order remitting the application to the Board was consistent with the criteria of fairness and justice and was a proportionate remedy for the applicant in the circumstances. As the applicant places some reliance on what I said in para. 118 of the remittal judgment in support of its request that the Court certifies Question 3 as a point of law of exceptional public

importance, I should perhaps quote more fully what I say in that paragraph. Having explained the criteria which I was applying, I continued:

*“As I have decided to remit the application, the applicant will receive a significant benefit in that Indaver’s application will be considered by the Board which will not include as one of its panel members the source of the objective bias, Mr. Boland. I will leave to the Board the decision as to whether to exercise its discretion to seek further information from Indaver and to invite a response thereto from the applicant and from the public, and on the assumption that the Board does so, the applicant will have the opportunity of commenting on, and addressing the further information provided and of dealing with any other relevant matters which may have emerged in the period since the applicant was last permitted to make submissions. All of these are significant benefits to the applicant and reflect its success on this ground.”* (para.118)

**23.** These comments should also be read with paras. 6 and 130 of the remittal judgment in which I explained that it would not be fair and just to require Indaver to go back to the start of the process and to make a fresh application, taking into account the fact there was a lengthy oral hearing by the inspector, who heard evidence from more than 90 witnesses and prepared a very detailed report for the Board. The applicant’s challenges to that report on various grounds were rejected in the principal judgment. I concluded that in remitting the application and in deciding on the point of time in the process to which it should be remitted, I should seek to preserve parts of the process, including the oral hearing, decisions taken before the oral hearing and certain of the decisions taken after the hearing. I further noted in that context (at para. 121) that since the applicant had not challenged the SID decision itself, that decision would remain in existence whatever the outcome of the remittal application. If the

impugned decision was quashed without the application having been remitted to the Board, Indaver would have to make a fresh application, starting with effect from the SID decision made by the Board on 23 December 2015 and not at an earlier stage in the process (para. 121).

**24.** Seventh, while I gave consideration to the assertion by Indaver that if the application were not remitted and if it had to make a fresh application there would be a further significant delay in the determination of its application, I felt that while delay was relevant, relatively limited weight should be afforded to it in light of the fact that the process itself had been a lengthy one commencing as far back as 2012.

**25.** Finally, I considered the point in time in the process to which the application should be remitted (paras. 125-129). For the reasons set out in those paragraphs, I concluded that the application should be remitted to the stage the process was at immediately prior to 23 October 2017, when the Board decided not to circulate the additional material and information which Indaver had provided. Mr. Boland had made that decision on behalf of the Board. I felt that a reasonable objective observer could well have a reasonable apprehension of bias based on Mr. Boland's involvement in that decision and that the outcome of the decision could have prejudiced the applicant in terms of its ability to address the additional information and material provided by Indaver to the Board. I felt that a reasonable objective observer could reasonably have a lingering feeling of unease about that decision (para. 128).

**26.** I concluded the relevant part of the remittal judgment by recommending that the Board give consideration to exercising its statutory powers once the application was remitted to it. I noted from what was said by counsel on behalf of the Board during the hearing of the remittal application that it was highly likely that the Board would

exercise at least some of those powers in light of the lapse of time since the impugned decision and the Board's earlier decision of 23 October 2017 were made. I further stated that if the Board did not give proper consideration to exercising those powers, it might well be open to the applicant to bring further proceedings arising out of such failure. However, I explained that I would not direct the Board to exercise those powers (para. 130).

### **C. Applicant's Proposed Questions for Certification**

27. The applicant has proposed four questions (some involving a number of sub-questions or issues) which it contends contain points of law of exceptional public importance which it is desirable in the public interest should be the subject of an appeal to the Court of Appeal pursuant to S.50A(7) of the 2000 Act. Those questions are as follows:

#### **Question 1**

*In a remittal application raised for the first time following the delivery of the main judgment quashing a planning decision on grounds of objective bias by virtue of the involvement of a member of the decision-making panel (the "relevant person"):*

- (i) Is an applicant precluded in law from relying on pleas as to the involvement of the relevant person throughout the process by reason of the fact that those pleas did not "challenge" the interim steps or decisions in which the relevant person was involved?*
- (ii) Is an applicant precluded in law from relying on pleas or information as to the involvement of the relevant person throughout the process (including pleas or information accepted by the Court in its reasoning*

*leading to the finding of objective bias) by reason of the fact that the particulars of the ground of objective bias did not enumerate the interim steps or decisions in which the relevant person was involved?*

- (iii) *Does the Court have discretion within O.84, r.27(4) to hear further information and/or evidence as to the full involvement of the relevant person, following the delivery of the main judgment quashing the decision?*

### **Question 2**

*Is an applicant who establishes objective bias sufficient to warrant the quashing of an An Bord Pleanála decision on a planning application, precluded in law from opposing remitting and/or opposing remittal to a particular point in the application process, because the applicant did not seek to challenge the parts of that process in which the relevant party had been involved but only challenged the final decision to grant planning permission?*

### **Question 3**

*Is it correct in law for the Court to determine what is fair and just (the overriding criteria in a remittal application) with reference to a perceived benefit an applicant might derive from a quashed but remitted decision which perceived benefit is based upon a mere assumption that the Board would exercise its discretion to seek further information from the developer?*

### **Question 4**

*Where a Court has found objective bias based on the participation of the relevant person (and/or his participation throughout the statutory process) and given that that Court when considering remittal is required by law to undo the consequences of the objective bias and no more:*



- (i) *Is it sufficient for the Court to ascertain whether the circumstances which give rise to the objective bias no longer exist and will not exist when the remitted application comes to be considered again by the Board?*
- (ii) *Is it lawful for the Court to remit to any point in the process?*

28. Before considering whether these questions raise points of law of exceptional public importance, I will briefly refer to the relevant statutory provision and to the legal principles by reference to which the applicant's application for leave to appeal must be considered.

**D. Relevant Statutory Provision: s.50A(7) of the 2000 Act**

29. Section 50A(7) provides as follows:

*“The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal].”*

30. Section 50A(7) originally referred to the Supreme Court rather than the Court of Appeal. The reference to the Supreme Court was replaced by the reference to the Court of Appeal by s.75 of the Court of Appeal Act 2014.

**E. Relevant Legal Principles: Application for Certificate under s.50A(7)**

**31.** The principles governing applications for leave to appeal under s.50A(7) of the 2000 Act are well established and have been set out and considered in an extensive body of case law. Many of the decisions are listed in the recent judgment of Humphreys J. in *Save Cork City Community Association CLG v. An Bord Pleanála & Ors. (No. 2)* [2021] IEHC 700 (“*Save Cork (No. 2)*”). It is unnecessary to repeat that list here. I have considered the applicant’s application for leave to appeal by reference to the principles set out in those cases, the most notable of which, for present purposes, are *Arklow Holidays Limited v. An Bord Pleanála (No. 1)* [2006] IEHC 102, [2007] 4 IR 112, *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 (“*Glancre*”) and *Arklow Holdings Limited v. An Bord Pleanála (No. 2)* [2008] IEHC 2 (“*Arklow (No. 2)*”). As with the principles governing remittal applications, the principles applicable to applications for leave to appeal are not set in stone. They have been considered and expanded upon in subsequent cases including *Ogalas Limited v. An Bord Pleanála* [2015] IEHC 205, *Callaghan v. An Bord Pleanála* [2015] IEHC 493, *SA v. The Minister for Justice and Equality (No. 2)* [2016] IEHC 646 (which was not a planning case, but the principles set out there have been considered and applied to applications for leave to appeal in planning cases), *Halpin v. An Bord Pleanála* [2020] IEHC 218 (“*Halpin*”), *Rushe v. An Bord Pleanála* [2020] IEHC 429 (“*Rushe*”) and *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2021] IEHC 146, as well as in a series of recent judgments given by Humphreys J., as the judge in charge of the Commercial Planning & SID List, including *Save Cork (No. 2)*.

**32.** While not intended to be exhaustive of the legal principles applicable to applications for leave to appeal in planning cases, the following appear to me to be the most potentially relevant for the purposes of this application:

- (1) The clear intention of the Oireachtas in enacting s.50A(7) (and its statutory predecessors) was that, in most cases, the decision of the High Court on an application for leave to seek judicial review in respect of a planning decision or on an application for judicial review of such a decision should be final and should not be the subject of an appeal.
- (2) In order for a party to appeal from the High Court to the Court of Appeal, the intended appellant must obtain leave of the High Court under s.50A(7) and must satisfy the requirements of that section.
- (3) S.50A(7) requires an intended appellant, in order to obtain leave to appeal, to persuade the Court that (a) its decision involves a point of law of exceptional public importance and (b) it is desirable in the public interest that an appeal should be taken to the Court of Appeal. While there may be some overlap between the factors relevant to these two requirements, they are cumulative requirements and require separate consideration.
- (4) The jurisdiction of the Court to grant leave to appeal under s.50A(7) must be exercised sparingly.
- (5) When asked to grant leave to appeal under s.50A(7) and to certify a point or points of law under that section, the Court must have regard to the effect of the 33<sup>rd</sup> Amendment to the Constitution and the enactment of the Court of Appeal Act 2014 and, in particular, the new “*constitutional architecture*” created under those provisions. While an appeal from a decision of the High Court in a planning case might potentially be brought directly to the Supreme Court, the High Court, in considering whether to grant a certificate giving leave to appeal, must have regard to the fact that

an appeal to the Court of Appeal remains the more normal route for such appeals.

- (6) It is not sufficient for an intended appellant merely to show that the decision of the High Court involves a point of law. The point of law must be one of exceptional public importance. This is a clear and significant additional requirement which must be satisfied in respect of the proposed point of law.
- (7) The point of law proposed by the intended appellant must arise out of the decision of the High Court itself and not from the discussion, argumentation or consideration of the point during the course of the hearing. A point the court did not decide in its judgment could not amount to a point of law of exceptional public importance.
- (8) In most circumstances, in order to establish that the point of law is one of exceptional public importance, the intended appellant must demonstrate that there is some uncertainty or lack of clarity in the law or that the law in the area is still evolving.
- (9) Merely raising an argument on the point of law proposed which the Court has rejected does not mean that the law is uncertain. The uncertainty must arise over and above the mere fact that an argument can be made on the point. An example given in the cases is where there is uncertainty in the daily operation of the law in question which is required to be clarified.
- (10) The fact that the point of law raises a novel issue does not necessarily mean that the law is uncertain or evolving. It is not, however, necessary to point to other decisions which conflict with the decision of the High Court on the point from which it is sought to appeal. However, where the

point is a novel one and the law is in a state of evolution, it is likely that the Court will find that the point of law raised is one of exceptional public importance.

- (11) In considering an application for leave to appeal under s.50A(7), the Court should not concern itself with the merits of the parties' arguments on the point or with the intended appellant's prospects of success on any appeal. The Court should take the intended appellant's case on the point at its height and should recognise the fact that the Court may be wrong in its decision on the point. Equally, the intended appellant must not use the application for leave to appeal as an opportunity merely to reargue the merits of the case which the Court has already decided against that party in its substantive decision. However, it may sometimes be difficult to avoid doing so (or at least giving the impression of doing so) in order to persuade the Court that the law is uncertain or evolving in the area and that the point raised is a point of law of exceptional public importance.
- (12) The relevant point of law must transcend well beyond the individual facts of the case and the parties in the case since most points of law are of some importance.
- (13) The point of law must be one which is actually determinative of the proceedings and not one which, if answered differently, would leave the result of the case unchanged.
- (14) The question raising the point of law must be formulated with precision and in a manner which indicates how it is determinative of the proceedings. The question should not invite a "*discursive, roving, write-*

*an-essay*” type response (*per* Humphreys J. in *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 636 at para. 6(i)).

- (15) Where a party has lost in the High Court on the particular point (or points) on the basis of the application of clear and well established principles to the facts of the case, it will be much more difficult for that party to satisfy the requirement that the point of law is one of exceptional public importance and that it is desirable in the public interest that there be an appeal on the point. As is clear from cases such as *Halpin* and *Rushe*, valuable guidance can be obtained from the approach adopted by the Supreme Court in determining applications for leave to appeal where one of the requirements is that the decision must involve a matter of “*general public importance*”. As explained in the determinations of the Supreme Court in cases such as *BS v. Director of Public Prosecutions* [2017] IESC DET 134 (“*BS*”), *Quinn Insurance Limited v. Price Waterhouse Coopers* [2017] IESC 73, [2017] 3 IR 812 (“*Quinn Insurance*”) and *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61 (“*Fitzpatrick*”), the closer you come on the spectrum to the application of well-established legal principles to the facts of an individual case the further you get away from there being a point of law of exceptional public importance. While the Court cannot rule out the possibility that the application of well-established principles to the particular facts of the case may potentially give rise to a point of law of exceptional public importance, that is only likely to be the case in exceptional circumstances and is not in any sense the normal or usual position. Generally, where a Court applies well established legal principles to the particular facts of the case before it, it

will be very difficult for an intended appellant to satisfy the cumulative statutory requirements in s.50A(7). Conversely, the failure by the Court to apply well established legal principles to the particular facts of the case may well give rise to a point of law of exceptional public importance, subject to complying with the other principles referred to here.

- (16) Generally, it will not be appropriate to grant leave to appeal under s.50A(7) in respect of a point of law which has not been properly pleaded: *Ross v. v. An Bord Pleanála (No. 2)* [2015] IEHC 484; *Hellfire Massy* at para. 6(iv).
- (17) In considering the second requirement which an intended appellant must satisfy, there may be some overlap in the factors relevant to the question as to whether it is desirable in the public interest that an appeal be brought to the Court of Appeal such as where there is uncertainty in the relevant area of law or where that area of law is evolving such that it is desirable to have that uncertainty clarified. The case law demonstrates that there is a broad range of different factors and considerations which may be taken into account by the Court in determining whether it is desirable in the public interest that an appeal be brought. Those factors include, but are not limited to, the existence of uncertainty in the law, the nature of the particular development and the potential consequences of a significant further delay in the final determination of the case before the courts.

**33.** While the principles summarised above are of general application, it is appropriate to note one additional point which is particularly relevant to the applicant's application for leave to appeal in respect of the remittal judgment. The point is an important one and it is that the parties all accept that in considering

whether to remit Indaver's planning application to the Board, the Court was exercising a wide discretion where the governing criteria were fairness and justice: see, for example, *per* Kelly J. in *Usk (No. 1)* at para. 38 and *per* McDonald J. in *Barna* at para. 22.

**34.** An intended appellant who seeks leave to appeal from a decision made by the High Court in the exercise of a wide discretion to the facts of a particular case, where the governing criteria are to achieve fairness and justice in that case, faces a particularly uphill task in persuading the Court that there is a point of law of exceptional public importance involved and that it is desirable in the public interest that there be an appeal to the Court of Appeal. That task is made even more difficult in circumstances where the intended appellant was successful in obtaining an order of *certiorari* quashing the decision challenged in the substantive proceedings.

**35.** Having set out those principles, I will now proceed to consider each of the questions proposed by the applicant. I will first consider in respect of each of the questions whether the applicant has demonstrated that in respect of each question there is a point of law of exceptional public importance. Having done so, I will, to the extent that it is necessary, consider in a separate section of the judgment whether it is desirable in the public interest that the applicant be permitted to appeal in respect of these points to the Court of Appeal.

**F. Consideration of Questions Proposed by Applicant for Certification:**

**Points of Law of Exceptional Public Importance?**

**i. Question 1**

*In a remittal application raised for the first time following the delivery of the main judgment quashing a planning decision on grounds of objective bias by*



*virtue of the involvement of a member of the decision-making panel (the “relevant person”):*

- (i) Is an applicant precluded in law from relying on pleas as to the involvement of the relevant person throughout the process by reason of the fact that those pleas did not “challenge” the interim steps or decisions in which the relevant person was involved?*
- (ii) Is an applicant precluded in law from relying on pleas or information as to the involvement of the relevant person throughout the process (including pleas or information accepted by the Court in its reasoning leading to the finding of objective bias) by reason of the fact that the particulars of the ground of objective bias did not enumerate the interim steps or decisions in which the relevant person was involved?*
- (iii) Does the Court have discretion within O.84, r.27(4) to hear further information and/or evidence as to the full involvement of the relevant person, following the delivery of the main judgment quashing the decision?*

**36.** The applicant contends that the issue raised in the various component parts of this question concerns the extent of the obligation on an applicant who seeks to challenge a planning decision on the grounds of objective bias in terms of the detail required to be provided in respect of that claim for the purposes of a remittal application where the relevant decision is quashed. The applicant maintains that each of the component parts of Question 1 arise from the remittal judgment and refers, in particular, to paras. 90-91, 99-107 and 108-113. The applicant’s counsel referred to para. 103 of the remittal judgment as containing the “*central passage*” for the purposes of this question. While acknowledging that, at para. 91 of the remittal judgment, I refer to a series of cases which stressed the importance of pleadings in

judicial review proceedings and, in particular, in such proceedings involving challenges to planning decisions, the applicant contends that those cases did not involve the exercise of discretion under O.94, r.27(4) to remit proceedings. The applicant pointed to the pleading requirements contained in O.84, r.20(3) in respect of statements grounding applications for judicial review and in O.84, r.20(5) in respect of statements of opposition. It noted that none of the cases considered pleading requirements in the case of a proposed remittal in circumstances where neither the respondent nor the notice party had pleaded in its statement of opposition that, in the event that the court quashed the relevant decision, the matter should be remitted. The applicant maintains that this case is quite different to other cases in which the courts have emphasised the importance of pleadings and where the RSC require particulars as the court here had to consider the position after the impugned decision was quashed on the grounds of objective bias. The applicant contends that a finding of objective bias is of a different order to findings made on other potential grounds of judicial review in respect of a planning decision as the finding of objective bias attaches to the process for the duration of Mr. Boland's involvement and not just to the impugned decision. The applicant contends, therefore, that while the principles governing pleadings arising from O.84, r.20(3) are well established, they are not well established in the context of a remittal application brought by a notice party following judgment of a court which quashes a decision on the grounds of objective bias.

**37.** The applicant contends that there is uncertainty in respect of the principles applicable to remittal in such circumstances which would be resolved by the Court of Appeal in the event that an appeal was permitted in respect of the component parts of Question 1. The applicant further contends that the points of law raised by Question 1 transcend the facts of the case as they concern the extent of the requirement to

particularise grounds of objective bias for the purposes of a remittal application following a judgment quashing the relevant planning decision. The applicant argues that, if the remittal judgment is correct, a very significant pleading burden is placed on an applicant in its position. The applicant maintains that as a result of the remittal judgment an applicant would have to include various pleas and particulars in its statement of grounds at the outset including:

- (a) particulars as to the prior professional relationship giving rise to the objective bias including when it occurred and the extent of the relationship;
- (b) particulars of the cogent and rational link between that relationship and the decision being challenged.;
- (c) a plea that remittal under O.84, r.27(4) would not be appropriate, just or fair;
- (d) pleas concerning each interim act or decision in which the relevant person whose involvement gave rise to the objective bias participated in the process leading to the ultimate decision so as to ensure that the benefit obtained from an order of *certiorari* in respect of that decision is not diluted by remittal, in circumstances where a request for remittal does not have to be pleaded by a respondent or a notice party but could, under O.84, r.27(4), arise once the court decides to grant *certiorari*; and
- (e) a challenge to each interim act or decision of the Board in which the relevant person had involvement, in addition to challenging the final decision granting permission.

**38.** It is said that this is a significant pleading burden on an applicant, and, to that extent, the remittal judgment would have an impact on all cases in which a similar

allegation of objective bias is made. The applicant maintains that it would be in the common good that the principles relating to pleading in judicial review where the question of remittal arises be clarified and that there is, therefore, a public benefit in the clarification of those principles.

**39.** Indaver contends that Question 1 does not contain any point of law of exceptional public importance. It points to the findings contained at para. 112 of the remittal judgment that, in opposing remittal in reliance on new and additional documents, the applicant was seeking to make a new case and that it was not entitled to do that. Indaver maintains that no point of principle arises from the various component parts of Question 1. It says that it is clear that an applicant is not entitled to make a new case after judgment and that, in accordance with the well-established principles governing pleading in judicial review cases, an attempt to make a new case after judgment is more objectionable than the pursuit of a case at hearing for which leave has not been granted.

**40.** Indaver contends that at the core of Question 1 is the obligation on an applicant to plead grounds on which it contends that a decision should be quashed and that the principles governing that issue are well established. Indaver points to the cases referred to at para. 91 of the remittal judgment. Indaver also referred to the court to the recent decision of the Supreme Court in *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42 (“*Casey*”) and, in particular, to paras 22-36 of the judgment as delivered by Baker J. for the Supreme Court in that case. Indaver notes that the applicant did not challenge the principles governing the pleadings and judicial review proceedings and does not contend that those principles are inapplicable where a case of objective bias is made. Indaver contends that what the

applicant is in effect saying is that it should not be bound by its pleaded case when it comes to the court's consideration of the question of remittal.

**41.** Indaver maintains that Question 1 concerns the application of well-established legal principles governing pleadings in judicial review proceedings to the particular circumstances of this case. It says that the question does not give rise to any issue of law where there is significant doubt or uncertainty. The absence of any express authority on the point, it maintains, supports its position that the principles are clear and that, in its remittal judgment, the court was simply applying those principles to the particular circumstances of the case. It disagrees with the applicant that there is some qualitative difference between the principles applicable where remittal is sought in circumstances where a decision is quashed on a finding of objective bias. It points out that the applicant did not make the case that remittal is precluded in such circumstances. Its case was that remittal is not possible in this case. Indaver also disputed the claimed pleading burden on an applicant who alleges objective bias. It maintains that the remittal judgment means that it is not open to an applicant to expand its case after the judgment has been delivered in order to oppose remittal and that the remittal judgment did not in any way add to the ordinary pleading burden on an applicant.

**42.** Additionally, with respect to the Question 1(iii), Indaver's position is that the question does not arise from the remittal judgment at all as the court did in fact consider the further information and evidence as to the involvement of Mr. Boland following the delivery of the principal judgment, as is evidenced from paras. 108-122 of the remittal judgment.

**43.** The Board's position with respect to Question 1 is similar to that taken by Indaver. The Board maintains that the various component parts of the question are

tied to the particular details of the case and to the pleadings in the case and do not transcend the facts of the case. It says that Question 1 does not give rise to any point of law of exceptional public importance and that the remittal judgment does not give rise to any uncertainty for further cases which requires to be resolved or clarified by way of an appeal on the matters raised in Question 1. In particular the Board maintains that there is nothing in Question 1 which is directed to resolving an issue which arises in the daily operation of the law and which would require to be clarified on appeal by the Court of Appeal.

**44.** Like *Indaver*, the Board maintains that the remittal judgment applies well established legal principles applicable to pleadings in judicial review proceedings and to the exercise by the court of a discretionary power to admit an application in a particular case. It notes that the legal principles in both those areas were not in dispute between the parties.

**45.** The Board also relies on the terms of O.84, r.27(4) under which the court may remit a matter to the decision maker with a Direction to consider the matter and “*reach a decision in accordance with the findings of the Court*”. The Board submits that the terms of O.84, r.27(4) make clear that there is a linkage between the discretion to remit the matter to the decision maker and the case which was pleaded, argued and ultimately decided by the court.

**46.** Finally, the Board notes that the applicant could point to no authority to support the proposition that it is entitled to make a new case based on new evidence after the substantive judgment has been delivered in order to oppose remittal or to support the contention that the court erred in the approach adopted in the remittal judgment.

**47.** I have carefully considered the submissions made by the parties in respect of this question and have approached my decision on whether the question raises a point

or points of law of exceptional public importance by reference to the legal principles extracted from the case law which I summarised in the previous section of this judgment. Having done so, I have concluded that this question does not raise any point of law of exceptional public importance. I have reached that conclusion for a number of reasons.

**48.** First, with respect to Question 1(iii), I am satisfied that the issue raised there does not arise out of the remittal judgment at all. Question 1(iii) asks whether the court has a discretion under O.84, r.27(4) to consider further information or to hear further evidence as to the full involvement of the person, whose involvement in the decision making process and in the decision challenged gave rise to the objective bias, after the principal judgment quashing the decision has been delivered. However, I did not decide in the remittal judgment that the court did not have such a discretion. On the contrary, I considered the further information and evidence on which the applicant sought to rely (referred to at para. 26 of the remittal judgment as the “new documents” and the “additional documents”). I explained at paras. 26-29 of the remittal judgment the circumstances in which the applicant had sought to rely on the new and additional documents and had brought a motion seeking liberty to do so. Neither the Board nor Indaver had any major objection to the new and additional documents being considered by the court at the hearing on a *de bene esse* basis. I agreed to consider the new documents (which were not previously before the court) and the additional documents (which had been exhibited in the material relied upon by the applicant in the proceedings). I did, in fact, proceed to consider those documents and permitted the parties to make submissions as to the relevant or significance of them to the remittal issue. They were considered at paras. 108-112 of the remittal judgment. Having done so, I concluded that by seeking to rely on those documents, the applicant

was seeking to make a new case on the remittal application in order to resist the remittal sought on it by Indaver. It can be seen, therefore, that I did not refuse to consider the further information and evidence relied on by the applicant in the course of the remittal application. I did in fact consider it. In those circumstances, the issue raised in Question 1(iii) does not arise out of the remittal judgment and, on the basis of the case law referred to earlier, including *Arklow (No. 1)*, *Glancre* and *Arklow (No. 2)*, the question does not give rise to a point of law of exceptional public importance.

**49.** Second, with respect to Questions 1(i) and (ii), I am not satisfied that these questions raise points of law of exceptional public importance for the following reasons.

**50.** Both questions raise an issue concerning the pleading obligation on a party who seeks to challenge by way of judicial review a decision on the grounds of objective bias. I concluded in the remittal judgment that since the applicant had not challenged the various interim steps or decisions in which Mr. Boland was involved, the court was not precluded from remitting Indaver's application back to the Board to a point in the process from which it would be reconsidered by the Board in circumstances where Mr. Boland would no longer be involved in the process, having retired from the Board a number of years ago. To that extent, therefore, the issue raised in Question 1(i) does arise out of the remittal judgment. However, I did not decide that the applicant was precluded from relying on material concerning the involvement of Mr. Boland in the process by reason of the fact that the applicant's amended statement of grounds did not "*enumerate the interim steps or decisions*" in which Mr. Boland was involved. Therefore, Question 1(ii) does not arise out of the remittal decision. If I am wrong about that, and if the issue raised in Question 1(ii) does arise out of the remittal



decision, for the further reasons set out below, I am satisfied that Questions 1(i) and (ii) do not raise a point or points of law of exceptional public importance.

**51.** My decision that it was not open to the applicant to make a new case in order to resist remittal and that, on the basis of the case made by the applicant up to the date of delivery of the principal judgment, the court could in the exercise of its discretion remit Indaver's application back to the Board involved the application of well-established legal principles in two areas to the particular facts of this case. In the first place, it involved the application of well-established principles concerning the pleading obligations on an applicant in judicial review proceedings and, in particular, in such proceedings which challenge planning decisions. Some of the relevant cases setting out or applying the principles were referred to by me at para. 91 of the remittal judgment. Those principles were further discussed, and the importance of pleading in judicial review proceedings was elaborated upon, by the Supreme Court in *Casey*, at paras. 22-33 of the judgment of Baker J. in that case. The principles in this area are very well established and the remittal judgment merely sought to apply those principles to the case which the applicant was seeking to make in order to resist remittal of Indaver's application to the Board.

**52.** The second area in which the legal principles are well established and where the remittal judgment applied those principles with respect to the approach which the court is required to take in deciding whether to remit a matter back to a decision maker. The legal principles governing the court's exercise of its discretion to remit it under O.84, r.27(4) are also well established and were not significantly in dispute between the parties for the purpose of Indaver's application. Those principles, derived from several cases, were set out by me at para. 88 of the remittal judgment. As noted earlier, and as set out at para. 90 of the remittal judgment, I agreed with the

applicant that the principles governing remittal are not set in stone and that the court should at all times be conscious of the need to protect the integrity of, and to preserve public confidence in, the Board's decision-making process. The applicant did not make the case that those principles were inapplicable where remittal was sought following quashing of a decision on the grounds of objective bias. The applicant argued that on the facts of this case the application should not be remitted but not that the principles themselves did not apply.

**53.** While it is true that none of the cases discussing the importance of pleading in judicial review proceedings involved an application to remit following the quashing of a decision on the grounds of objective bias, I do not see how that could elevate the point to a point of law of exceptional public importance in circumstances where the principles themselves were not in dispute but only their application.

**54.** Similarly, while none of the parties were able to identify a case in which the remittal principles were applied in the case of a decision which was quashed on the grounds of objective bias, as noted above, the principles themselves were not in dispute.

**55.** I am satisfied that in those circumstances the case is located on the spectrum of cases where a point of law of exceptional public importance does not arise as the case involves the application of well-established legal principles, as discussed by the Supreme to the facts of an individual case, as discussed by the Supreme Court in *BS, Quinn Insurance* and *Fitzpatrick* and by the High Court in *Halpin, Rushe* and *Reid v. An Bord Pleanála (No. 3)* [2021] IEHC 593. While, as I noted in *Rushe* (at para. 50), the court cannot rule out the possibility that the application of well-established principles to the particular facts of the case might potentially give rise to a point of law of exceptional public importance, that is only likely to be so in exceptional

circumstances and is not the normal or usual position. I do not believe that exceptional circumstances exist in this case where the applicant was successful in obtaining an order of *certiorari* in respect of the impugned decision and the application has been remitted for further consideration and determination by the Board.

**56.** I am satisfied, therefore, that what was involved here in the remittal judgment was the application of very well-established legal principles in these two areas and that that means that the issues raised in Question 1(i) and (ii) do not amount to points of law of exceptional public importance.

**57.** Nor, it seems to me, can it be said that the various issues raised in Question 1 transcend the rather unusual facts of this particular case or seek to clarify or resolve any uncertainty in the law for future cases. While allegations of objective bias against members of the Board by reason of their prior professional connections are not unprecedented (such an allegation was also made in *Kemper*), the circumstances of this case, so far as remittal is concerned, are somewhat unusual in that the person concerned (Mr. Boland) was involved at various stages in the process, both prior to the SID decision of December 2015 and during the course of the Board's consideration of the planning application itself. However, Mr. Boland ceased to be a member in late December 2018 and will have no involvement in the Board's further consideration and determination of Indaver's application following its remittal. The way in which the various component parts of Question 1 are phrased seems to take account of the particular circumstances of this individual case. I agree with the Board that the issues raised do not transcend the facts of this case.

**58.** I also agree with the Board and with Indaver that there is no uncertainty or lack of clarity in the law in terms of the pleading obligations on parties in judicial review

proceedings or in terms of the circumstances in which it is appropriate to remit an application to the Board. The fact that the parties were unable to point to any previous case in which remittal occurred in similar circumstances to the present case does not, in my view, mean that there is any uncertainty. It more likely means that the facts of this case are unusual. However, the applicable legal principles are well-established. Nor can it be said that the law in these areas is still evolving, as was the case in some of the decisions in which leave to appeal was granted, such as *People Over Wind v. An Bord Pleanála* [2015] IEHC 393 and in *Callaghan*. Nor is there the sort of uncertainty which is required to be clarified or resolved by an appeal as was the case in *Dublin Cycling*.

**59.** Finally, in this regard, I do not believe that it can be said that the issues raised in Question 1 are required to be addressed by the Court of Appeal in order to resolve or clarify an uncertainty in the daily operation of the law in any of the areas concerned, whether in terms of the pleading obligations on parties under O.84, r.20 and under the principles established by the cases, or the law relating to objective bias or the principles applicable to the exercise of the court's discretion to remit under O.84, r.27(4) and under the principles set out in the cases.

**60.** I should say that I do not accept that the remittal judgment imposes additional pleading obligations on a party, as the applicant contends. It merely requires a party to plead its case fully at the outset (or by way of amendments to its Statement of Grounds or its Statement of Opposition) and precludes the party from relying on a new or different case when opposing remittal.

**61.** For these reasons, I am not satisfied that there is any point or points of law of exceptional public importance in Question 1(i), (iii) proposed by the applicant.

**ii. Question 2**

*Is an applicant who establishes objective bias sufficient to warrant the quashing of an An Bord Pleanála decision on a planning application, precluded in law from opposing remitting and/or opposing remittal to a particular point in the application process, because the applicant did not seek to challenge the parts of that process in which the relevant party had been involved but only challenged the final decision to grant planning permission?*

- 62.** The applicant accepts that the issues raised in Question 2 are similar to those raised in Questions 1(i) and (ii) although the focus of those latter questions is on the pleadings whereas Question 2 concentrates specifically on the failure to challenge parts of the process in which the person whose involvement has given rise to the objective bias have been involved and where the only challenge is to the final decision to grant planning permission in respect of the relevant development.
- 63.** The applicant maintains that the issue raised by Question 2 arises from paras. 103-104 of the remittal judgment. In para. 103 of the remittal judgment, I made the point that although there was some reference made to Mr. Boland's involvement in the pre-application consultation process in the amended statement of grounds, those references were only in the context of the impugned decision itself being vitiated by objective bias. I noted that para. 50 of the amended statement of grounds set out conclusions based on the matters pleaded earlier in that part of the document. I explained that there was:
- No reference to advice given by Mr. Boland during the course of the pre-application consultation process.
  - No challenge to any decision made by the Board during that process in which Mr. Boland was involved.

- No challenge to the SID decision of 23 December, 2015 in which Mr. Boland was involved.
- No challenge on the grounds of objective bias to any of the decisions taken by the Board during the planning application process itself in which Mr. Boland was involved, apart from the challenge to the impugned decision itself.

**64.** I noted that some of the decisions were referred to in the general background part of Section E of the amended statement of grounds but not in the context of any challenge made to the decisions by reason of Mr. Boland's involvement. At para. 104 of the remittal decision, I pointed that the amended statement of grounds was very carefully and expertly drafted to seek relief in respect of the impugned decision only on the grounds that that decision was vitiated by objective bias by reason of Mr. Boland's involvement in it. I noted that the applicant had contended that it was not necessary to seek relief in respect of any of the earlier decisions in the process. While accepting that that was so in terms of the ultimate objective of the applicant to obtain *certiorari* of the impugned decision and a declaration in respect of that decision, I concluded that the failure to challenge the earlier decisions was very relevant in the Court's consideration as to whether or not the application should be remitted to the Board.

**65.** The applicant maintains that the point raised in Question 2 is a point of law of exceptional public importance. It relies on essentially the same arguments as it makes in respect of Question 1. It says that there is no precedent for the remittal of an application where the decision was quashed on the grounds of objective bias to a point in the process in which the person whose involvement gave rise to the objective bias had participated. The applicant maintains that there is uncertainty

in the law in this area and that if I am wrong in the decision I reached on the point, an appeal would be necessary in order to correct the position and to resolve the uncertainty. Resolution of that issue on appeal would have an impact on all potential applicants who wish to challenge a planning decision on the grounds of objective bias as well as other parties to any such challenge.

**66.** The position adopted by Indaver and by the Board is that the issues raised in Question 2 are identical to those raised in Question 1 and that Question 2 is merely a reformulation of Question 1. Indaver pointed out that it is necessary to consider not just paras. 103 and 104 of the remittal judgment, as the applicant contends, but to look at the more extensive discussion contained in paras. 90 to 11. Indaver contends that whether read on their own or in the context of the other paragraphs referred to, paras. 103 and 104 concern matters which are entirely fact specific and arise in the context of this particular case. The Board also makes the point that the issues raised in Question 2 are very much rooted in the facts of the case and do not transcend those facts.

**67.** Both Indaver and the Board maintain that there is no uncertainty in the law and that my decision in the remittal judgment was based on the application of well-established and agreed legal principles to the particular facts. The Board makes the point that my decision turned on the particular details of the decision-making process of this case and how the applicant pleaded and presented its case. On that basis both contend that Question 2 does not contain a point of law of exceptional public importance.

**68.** I have again considered this question by reference to the legal principles summarised earlier and on the basis that I could be wrong in my decision to remit Indaver's application to the Board. However, applying those principles, I reach the

same conclusion as I reached in respect of Question 1. In circumstances where the applicable legal principles, both in terms of pleadings and in terms of remittal are well established and were not disputed by the parties, and where in the remittal judgment I was merely applying those principles to the facts of this case, no point of law of exceptional public importance, in my view, arises. The applicant did not make the case that remittal was precluded as a matter of law where the relevant decision was quashed on the grounds of objective bias, although it did of course argue that the court should exercise its discretion in accordance with the relevant principles to refuse to remit the application.

**69.** Nor, for the reasons set out earlier in respect of Questions 1(i) and (iii) can it be said that there is any uncertainty in respect of the relevant legal principles but merely a dispute as to how those principles should be applied in this case. Moreover, for the same reasons as I gave in respect of Questions 1(i) and (iii) it cannot be said that issues raised in Question 2 transcend the particular facts of this case. On the contrary, the essential issue raised in Question 2 is very much dependent on the somewhat unusual facts of this case. In addition, I stated at para. 97 of the remittal judgment that in my view there was no reason in principle why an application could not be remitted to the Board in circumstances where the Board's decision was quashed by the court on the grounds of objective bias where the circumstances which gave rise to that objective bias no longer existed and would not exist when the remitted application came to be considered again by the Board. However, I further stated that the position might be different in other factual circumstances. I did not conclude, therefore, that a person such as the applicant was precluded in law from opposing remittal or opposing remittal to a particular point in the application process on the basis suggested in Question 2. I expressly left open the possibility that in different



factual circumstance to those which exist in this case, remittal might be refused by the court. To that extent therefore it might also be said that Question 2 does not actually arise from the remittal judgment. I would prefer however to base my reasons for concluding that Question 2 does not raise any point of law of exceptional public importance on the other reasons just given, namely, that the remittal judgment involved the application of well-established legal principles to the particular facts of this case, that there is no uncertainty in the law in the relevant areas and the law is not in a state of evolution and that the point raised does not transcend the individual facts of the case. For these reasons, I am satisfied that Question 2 does not give rise to a point of law of exceptional public importance.

**iii. Question 3**

*Is it correct in law for the Court to determine what is fair and just (the overriding criteria in a remittal application) with reference to a perceived benefit an applicant might derive from a quashed but remitted decision which perceived benefit is based upon a mere assumption that the Board would exercise its discretion to seek further information from the developer?*

**70.** The applicant contends that this questions arises from para. 118 of the remittal judgment. The applicant relies on a small part of what I said in that paragraph in support of its contention that Question 3 involves a point of law of exceptional public importance. The applicant suggests that, in considering whether it would be fair and just to remit Indaver's application, I took into account (a) an assumed benefit for the applicant by virtue of the Board's reconsideration of Indaver's application without Mr. Boland's involvement and (b) an assumption that the Board would exercise its discretion to seek further information from Indaver and to invite a response from the applicant and from the public and that the applicant would then have the opportunity

of addressing that further information. According to the applicant, Question 3 raises the issue as to whether it was open to the court in concerning what was fair and just in determining whether to remit the application or not to consider a “*perceived benefit*” which an applicant might derive based on a “*mere assumption*” that the Board will exercise its discretion to seek further information from a developer.

**71.** The applicant contends that the issue raised in Question 3 transcends the individual facts of this case. While it accepts that the issue raised in the question concerns the application of a well-established principle, it contends that the case does not lie at the end of the spectrum identified by the Supreme Court in *BS* (as discussed in *Halpin* and *Rushe*) such as would preclude a finding that a point was one of exceptional public importance, but at the other end of the spectrum, such as in *Fitzpatrick*. It contends that the issue has the potential to affect other cases in which a similar situation arises and where the court has to consider where the justice and fairness of the case lies in deciding whether or not to remit. Essentially, therefore, the applicant contends that the question as to whether the court is entitled to assess what is fair and just in deciding whether or not to remit the court is entitled to proceed on the basis of an assumption that the Board would act in a certain way and that the applicant would derive a certain benefit.

**72.** Both Indaver and the Board contend that Question 3 does not give rise to any point of law of exceptional public importance. They both make the point that the applicant has taken what I said at para. 118 of the remittal judgment completely out of context and has overlooked other parts of the remittal judgment and even other parts of para. 118 itself.

**73.** Indaver next submits that in the part of para. 118 of the remittal judgment on which the applicant relies I was setting out certain factors relevant to the court’s

overall assessment as to whether remittal to the Board was fair and just in the particular circumstances of this case. Indaver notes that the applicant did not and does not challenge the relevant principles applicable to remittal (including the overall governing criteria of fairness and justice) but rather the application of those principles to the facts. Thus, the issue raised in Question 3 again concerns the application of well-established principles. It contends that the case lies at the wrong end of the spectrum and does not give rise to a point of law of exceptional public importance. Since the question concerns a factor considered by the court in the exercise of its discretion whether to remit or not in the circumstances of the case, the point does not have any wider impact beyond these proceedings.

**74.** The Board advances similar grounds of objection in respect of this question. It contends that the issue raised does not transcend the facts of this case. The Board makes the point that the applicant has taken what I said at para. 118 of the remittal judgment out of context and that it is necessary to consider my full assessment of the issue at paras. 118-121 of the remittal judgment. It says that when those paragraphs are considered, it is clear that a number of considerations were key to the court's decision on the remittal point. They included that (i) the applicant would receive a significant benefit in that the Board's decision would be quashed and reconsidered by the Board and Mr. Boland would not be involved; (ii) it would not be fair, just or proportionate to require Indaver to go back to square one, particularly bearing in mind the extensive work done at the oral hearing and in the Inspector's first report which the applicant had unsuccessfully challenged in the proceedings; and (iii) the fact that the SID decision of 23 December 2015 would stand irrespective of whether the court quashed the decision without more or quashed it and remitted the application for reconsideration by the Board.

**75.** The Board contends that the manner in which the applicant has framed Question 3 does not properly reflect the assessment I made as to how best to achieve the overall objective of fairness and justice in deciding whether or not to remit the application to the Board. It submits, therefore, that the question does not properly arise out of the court's decision. It also makes the point that the assumption to which reference is made at para. 118 of the remittal judgment was clearly additional as opposed to a core consideration in the overall assessment I made by reference to the fairness and justice criteria. Furthermore, the Board submits that the assumption referred to at para. 118 of the remittal judgment was not unreasonable in light of the significant passage of time since the impugned decision was made. The Board also drew attention to para. 130 of the remittal judgment where I recommended that the Board give consideration to exercising its statutory powers and I noted from what was said by counsel on behalf of the Board during the hearing of the remittal application that it was "*highly likely*" that the Board will utilise at least some of those powers in light of that passage of time. Finally, the Board contends that the assessment of what fairness and justice requires is inherently a balancing exercise in which the court, in the exercise of its discretion, has to give different weight to the different factors involved. The Board notes that Question 3 raises an issue about the weight to be given to a particular factor but does not identify any issue of principle or error of law requiring consideration or clarification by the Court of Appeal.

**76.** I have again carefully considered the arguments advanced by the applicant and by Indaver and the Board on whether Question 3 raises any point of law of exceptional public importance. I am satisfied that it does not. I recognise, of course, that I might be wrong in the weight I attached to different criteria in determining whether it was fair and just to remit Indaver's application to the Board. However,

notwithstanding that, I am required to consider the issue raised in this question by reference to all of the principles summarised earlier. I do not believe that the question raises a point of law of exceptional public importance for a number of reasons.

77. In relying on what I said in a small part of para. 118 of the remittal judgment, the applicant has taken the reference to an assumption that the Board would exercise its powers out of context and has not had sufficient regard to what I said elsewhere in the judgment and indeed elsewhere in para. 118. At paras. 6 and 130 of the remittal judgment I noted that I had considered whether to direct the Board to exercise some or all of its statutory powers but had decided that I would not make such a direction but would recommend that the Board give consideration to exercising those powers and I noted in what was said by counsel for the Board during the hearing that it was “*highly likely*” that the Board would exercise at least some of those powers in the context of the remitted application in light of the lapse of time since the impugned decision and the earlier decision of the Board of 23 October, 2017. I went on to state at para. 130 that if the Board did not give proper consideration to exercising those powers, it might well be open to the applicant to bring future proceedings arising out of such failure. Further, at para. 118, I was expressly addressing the criteria of fairness and justice being the ultimate governing criteria in the exercise of a discretion as to whether or not to admit an application. In addition, I explained that I also had to consider what would be a proportionate remedy for the applicant to reflect its success on the objective basis ground. I concluded that an order of *certiorari* of the impugned decision together with the remittal of the application to the Board would be proportionate and would be consistent with fairness and justice. I explained in that paragraph why that was so. I made the point that the applicant would be obtaining an order of *certiorari* quashing the impugned decision.

78. The applicant would also be receiving a significant benefit (not an assumed benefit as was suggested at para. 43 of the applicant's written submissions) in that Indaver's application would be considered by the Board with whose members would not include the source of the objective bias, Mr. Boland. I then explained that I would leave to the Board the decision as to whether to exercise its discretion to seek further information from Indaver and to invite a response from the applicant and from the public. I stated that, on the assumption that the Board did so, the applicant would have the opportunity of commenting upon and addressing the further information provided and of dealing with any other relevant matters. That is the assumption which the applicant refers to as a "*mere assumption*" in Question 3. I do not believe that the question as phrased accurately reflects what I stated at para. 118. Read in the context of the other paragraphs to which I have mentioned and the other parts of para. 118 of the remittal judgment, I do not believe that it can be accurately said that I was determining what was fair and just by reference to a perceived benefit for the applicant based on a "*mere assumption*" that the Board would exercise its discretion to seek further information from Indaver. I referred to a series of benefits for the applicant, including the fact that the impugned decision is to be quashed and that the Board would be considering Indaver's application (from the particular point in time to which it was been remitted) without Mr. Boland being involved. The assumed benefit (which did not appear to be unreasonable in light of the recommendation which I was also making and the indication given to the Court on behalf of the Board) was an additional benefit for the applicant which I was considering alongside the other benefits referred to, all of which I felt were significant benefits to the applicant and reflected its success on the objective bias ground (as appears from para. 118 of the remittal judgment). It seems to me, therefore, that in suggesting that the benefit for

the applicant was assessed by reference to a “*mere assumption*” that the Board would exercise some or all of the relevant statutory powers, Question 3 raises a point which does not arise from my decision contained in the remittal judgment and does not, for that reason, amount to a point of law of exceptional public importance.

**79.** In addition, the applicant fairly accepts that, in the relevant part of the remittal judgment, I was applying a well-established principle governing the exercise of a discretion as to whether or not to remit a matter to a decision maker for reconsideration of the decision, namely, whether it was fair and just to remit the application in the particular circumstances of the case. That is a well-established principle set out in the cases referred to earlier and succinctly identified as the governing criteria by McDonald J. in *Barna*. In deciding that it was appropriate to exercise my discretion to remit Indaver’s application to the Board by reference to the governing criteria of fairness and justice, I was merely applying well-established legal principles to the particular facts of this case. I was doing so in circumstances where the decision as to whether to remit or not is an inherently discretionary decision in which various different factors had to be considered, all of which were set out not only in para. 118 of the remittal judgment but also, significantly, in paras. 119-121 of that judgment. Apart from the factors to which I have already referred, those other factors to which I considered in the exercise of my discretion were the fact that a lengthy oral hearing was conducted by the Inspector extending over seventeen days at which more than 90 witnesses gave evidence following which the Inspector prepared a very detailed report for the Board in January 2017. Challenges to the Inspector’s report were advanced by the applicant in its proceedings but were unsuccessful. I considered it relevant as part of the exercise of my discretion whether it would be appropriate to preserve parts of the process including the oral hearing and the

Inspector's report. I also considered the question of delay but did not feel that great weight should be attached to delay bearing in mind that the process had been a lengthy one up to that point. I also considered the fact that, as the Board pointed out in its submissions, whatever the outcome of the remittal application was, the SID decision of December 2015 would remain in existence and it has not been challenged. For the various reasons addressed in those paragraphs and having regard also to what I said at paras. 6 and 130 of the remittal judgment, it is evident that I considered a range of factors in ultimately concluding that I should exercise my discretion to remit. It seems to me that this is a classic case, therefore, of the application of well-established legal principles in the exercise of an inherently discretionary decision. In my view, that must inevitably lead to the conclusion that this case lies at the wrong end of the spectrum of the types of cases which although what is involved is the application of well-established principles, nonetheless there could be a point of law of exceptional public importance. In my view, this case lies firmly at the other end of that spectrum.

**80.** Nor can it be said that there is any uncertainty arising from the manner in which I exercised my discretion to refer. I did so, as indicated, by applying well established legal principles to the particular facts of this case and considered and gave weight to many different factors. That would also suggest that, even if it arose out of my decision (and I do not believe that it does), it is something that arises very much from the facts of this case and does not transcend beyond those facts.

**81.** For these various reasons, I do not believe that Question 3 gives rise to any point of law of exceptional public importance.



**iv. Question 4**

*Where a Court has found objective bias based on the participation of the relevant person (and/or his participation throughout the statutory process) and given that the Court when considering remittal is required by law to undo the consequences of the objective bias and no more:*

- (i) Is it sufficient for the Court to ascertain whether the circumstances which give rise to the objective bias no longer exist and will not exist when the remitted application comes to be considered again by the Board?*
- (ii) Is it lawful for the Court to remit to any point in the process?*

**82.** The applicant contends that Question 4 gives rise to a point or points of law of exceptional public importance and that the issues raised in Question 4 arise from paras. 88 and 97 of the remittal judgment. Para. 88 of the remittal judgment set out the legal principles governing the exercise by the Court of its discretion to remit a matter to a decision maker. At para. 97 of the remittal judgment, I stated that there was no reason in principle why an application could not be remitted in circumstances where the decision is quashed by the court on the ground of objective bias where the circumstances which gave rise to the objective bias no longer exist and will not exist when the remitted application is considered again by the Board (by reason of the absence of the person whose involvement gave rise to the objective bias). I also stated that the position might be different in other factual circumstances.

**83.** The applicant contends that there is a difference between undoing the consequences of a wrongful act and the absence of the circumstances which gave rise to the objective bias, namely, Mr. Boland's involvement in the process which was the unlawful act. It submits that the consequences of that act include the benefit which Indaver might be perceived to have obtained from Mr. Boland's involvement and the

damaged public confidence in the integrity of the Board's decision-making process.

The applicant submits that there is uncertainty as to the principle to be applied in a remittal application in the case of a finding of objective bias and that the clarification or resolution of that uncertainty could impact on future cases.

**84.** Both Indaver and the Board contend that there is a considerable overlap between Question 4 and Questions 1 and 2. They make largely the same objections to this question as to those earlier questions. Indaver makes the point that the applicant does not dispute any of the legal principles applicable to remittal including the principle that the court should aim to undo the consequences of any wrongful or invalid act but should go no further, which is one of the principles summarised by McDonald J. in *Barna* and referred to by me at para. 88 of the remittal judgment. It notes that the applicant does not dispute the validity of that principle but suggests that, properly applied, it should have led to a different result, namely, that the court should have refused to remit the application to the Board. Indaver contends, therefore, that the issue raised in this question concerns the application of well-established legal principles to the particular facts of this case and that in raising the point the applicant is attempting to re-argue the case made at the hearing of the remittal application. It further submits that the issue raised in the question concerns the application of the relevant legal principle to the particular facts of this case and that no uncertainty arises with respect to the principle or its application.

**85.** The Board made somewhat similar points stressing that the issue raised in Question 4 is very fact specific, arising from Mr. Boland's involvement at the earlier stages of the Board's consideration of Indaver's application. It refers to the fact that at para. 97 of the remittal judgment I made the point that the decision on remittal might be different in other factual circumstances. The Board also drew attention to

the fact that the applicant was unable to point to any authority to suggest that I was wrong in my conclusion that there is no overriding principle that remittal is not possible where a decision is quashed on the grounds of objective bias.

**86.** I have again considered the submissions advanced by the parties in respect of this question by reference to the legal principles summarised earlier. I have concluded that, as with the other questions, Question 4 does not give rise to a point of law of exceptional public importance for many of the same reasons as I set out in respect of Questions 1 and 2 above. Question 4, and the argument advanced by the applicant that it does contain a point of law of exceptional public importance, proceeds on the basis that the principles governing remittal (referred to at para. 88 of the remittal judgment and summarised by McDonald J. in *Barna*) are the relevant principles to be applied by the court in the exercise of its discretion. There was and is no dispute about those principles. It was not suggested that they had no application where the relevant decision is quashed for objective bias. What was argued by the applicant was that in this case the court should not remit the application to the Board. It seems to me, therefore, that this question also involves the application of well-established and undisputed legal principles to the particular circumstances of this case and falls at the wrong end of the spectrum referred to by the Supreme Court in *BS*. I cannot identify any uncertainty in the law which is required to be clarified by the Court of Appeal. Nor can it be said that the law is in a state of evolution as in some of the other cases, including *People Over Wind* and *Callaghan*. Nor do I believe that the question raised transcends the facts of this case. Rather it seems very tied to the particular facts which, as noted, while not unprecedented, are somewhat unusual.

**87.** For these reasons which are outlined in somewhat more detail in respect of Question 1 and 2, I do not believe that Question 4 contains a point of law of exceptional public importance.

**G. Whether an Appeal is Desirable in the Public Interest**

**88.** As I have found that none of the questions proposed by the applicant contain a point or points of law of exceptional public importance and as the requirements in s.50A(7) of the 2000 Act of demonstrating that such a point arises and that it is desirable in the public interest that there be an appeal are cumulative requirements, it is strictly speaking unnecessary for me to consider whether such an appeal is desirable in the public interest. However, for completeness, I will briefly explain why I have also concluded that an appeal is not desirable in the public interest in respect of any of the points contained in the questions proposed by the applicant.

**89.** The applicant maintains that an appeal is desirable in the public interest. It stresses the importance of public confidence in the integrity of the Board's processes and notes that this was one of the matters which I indicated in the remittal judgment (at para. 90) was a factor to be considered in deciding whether or not to exercise my discretion to remit the application to the Board. The applicant links the need to ensure that there is such public confidence in the integrity of the Board's processes with its contention that it is desirable in the public interest that there be an appeal from the remittal judgment. The applicant makes the further point that if there is any uncertainty with respect to the application of the relevant legal principles where remittal is sought following a finding of objective bias, it is very much in the public interest that this uncertainty be resolved on appeal.

**90.** While acknowledging that Indaver, in particular, would be relying on delay as a factor against the desirability of an appeal in the public interest, the applicant seeks to

distinguish the incinerator development in Ringaskiddy (a commercial development) from public type developments such as that considered in *Arklow (No. 1)* and *Arklow (No. 2)*. It notes that such a distinction was referred to by Haughton J. in *People Over Wind* and by Costello J. in *Callaghan*. While accepting, therefore, that delay is a factor to be considered, it contends that such delay is of less significance in the case of a commercial development when compared to a public or municipal type development. It accepts, therefore, that delay is a factor but maintains that it is not determinative of the position here.

**91.** Both Indaver and the Board maintain that it is not desirable that there be an appeal in the public interest. While accepting that uncertainty in the law may mean that it is desirable in the public interest that an appeal be taken, both submit that no such uncertainty exists. They rely on the point made earlier that most of the questions proposed by the applicant are directed to the application by me in the remittal judgment of well-established principles to the particular facts of the case. They maintain that there is no uncertainty. They also rely on delay as a factor pointing against the desirability of an appeal. Indaver makes the point that the delay which would arise from an appeal is different to the delay which I considered at para. 120 of the remittal judgment. A delay which would be occasioned by an appeal is a delay in the final determination of proceedings which are intended to be dealt with on an expeditious basis.

**92.** The Board makes the additional point that since, as I acknowledged at para. 121 of the remittal judgment, irrespective of whether the application was simply quashed without more or whether it was quashed and remitted to the Board, the SID decision of December 2015 would stand and the dispute between the parties was really, therefore, about the point in time to which the application should be remitted.

**93.** The Board also made the point that it is relevant in considering when an appeal is desirable in the public interest that the applicant was successful in its application to quash the impugned decision.

**94.** In considering whether it is desirable in the public interest that an appeal be brought in a case such as this, it is open to the court to consider a range of different factors and considerations (see, for example *Rushe* at para. 68). The cases, including *Arklow (No. 1)* and *Arklow (No. 2)*, demonstrate that a broad range of factors and considerations may be taken into account in considering whether an appeal is desirable in the public interest (see for example *Rushe* at para. 71). There is an overlap in some of the factors which may be relevant to the question as to whether point of law of exceptional public importance arises and as to whether it is desirable in the public interest that an appeal be brought. One such overlapping factor is where there is uncertainty in the law. The existence of such uncertainty can mean that the relevant point is a point of law of exceptional public importance. The need to clarify or resolve that uncertainty can mean that it is also desirable in the public interest that an appeal be brought. But that factor does not arise in this case as I have concluded earlier that no uncertainty arises in respect of any of the legal principles which are required to be applied in this case where the remittal judgment involved the application of well-established legal principles to the facts of the case.

**95.** Another potentially relevant factor is delay. I considered the weight to be attached to delay at para. 120 of the remittal judgment. I considered that relatively limited weight should be afforded to the question of delay in deciding whether or not to remit the application to the Board since the process had been a lengthy one, going back to 2012 when the pre-application consultation process started. Delay is also relevant in considering the desirability of an appeal in the public interest. The delay

to be considered here is the delay which would be occasioned in the final disposal of the proceedings, in circumstances where the clear intention of the Oireachtas in enacting s.50A(7) (and its statutory predecessors) is that the decision of the High Court in these cases should be final and should not be the subject of any appeal and where an appeal will delay the conclusion of the proceedings. However, again, I believe that relatively little weight should be attached to any delay occasioned by an appeal to the Court of Appeal as that court is prepared to afford significant priority to appeals in urgent cases, including planning cases.

**96.** While I fully accept the importance of ensuring that there is public confidence in the integrity of the Board's decision-making process, I do not accept that that is a strong factor pointing towards the desirability of an appeal in the public interest in this case. I remain of the view I expressed at para. 93 of the remittal judgment that the applicant's success in the principal judgment on the objective bias point promotes public confidence in the integrity of the Board's processes and procedures.

**97.** Perhaps the most significant factor, in my view, against the desirability of an appeal in the public interest arises from the very particular circumstances of the applicant's application for leave to appeal. The applicant has sought such leave in circumstances where it has succeeded in obtaining an order of *certiorari* quashing the impugned decision on the grounds of objective bias and a related declaration (as well as succeeding on another ground of challenge advanced by it to the impugned decision). The appeal sought arises from the Court's decision that the matter should be remitted to a point in time in the process to be considered by the Board in circumstances where the person whose involvement gave rise to the objective bias will no longer be involved. That is a very unusual situation. I find it hard to see how an appeal from a decision to remit the application in those circumstances would sit

comfortably with the clear intention of the Oireachtas that a decision of the High Court in a case like this should generally be final and that there should be no appeal save in the exceptional circumstances provided for in s.50A(7). I find it difficult to see in those circumstances how it could be said that an appeal on any of the issues raised in the questions proposed by the applicant is desirable in the public interest.

**98.** In my view, for the reasons set out above, I am satisfied that it would not be desirable in the public interest that there should be an appeal to the Court of Appeal in respect of any of the issues raised by the applicant in the questions which it has proposed.

#### **H. Conclusion**

**99.** In conclusion, for the reasons set out earlier, I have decided that the questions proposed by the applicant which are said to arise from the remittal judgment do not involve any point of law of exceptional public importance. Nor, for the reasons separately identified above, am I satisfied that it is desirable in the public interest that an appeal should be brought to the Court of Appeal from the remittal judgment. Therefore, the cumulative requirements contained in s.50A(7) of the 2000 Act have not been satisfied by the applicant.

**100.** I, therefore, refuse to grant leave to appeal to the applicant.

**101.** This judgment is being delivered electronically. I will list the matter for mention at 10.30 a.m. on 4 May 2022 to address the final orders to be made in the proceedings.