

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2021] IEHC 629**

**[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 1<sup>st</sup> day of October, 2021**

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### **1. Introduction**

1. This judgment addresses the reliefs to be granted to the applicant arising from the judgment on the substantive issues in the proceedings which I delivered on 19<sup>th</sup> March, 2021 [2021] IEHC 203 (the “principal judgment”). The applicant succeeded on two of the grounds of challenge advanced by it in respect of the decision of the respondent, An Bord Pleanála (the “Board”), dated 29<sup>th</sup> May, 2018 granting planning permission for the development of an incinerator at Ringaskiddy, County Cork to Indaver Ireland Ltd, the first named notice party (the “impugned decision”).

2. The two grounds on which the applicant succeeded were: ground 4 (the objective bias issue) and ground 1 (the prospective applicant/applicant: jurisdiction issue). The parties have been unable to agree on the reliefs which the court should grant in respect of those two grounds on which the applicant succeeded. With respect to ground 4, it is common case that the court should grant an order of *certiorari* quashing the impugned decision. However, while the applicant maintains that the court should make an order of *certiorari* simpliciter, the notice parties (who, for convenience, I will refer to as “Indaver”) contend that the court can and should remit its planning application to the Board to be considered and determined in accordance with the principal judgment. The Board’s position is that it would be in a position to exercise its statutory duties and obligations in the event that Indaver’s planning application

was remitted to it. There is a slight divergence of views between the Board and Indaver as to the point in time in the process to which the application could be remitted. The applicant is resolutely opposed to any remittal of Indaver's planning application. It is, therefore, necessary for the court to determine whether it should grant an order of *certiorari* in respect of ground 4 and remit the application to the Board or whether it should grant an order of *certiorari simpliciter*. In the event that the court does decide to remit the application, the Board and Indaver request that the court make certain directions as to the basis on which the Board should deal with the remitted application.

3. There is further significant disagreement between the parties as to the relief which the court should grant to the applicant under ground 1. The applicant maintains that the court should grant an order of *certiorari* on the basis that the consequence of the court's decision on this ground is that the Board did not, and does not, have jurisdiction to entertain an application for permission made by an entity other than the entity which was the "prospective applicant" under the Strategic Infrastructure Development provisions (the "SID provisions") of the Planning and Development Act, 2000 (as amended) (the "2000 Act"). The Board and Indaver maintain that the court should not grant an order of *certiorari* on the basis of what they maintain was a clerical error in the name of the applicant for the permission and that, if necessary, the court could grant an appropriate declaration to reflect the applicant's success on this ground. They maintain that, if remitted consequent on an order of *certiorari* made in respect of ground 4, the court can direct the Board to amend or, alternatively, that the Board has the power to amend the name of the applicant for permission so as to refer to the correct entity, namely, the entity which was the "prospective applicant". The applicant, however, maintains that the court should not make any such direction and that the Board does not have the power to amend the name of the applicant in the manner suggested.

## **2. Summary of Decision**

4. For reasons which I explain in this judgment, I am satisfied that, in respect of ground 4, the court should grant an order of *certiorari* quashing the impugned decision and should remit Indaver's planning application to be further considered and determined by the Board. I am not satisfied that the objections raised by the applicant to such remittal are well founded. Nor am I satisfied that the applicant's complaints that public confidence in the integrity of the planning process would be undermined in the event that such a remittal were made are reasonable or correct.

5. I have concluded that the appropriate point in time to which the application should be remitted is the point in time immediately prior to the decision made on behalf of the Board by the deputy chairperson, Mr. Boland, on 23<sup>rd</sup> October, 2017 not to afford the applicant and others the opportunity of responding to the further information and submissions received from Indaver earlier in October, 2017. The consequence of the remittal to that point in time is that the addendum or supplemental report of the inspector dated 7<sup>th</sup> March, 2018 should not be considered by the Board in the course of its consideration of the remitted application as the applicant and others did not have the opportunity of commenting upon the further information and submissions provided by Indaver in early October, 2017.

6. I have noted the wide range of powers available to the Board under the SID provisions, such as s. 37F(1) and s. 37F(2), and under s. 134 of the 2000 Act, as well as developments which have taken place in the period between the date of the impugned decision and the delivery of the principal judgment, and have concluded that it is not necessary for the court to direct that the Board exercise any of those or other statutory powers which it may have. However, I recommend that the Board does give proper consideration to exercising some or all of those powers and a failure to properly to do so may have adverse

legal consequences for the Board, but I do not believe that it is either necessary or appropriate for me to make any direction in that regard.

7. As regards the relief to be granted in respect of ground 1, I have concluded that it is strictly speaking unnecessary for me to decide whether to grant an order of *certiorari* on this ground as such an order is being made in respect of ground 4. However, in the event that I am wrong about that, I have concluded that it would be an appropriate exercise of my discretion to refuse to grant an order of *certiorari* in respect of the impugned decision on this ground on the basis of the clerical error in Indaver's planning application and that it would be a proper exercise of that discretion to grant an appropriately worded declaration to reflect the applicant's success on the point.

8. I am further satisfied that the Board does have the power to amend the name of the applicant for permission so as to reflect the name of the originally intended applicant, namely, Indaver NV t/a Indaver Ireland. I direct that the Board make that amendment when considering the planning application remitted to it.

9. I am satisfied that it is an appropriate exercise of my discretion to refuse *certiorari* in respect of this ground, in circumstances where (a) the court is already making an order of *certiorari* in respect of ground 4; (b) having regard to the close connection between the two Indaver entities concerned and the statutory objectives sought to be achieved under the SID provisions of the 2000 Act, those statutory objectives would not be undermined; and (c) the applicant was not prejudiced in any way as a result of the fact that the incorrect Indaver entity applied for the permission as a result of a clerical error.

10. I am satisfied that this is an approach which the court is entitled to take, and should take, in the exercise of its discretion in light of earlier case law including *The State (Toft) v. Corporation of Galway* [1981] ILRM 439 (High Court, Costello J.) and unreported, Supreme Court, 30<sup>th</sup> June, 1981 (Supreme Court) ("*Toft*") and *Schwestermann v. An Bord Pleanála*

[1994] 3 IR 437 (“*Schwestermann*”). I am also satisfied that that approach is consistent with the approach recently adopted, and the observations made, by Owens J. in the High Court in *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 403 (“*Pembroke Road*”) and that it does not fall foul of the decision of the Supreme Court in *Ecological Data Centres Ltd v. An Bord Pleanála* and *Urrinbridge Ltd v. An Bord Pleanála* [2013] IESC 61 (“*Urrinbridge*”). In circumstances where the impugned decision is being quashed under ground 4 and Indaver’s planning application is being remitted to the Board for further consideration and determination by it, there is no irrevocable decision by the Board and the Board is not *functus officio*.

### **3. Summary of Principal Judgment**

**11.** The applicant originally maintained eleven grounds of challenge in respect of the impugned decision. Those grounds are summarised at para. 47 of the principal judgment. The applicant withdrew one of those grounds at the outset of the hearing (ground 2) but maintained ten of the grounds. The applicant succeeded on two of those grounds, ground 4 and ground 1.

**12.** Ground 4 (objective bias) was the ground which took up most of the time at the hearing and I referred to it as the “*most significant issue*” raised in the proceedings (para. 5 of the principal judgment). I concluded that the impugned decision was tainted by objective bias by reason of the prior involvement of the then deputy chairperson of the Board, Conall Boland, who was also the presenting member of the Board in respect of its consideration of Indaver’s planning application, as a consultant in work done for Indaver in 2004. I was satisfied that there was a clear, rational and cogent connection between the work done by Mr. Boland and Indaver’s planning application. A summary of my conclusions in respect of ground 4 is contained at paras. 5 and 513 of the principal judgment. The reasons for my decision in respect of that ground are mainly contained in paras. 144 to 175 of the principal

judgment. For the reasons set out in detail in those paragraphs, I was satisfied that the applicant had established that a reasonable objective observer would have a reasonable apprehension that the Board might not be capable of considering and determining Indaver's planning application in an unbiased and impartial manner by reason of the prior professional association of Mr. Boland in the work which he did as a consultant for Indaver in 2004. I was satisfied that it was necessary to grant relief to the applicant on this ground in order to ensure that public confidence in the integrity of the Board's procedures was maintained (para. 175).

**13.** While noting that, as I had found that the applicant was entitled to succeed in respect of ground 4, it might not, therefore, be strictly necessary for me to deal with the other grounds of challenge maintained by the applicant, nonetheless, for completeness, I proceeded to do so.

**14.** With respect to the other ground on which the applicant succeeded, ground 1 (the "prospective applicant"/applicant issue), I provided a summary of my decision on that ground at paras. 5 and 514 of the principal judgment. The reasons for my decision in respect of this ground are mainly set out at paras. 201 to 250 of the principal judgment. I concluded that the proper interpretation of the SID provisions in the 2000 Act requires that the applicant seeking permission under s. 37E should be the same person as the "prospective applicant" who engaged in the pre-application consultation procedure provided for in those provisions. The Indaver entity which applied for permission for the proposed incinerator development in Ringaskiddy was not the same Indaver entity which had applied to and engaged in the pre-application consultation procedure with the Board. I accepted the case made by Indaver that the reason why the application was made in the name of Indaver Ireland Ltd and not in the name of Indaver NV was as a result of a clerical error which had been pointed out by Indaver prior to and at the oral hearing. I rejected the contention made by the applicant that the mistake was not a clerical error (para. 243).

**15.** Having expressed my agreement with the interpretation of the SID provisions for which the applicant contended and having noted that the consequence of that interpretation might normally lead to an order of *certiorari* quashing the Board's decision on the basis that it did not have jurisdiction to consider and determine the application, I went on to observe that that might not always be the appropriate order to make and I made a number of observations relevant to the relief which might be granted to reflect the applicant's success on this ground (paras. 244 to 250).

**16.** However, as I had been expressly requested by the applicant during the course of the hearing to leave over the issue as to the appropriate relief to be granted in respect of this ground, in the event that the applicant succeeded on it, I refrained from expressing a concluded view on whether I should exercise my discretion to refuse to grant an order quashing the impugned decision under ground 1. I did, however, express certain reservations as to whether *certiorari* would be appropriate under this ground having regard to the close relationship between the applicant for the permission, Indaver Ireland Ltd, and the "prospective applicant", Indaver NV. Indaver Ireland Ltd is a subsidiary of Indaver NV.

**17.** I observed that having regard to the close relationship between the two Indaver entities, and having regard to the objective and rationale of the scheme provided for under the SID provisions, namely, to ensure that the person who ultimately applies for permission has had the benefit of the consultations and advice given by the Board during the pre-application procedure, I thought that it might be difficult to see how that objective would be undermined in circumstances where, due to the clerical error, the applicant for the permission was a subsidiary of the "prospective applicant" and not the "prospective applicant" itself (paras. 245 and 247). I also agreed with the Board and Indaver that no issues of enforcement should arise by virtue of any issue concerning the identity of the applicant and the "proposed applicant" (paras. 245 and 248). I observed that, apart from making the point concerning the



proper interpretation of the SID provisions, the applicant had not shown how its position had in any way been prejudiced as a result of the fact that the Indaver entity which applied for the permission was different to the Indaver entity which had engaged in the pre-application consultation procedure (para. 248). I referred to *Toft* and *Schwestermann* as being potentially relevant to this issue and raised the possibility that it might be open to the Board to correct the name of the applicant for permission in certain circumstances. However, I expressly refrained from stating a concluded view on these issues to enable further submissions to be made.

**18.** While these are the two grounds on which the applicant succeeded, I should also draw attention to two of the other grounds raised by the applicant on which it did not succeed, as they are potentially relevant to some of the issues which must be resolved in determining the relief which should be granted to the applicant following its success on these two grounds.

**19.** The first is ground 9. One of the arguments advanced by the applicant under this ground was that the Board was obliged under s. 37F(2) of the 2000 Act to make the additional material and information provided by Indaver to the Board in October, 2017 available for inspection and to afford the applicant and others the opportunity of considering and commenting upon that additional material and information but that it wrongfully failed to do so. I considered that aspect of the applicant's case under this ground at paras. 469 and 470. The decision not to make that additional material and information available and not to invite submissions on it was made by Mr. Boland and is recorded in a memorandum dated 23<sup>rd</sup> October, 2017. The applicant contended that the Board was obliged under s. 37F(2) to make that material information available and to permit submissions to be made on it but failed to do so. The applicant did not expressly challenge that decision on the grounds of objective bias. The relevance of that will be considered below. I rejected the case which the applicant made

under that ground in respect of that decision, namely, that it was in breach of s. 37F(2) and my reason for doing so is set out at para. 470.

20. The second other ground which is potentially relevant to the issues arising on this application is ground 11 which raised a complaint that the inspector had not provided the Board with a fair, complete and sufficient report. One of the reasons advanced in support of that ground was the alleged failure by the inspector to deal fully with the issue of coastal erosion in his report. That issue was raised at para. 97(c) of the amended statement of grounds. I rejected the entirety of the applicant's case under ground 11. In particular, with reference to the complaint made in relation to the inspector's report concerning coastal erosion, I did not accept that the inspector had not provided a fair and accurate report on that issue (para. 503). The reason I mention this ground is that the applicant has sought to raise the issue of coastal erosion and how the Board dealt with that issue as part of its case that Indaver's planning application should not be remitted since Mr. Boland had an involvement in the question of coastal erosion both in the pre-application stage and after Indaver's planning application was submitted.

#### **4. Events post Principal Judgment**

21. Following the delivery of the principal judgment, the case was adjourned to enable the parties to correspond in relation to the reliefs to be granted consequent upon the judgment.

22. In a letter dated 1<sup>st</sup> April, 2021, Indaver's solicitors contended that, with respect to ground 5, the court should make an order of *certiorari* arising from its findings in relation to that ground only and that Indaver's application should be remitted to the Board for further consideration in accordance with law. Indaver contended that the impugned decision should not be quashed arising from the court's findings in relation to ground 1. It submitted that declaratory relief would be the more appropriate remedy in respect of the court's findings on that ground. As regards remittal in respect of ground 4, Indaver submitted that in accordance

with the well-established principles in the case law, it would be appropriate for the court to remit the planning application to the Board. It pointed out that the deputy chairperson, whose prior involvement gave rise to the objective bias found by the court, was no longer a member of the Board. Indaver submitted that it would be consistent with the court's decision that the matter be remitted to a point in time immediately prior to Mr. Boland's appointment as presenting member on 3<sup>rd</sup> May, 2018. However, it also referred to the memorandum of 23<sup>rd</sup> October, 2017 recording the decision of the Board not to further cross-circulate submissions and stated that, notwithstanding that a separate challenge to that decision had failed, the court might consider that it was appropriate for the application to be remitted to that point in time, namely, 23<sup>rd</sup> October, 2017 and that Indaver would have no objection to the matter being remitted to that date, if the court considered it more appropriate to do so. Indaver also stated that it anticipated that the Board would exercise the powers available to it under the 2000 Act including the power under s. 37F(1) to require the submission of further information and to seek further submissions or observations. It anticipated that that was a power which the Board would choose to exercise and noted that Indaver had submitted an application for an industrial emissions licence to the Environmental Protection Agency in 2019 which included an Environmental Impact Assessment report, screening for Appropriate Assessment and a Natura Impact Statement. On that basis, Indaver considered that any order of *certiorari* should be limited to ground 4 and that the application should be remitted to the Board as indicated.

**23.** On the same date, the applicant's solicitors wrote stating that the applicant would be seeking an order quashing the impugned decision simpliciter on grounds 1 and 4 together with an order for costs as against the Board. In a further letter dated 9<sup>th</sup> April, 2021, the applicant's solicitors reiterated that position and contended that with respect to ground 4, the impugned decision should be quashed simpliciter, *inter alia*, because of the involvement of

Mr. Boland in the pre-application process. The applicant contended that that process had included the giving of advice to the “prospective applicant” which was a benefit to that entity.

**24.** In a letter dated 23<sup>rd</sup> April, 2021, the Board’s solicitors conveyed the following views of the Board. The Board considered that it has the appropriate powers to carry out its statutory function in light of the court’s findings. The Board was, therefore, not opposing the making of an order remitting the application to the Board for further consideration. The Board was reserving its entitlement to invite the court, in the event that it was minded to remit the matter to the Board, to exercise its discretion to give directions in relation to such remittal.

**25.** The hearing to resolve these disputed issues was listed for 8<sup>th</sup> June, 2021. The parties exchanged written submissions in advance of the hearing which I found of great assistance in determining the disputed issues.

**26.** In addition, on 3<sup>rd</sup> June, 2021, the applicant issued a motion seeking liberty to tender by way of evidence certain documents which it contended were relevant to Indaver’s application to remit the planning application to the Board. The applicant sought to rely on five documents (the “new documents”), four of which were not available to the applicant when it applied for and obtained leave to bring these proceedings on 24<sup>th</sup> July, 2018 and one of which was available but was inadvertently not included in the material put before the court. That latter document (the second Aquavision report) had been appended to the inspector’s main report of 27<sup>th</sup> January, 2017. The other four documents were obtained by the applicant on 26<sup>th</sup> July, 2018, on foot of a freedom of information request. In addition to these five documents, the applicant also sought to rely on six additional documents (the “additional documents”) which were exhibited at exhibit “MOL1” to the affidavit sworn by Mary O’Leary on 17<sup>th</sup> July, 2018 for the purpose of grounding the applicant’s application for judicial review.

**27.** In an affidavit grounding the applicant's application for leave to rely on the five new documents, the applicant's solicitor, Mr. Noonan, explained that the documents were relevant in that they disclosed Mr. Boland's role in the pre-application process and demonstrated that his role was more extensive than portrayed in the submissions furnished by the Board and by Indaver. Mr. Noonan asserted that the documents demonstrated that in September/October, 2015, Mr. Boland had proposed to the Board that consultants on the issue of coastal erosion (which was one of the grounds on which a previous application by Indaver was refused by the Board) be retained by the Board and that there was a record of Mr. Boland's involvement in March, 2016, in relation to the planning application submitted by Indaver in January, 2016, when Mr. Boland had proposed that the Board retain the same coastal erosion consultants (Aquavision) for the purposes of the planning application.

**28.** The applicant's motion was listed on the same day as the hearing. On 6<sup>th</sup> June, 2021, Indaver's solicitors indicated that, while Indaver did not accept that the additional documents were relevant, Indaver had no objection to the documents being admitted on a *de bene esse* basis at the hearing. The Board's solicitors responded to the motion in a letter sent shortly before the hearing on 8<sup>th</sup> June, 2021. The Board disputed the relevance of the documents to the remittal application and questioned the adequacy of the explanation given by the applicant as to why the documents were being tendered at such a late stage in the proceedings. The Board drew attention to the fact that the applicant had been in possession of the documents (or at least four of the five documents) since 26<sup>th</sup> July, 2018, two days after leave was granted. It had been in possession of one of the documents prior to the grant of leave. The Board contended that there had been adequate opportunity for the applicant to adduce the documents in evidence if it considered them relevant to the objective bias ground. The Board also disputed the contention that the documents sought to be relied on by the applicant provided evidence of Mr. Boland providing "advice" to Indaver as part of the pre-

application procedure. The Board asserted that the documents simply showed that Mr. Boland had proposed to the Board that external independent consultants (Aquavision) be engaged to assist the Board with coastal erosion issues and that he was part of the Board that signed off on the engagement of those consultants. However, notwithstanding those assertions, the Board was also agreeable to the documents being admitted in evidence on a *de bene esse* basis. Finally, the Board noted that the Board's power to appoint consultants is contained in s. 124(1) of the 2000 Act and that, at the relevant time, while the Board's assistant director of planning was responsible for sourcing external experts/consultants and would make recommendations to the Board in that respect, the appointment of such experts/consultants had to be formally proposed and signed off at a Board meeting and that that was almost invariably done by the then deputy chairperson, Mr. Boland.

**29.** At the hearing which commenced on 8<sup>th</sup> June, 2021 and continued on 18<sup>th</sup> June, 2021, I agreed that, on the basis of the position set out in correspondence, and in the absence of any major objection from the Board or from Indaver, I would consider the five new documents the subject of the applicant's application and permit the parties to make submissions as to the relevance or significance of those documents to the remittal issue. The hearing proceeded on that basis.

**30.** As it was Indaver which was advocating that its planning application should be remitted to the Board consequent upon an order of *certiorari* quashing the impugned decision under ground 4, it went first, followed by the Board and then by the applicant. That was the sequence in which the written submissions in advance of the hearing had also been provided.

## **5. Summary of Parties' Submissions**

### **(a) *Indaver***

#### **(i) Ground 4**

**31.** With respect to ground 4, Indaver submitted that the appropriate course for the court to adopt was to make an order of *certiorari* quashing the impugned decision on the basis of the objective bias alleged by the applicant and found by the court under ground 4 and to remit its planning application to be further considered by the Board in accordance with the court’s judgment and in accordance with law. It submitted that that approach would be consistent with the principles set out in the case law as summarised and considered in cases such as *Clonres CLG v. An Bord Pleanála* [2018] IEHC 473 (“*Clonres*”), *Fitzgerald v. Dun Laoghaire-Rathdown County Council* [2019] IEHC 890 (“*Fitzgerald*”), *Barna Wind Action Group v. An Bord Pleanála* [2020] IEHC 177 (“*Barna*”), *Redmond v. An Bord Pleanála* [2020] IEHC 322 (“*Redmond*”) and *Kemper v. An Bord Pleanála* [2021] IEHC 281 (“*Kemper*”).

**32.** Indaver submitted that the fact that the court upheld the applicant’s case that the impugned decision was vitiated by objective bias by reason of involvement of the deputy chairperson, Mr. Boland, did not mean that that decision must be quashed simpliciter and that the application could not be remitted to the Board for further consideration and determination. It relied in this regard on a number of matters which I summarise as follows.

**33.** First, Indaver stated that the deputy chairperson, Mr. Boland, ceased to be a member of the Board in December, 2018 and that the chairperson is also no longer a member. It submitted, therefore, that as the former deputy chairperson would not be involved in the Board’s consideration of the remitted application, it would not be affected by the objective bias which arose solely by reason of the involvement of the former deputy chairperson.

**34.** Second, Indaver asserted that the case pleaded and the relevant relief sought by the applicant in the proceedings as against the Board was directed to the impugned decision and to the objective bias arising from Mr. Boland’s involvement in that decision and not to the various earlier decisions of the Board in the course of the pre-application planning procedure

(including its decision of 23<sup>rd</sup> December, 2015 that the development the subject of the application was SID (the “SID decision”)) or its earlier decisions in the planning application procedure itself. Indaver relied on the case pleaded by the applicant and on portions of the primary judgment and argued that, in seeking to rely on Mr. Boland’s involvement in the pre-planning application procedure and in the earlier parts of the planning application procedure itself, the applicant was seeking to recast its case and, in effect, to make a new case to that made in the pleadings and argued at the substantive hearing.

**35.** Third, Indaver disputed the contention made by the applicant (in reliance on the new and additional documents) that Mr. Boland was involved in giving advice to Indaver at the pre-application stage. It maintained that the new and additional documents relied upon by the applicant did not support that case. It also criticised the applicant for its failure to raise these new and additional documents prior to the hearing of the remittal application and made the point that the applicant knew that Mr. Boland was involved in the pre-application procedure but did not seek any relief in the proceedings in relation to that involvement or to decisions taken in the course of the pre-application stage. Insofar as those new and additional documents refer to the issue of coastal erosion, Indaver pointed out that the court dealt with that issue on its merits when dealing with, and rejecting, ground 11 of the applicant’s grounds of challenge, at paras. 503 and 505 of the principal judgment.

**36.** Fourth, Indaver relied on the decision of the Supreme Court in *Callaghan v. An Bord Pleanála* [2018] IESC 39 (“*Callaghan*”) and argued that the effect of that decision was to confirm that nothing is finally determined in the pre-application stage and that all relevant matters remain at large when the Board comes to consider whether to grant permission. It also submitted that with respect to s. 37C(2) of the 2000 Act (which was relied on by the Board in its written submissions), that provision precluded any material reliance on the consultations at the pre-application stage when it comes to the Board deciding on the



application for permission. Indaver felt, however, that the Board and the applicant were at cross purposes in relation to the submissions addressed to s. 37C(2).

**37.** Fifth, Indaver submitted that it would be consistent with the principles set out in the case law on which it relied to remit its application to the Board. It submitted that the court should only seek to undo the consequences of the identified wrongful or unlawful acts and should seek to preserve those parts of the process which were considered to have been carried out lawfully. It noted that the impugned decision was the culmination of a process which commenced as far back as August, 2012 and involved a series of steps in the pre-application and application processes up to the date on which the impugned decision was made in May, 2018. It pointed to the significant public consultation which took place in the interim period, including the hearings over seventeen days before the inspector, which led to the preparation of a detailed report by the inspector, which was not affected by any objective bias on the part of Mr. Boland and was not successfully challenged on any of the grounds advanced by the applicant. Indaver submitted that the court should not “*throw out the baby with the bathwater*” by making an order of *certiorari* in respect of the impugned decision simpliciter and by not remitting the application to the Board.

**38.** Sixth, Indaver pointed to the significant delay which would occur in the event that the application was required to go back to the very start of the process at the pre-application consultation stage (and it pointed out that no allegations of objective bias were made in the pleadings in respect of Mr. Boland’s involvement in the pre-application process and that the SID decision itself was not challenged in the proceedings) or even if the application had to go back to the start of the planning application process itself.

**39.** Seventh, Indaver submitted that significant weight should be attached to the view of the Board that it has the appropriate statutory powers to carry out its statutory duties and that

that view should not be lightly disregarded by the court. Indaver also referred to the significant powers available to the Board under s. 37F of the 2000 Act.

**40.** Eighth, Indaver rejected the suggestion by the applicant that the fact that the Board defended the proceedings, albeit unsuccessfully, and argued in its pleadings that Indaver had not made a clerical error and that the Board was entitled to proceed to deal with the application, meant that the application could not be remitted and that the Board could not be relied on to make an independent and impartial decision on the remitted application. Indaver relied on a number of the previous cases in which the Board had defended the proceedings unsuccessfully and yet the court had remitted the application to be reconsidered and determined again by the Board including, most recently, *Kemper*.

**41.** Ninth, Indaver submitted that any new decision which the Board might make on foot of a remitted application could address any ongoing concerns held by the applicant and pointed out again that nothing was finally decided at the pre-application stage with respect to the merits of the planning application itself. It also pointed out that if the applicant was dissatisfied with any new decision of the Board taken on foot of the remitted application, it would be open to the applicant to seek to challenge that new decision.

**42.** Indaver submitted, therefore, that the court should remit its planning application to the Board for further consideration and determination in accordance with the findings of the principal judgment and in accordance with law.

**43.** With regard to the point in time to which the application should be remitted, Indaver made the point in its written submissions that Mr. Boland had signed the memorandum on 23<sup>rd</sup> October, 2017 to the effect that the further submissions and information provided by Indaver did not need to be made available for public consultation or further submissions invited from the applicant and others. Indaver noted that notwithstanding that it was not alleged by the applicant in the pleadings that the decision of 23<sup>rd</sup> October, 2017 was vitiated

by objective bias by reason of Mr. Boland's involvement and even though that decision was unsuccessfully challenged by the applicant on other grounds, the court might consider that it would be appropriate to remit the application to the point in time just before 23<sup>rd</sup> October, 2017. At the hearing, Indaver raised the possibility that the court might consider it appropriate to remit the matter to 3<sup>rd</sup> May, 2018, as the Board had revisited the issue as to whether the further information provided by Indaver should be circulated and submissions sought in relation to it at that stage and had decided against doing so. Ultimately, however, Indaver accepted that the court could take the view that it might be appropriate to remit the application back to 23<sup>rd</sup> October, 2017.

**(ii) Ground 1**

**44.** With respect to ground 1, Indaver submitted that the making of its planning application in the name of Indaver Ireland Ltd and not Indaver NV, which had been the "prospective applicant" in the pre-application consultation process, was a clerical error, as found by the court in the principal judgment (at para. 243), and that the consequence of that error did not have to be, and should not be, an order of *certiorari* and should not invalidate the entirety of the planning application. While the making of an appropriate declaration might be a suitable remedy to reflect the conclusions which the court had reached on the correct interpretation of the relevant SID provisions (although it observed that such a declaration might not even be necessary), Indaver submitted that an order of *certiorari* would be inappropriate and manifestly disproportionate for a number of reasons.

**45.** First, it relied on the discretionary nature of the remedy of *certiorari*. While accepting that ground 1, on which the applicant had succeeded was a jurisdictional ground, Indaver relied on the observations of the court in the principal judgment (at paras. 244 to 250) and urged the court to adopt those observations in its conclusions on the appropriateness of the remedy of *certiorari* in respect of ground 1. Indaver submitted that the making of the

application in the name of an Indaver entity which was not the “prospective applicant” which had participated in the pre-application consultation process would not undermine the statutory objective of the SID provisions since, because of the close relationship between the two Indaver entities concerned, the company which made the planning application, in error, did in fact have the benefit of the consultations and advice given by the Board to the other Indaver entity in the course of the pre-application process. Nor, Indaver submitted, was the applicant prejudiced in any way as a result of the error in the name of the applicant, whether as regards the ability to enforce the conditions of the planning permission ultimately granted or otherwise.

**46.** Second, Indaver relied on the fact that the Board has jurisdiction under s. 146A(1) of the 2000 Act to amend a planning permission granted by it in order to correct any clerical error in the permission or otherwise to facilitate the operation of the permission and that if the impugned decision was not being quashed (under ground 4), it would have been open to the Board to rectify the error under that provision. Indaver relied on *Toft, Schwestermann* and *Pembroke Road* (and, in particular, on para. 34 of the judgment of Owens J.) in support of its contention that the Board must also have the power to amend the name of the applicant at an earlier stage of the process, prior to the decision to grant the permission. It advanced that submission notwithstanding the different statutory regimes involved. It also submitted that the power to amend, in the event that the application was remitted to the Board, was not inconsistent with the decision of the Supreme Court in *McDonagh & Sons Ltd v. Galway Corporation* [1995] 1 IR 191 (“*McDonagh*”), a case on which the applicant relied. Indaver submitted that the fact that the error was found to be jurisdictional did not mean that it was a fundamental error requiring an order of *certiorari* or precluding remittal and amendment in the event that an order of *certiorari* was made on this ground.

47. Third, while questioning the necessity or appropriateness on an order of *certiorari* in respect of this ground for the reasons just summarised and also as the court will in any event be making an order of *certiorari* under ground 4, if the court did nonetheless grant an order of *certiorari* under this ground also and remit the application to the Board, Indaver submitted that the Board must have the power to amend the name of the applicant in respect of the remitted application to correct the clerical error and to give effect to Indaver's original intention as to who the applicant for the permission would be.

**(b) The Board**

**(i) Ground 4**

48. With respect to ground 4, the Board did not dispute that an order of *certiorari* should be made quashing the impugned decision in light of the court's findings of objective bias. The Board did not oppose the remittal of Indaver's application for further consideration and determination by the Board. The Board expressed the view that there were no obstacles to the court remitting the application and that it has sufficient statutory powers to carry out its statutory duties and functions in respect of the application, if remitted. The following is a summary of the points made by the Board on this issue.

49. First, the Board submitted that the objective bias found by the court in the principal judgment arose as a result of Mr. Boland's participation in the impugned decision of 29<sup>th</sup> May, 2018. The reasonable apprehension of bias was specifically referable to Mr. Boland and he ceased to be a member of the Board in December, 2018. In those circumstances, the Board did not see any obstacle to remittal of the application by reason of the objective bias found by the court in circumstances where the application, if remitted, would fall to be determined by a Board which did not include Mr. Boland.

50. Second, the Board rejected the contention that the fact that it had stood over the impugned decision and defended the proceedings itself amounted to objective bias on its part

or otherwise provided a good reason for not remitting the application. It submitted that there was no basis for that proposition and no authority to support it.

**51.** Third, the Board agreed that the relevant principles applicable to remittal were summarised in *Clonres, Fitzgerald and Barna* and were applied in those cases and in *Redmond and Kemper*. It agreed that they were the principles to be applied by the court in considering whether to remit Indaver's application.

**52.** Fourth, the Board submitted that it has all the necessary statutory powers to enable it properly to discharge its statutory duties and functions in the event that the application is remitted to it, including the powers contained in s. 37F(1) and (2) and the discretion to hold a further oral hearing under s. 134 of the 2000 Act. It submitted that it was, and remains, a disinterested party and that its view that there is no obstacle to remittal and that it has all the necessary powers properly to discharge its statutory duties and functions in respect of any remitted application should not be disregarded lightly. The Board further submitted that it was best placed to determine whether to exercise those statutory powers.

**53.** Fifth, the Board submitted that the case sought to be made by the applicant in opposing Indaver's application for remittal concerned Mr. Boland's involvement in the pre-application process and that that involvement meant that the entire pre-application process and its outcome was also vitiated by objective bias. It said that that was a new case which was not made in the pleadings or at the hearing of the substantive proceedings. It noted that the Board's SID decision of 23<sup>rd</sup> December, 2015 was not challenged by the applicant in the proceedings. Nor was the Board's decision of 23<sup>rd</sup> October, 2017 not to circulate the further information and material received from Indaver and to invite further submissions from the applicant and others challenged on objective bias grounds, although it was challenged unsuccessfully on another ground. The Board referred to portions of the principal judgment where reference was made to the pre-application stage but not with respect to Mr. Boland's

involvement in it or any issue of objective bias arising in respect of that stage of the process by reason of his involvement or otherwise.

**54.** Sixth, the Board submitted that with respect to the new and additional documents on which the applicant sought to rely regarding Mr. Boland's involvement in the pre-application process, the applicant had those documents at the time of and shortly after it obtained leave to bring the proceedings and had apparently not considered them relevant to the case as they were not referred to or relied upon at all at the substantive hearing. In any event, the Board disputed the assertion that Mr. Boland gave advice to Indaver during the pre-application process and contended that the documents sought to be relied upon by the applicant did not demonstrate that he had given such advice. The Board further noted that coastal erosion, being the main issue with which the new and additional documents were concerned, was an issue in the case (it formed part of ground 11) and was addressed by the court in the principal judgment. Finally, on this point, the Board pointed to the fact that it was entitled to engage consultants under s. 124 of the 2000 Act and that, at the relevant time, it was necessary for the appointment of external consultants to be formally proposed and signed off at a Board meeting which was invariably done by the then deputy chairperson, Mr. Boland.

**55.** Seventh, the Board relied on s. 37C(2) of the 2000 Act and the decision of the Supreme Court in *Callaghan* to make the point that, with respect to Mr. Boland's involvement in the pre-application process and in the appointment of external consultants, there is an express statutory provision which precludes any material reliance being placed on the consultation process in terms of the ultimate decision to grant or refuse permission on foot of any remitted application.

**56.** Eighth, the Board submitted that if an order of *certiorari* simpliciter were made in respect of the impugned decision, the SID decision of 23<sup>rd</sup> December, 2015 and the outcome

of the pre-application consultation process would be unaffected as the applicant had not challenged that decision or the outcome of that process in the proceedings.

57. As regards the point in time to which Indaver's application could be remitted following an order of *certiorari* of the impugned decision, the Board took the position in its written submissions that, if the court felt it appropriate to remit, the appropriate point in time would be to some point in the process between the date of the inspector's additional or supplemental report of 7<sup>th</sup> March, 2018 and 3<sup>rd</sup> May, 2018 when the Board first convened to consider the application and to make a decision on it. It submitted that it was desirable, if possible, to preserve the work done by the inspector in the additional or supplemental report and noted that the inspector (Mr. Daly) was no longer employed by the Board. The Board further submitted that, irrespective of the point in time to which the application could be remitted, the Board would have to consider what steps were necessary to ensure that it had up to date information before it. At the hearing, the Board suggested that the court might consider a remittal to a point in time subsequent to the decision of 23<sup>rd</sup> October, 2017 on the basis that (a) that decision was revisited by the Board in May, 2018; (b) since much had happened since October, 2017, it was inevitable that the decision would have to be revisited and that the Board would have to consider what further information and submissions it needed from the participants and from the public; and (c) the Board did not wish, if at all possible, to have to duplicate the work done after that date, including the inspector's additional or supplemental report. However, the Board was not strongly wedded to a remittal to May, 2018 and saw the logic to a remittal to October, 2017 by virtue of the involvement of Mr. Boland in the decision of 23<sup>rd</sup> October, 2017. The Board accepted that this was ultimately a matter for the court. However, in the event that the application was remitted, it was necessary for there to be clarity as to the point in time to which it was being remitted. Finally,



in this context, the Board made the point that if it did not have the power to amend the claim of the applicant in the application then a remittal of the application would be futile.

**(ii) Ground 1**

**58.** As regards ground 1, the Board did not engage in the dispute between the applicant and Indaver as to whether an order of *certiorari* should be made in respect of this ground or whether it was sufficient for a declaration to be made. However, the Board submitted that, if the application is remitted, the Board would have the power to amend the clerical error in the application so as to reflect the name of the intended applicant, Indaver NV. The Board requested the court, for clarity, to exercise its discretion to make a direction that the Board amend the clerical error and deal with the application on the basis that it was being made by Indaver NV. In support of that position, the Board made a number of points which are summarised below.

**59.** First, it relied on *Toft* and *Schwestermann* and on the power to correct errors contained in s. 146A(1) of the 2000 Act. In circumstances where the Board can amend its order after a planning permission has been granted, the Board submitted that it must also logically be permitted to do so before it decides to grant the permission. The Board also relied on the judgment of Owens J. in *Pembroke Road* in support of its power to amend.

**60.** Second, the Board rejected the applicant's contention that, at least as far as the Board was concerned, the error made in the application for permission was not a clerical error as it had been pointed out to the Board in advance of and at the hearing, and yet the Board had proceeded to deal with the application and to grant permission and maintained in the statement of opposition that it was entitled to do so. The Board submitted that the nature of the error was not altered by its actions in dealing with the application and in defending the proceedings. The error remained a clerical error. It submitted that the implication of the applicant's argument was that if the Board had accepted at the time of the hearing that a

clerical error had been made, it could have amended the application and proceeded to deal with the application in the name of Indaver NV.

**61.** Third, with respect to the argument advanced by the applicant, based on the decision of the Supreme Court in *Urrinbridge*, that the impugned decision had become irrevocable when reduced to writing and could not be corrected, the Board contended that as the impugned decision will be quashed by an order of *certiorari* under ground 4, there will be no valid decision in the form of a determination by the Board reduced to writing and, therefore, no irrevocable decision of the Board would be in existence and the Board would not be *functus officio*, as submitted by the applicant.

**(c) *The Applicant***

**(i) Ground 4**

**62.** As regards ground 4, the applicant contended that the court should make an order of *certiorari* simpliciter and should not remit the application to the Board primarily because Mr. Boland, whose involvement gave rise to the objective bias found by the court in the principal judgment, was involved not only after Indaver's planning application was submitted in January, 2016 but also during the pre-application consultation stage before that. At no point during the entirety of the process (both pre and post-application) was Mr. Boland (or the Board) free from the condition of objective bias found by the court. Therefore, the applicant submitted that it would not be appropriate to remit the application to the Board. To do so, it said, would fundamentally undermine public confidence in the integrity of the planning process and would compound the damage already done. The applicant made a number of points in support of this fundamental submission which I summarise below.

**63.** First, with respect to the applicable legal principles governing remittals, the applicant accepted that the principles were summarised in *Clonres* and in the other cases relied upon by Indaver but stressed the wide discretion which the court has in deciding whether to remit an

application which must be exercised in a manner which is just and fair in the particular circumstances of the case. The applicant made three additional points in that regard, namely (a) it observed that, as stated by Kelly J. in *Usk & District Residents Association v. An Bord Pleanála* [2007] 2 ILRM 378 (“*Usk (No. 1)*”), the principles governing remittals are not set in stone; (b) an important principle additional to those summarised in *Clonres* and in the other cases is the necessity to protect the integrity of and to preserve public confidence in the Board’s decision-making process, particularly where a finding of objective bias has been made; and (c) it submitted that limited weight should be given to the Board’s view on remittal in circumstances where the Board defended the proceedings and could not, therefore, be said to be a dispassionate and disinterested party in light of the objective bias case being made against it. It submitted that lesser weight should be afforded to the view of the Board in the circumstances of this case as might otherwise often be the case.

**64.** Second, the applicant stressed the seriousness of the case on objective bias made by the applicant and upheld by the court, in terms of the important role of the Board in the planning process and the need to maintain public confidence in the Board’s decision-making process (and referred in that context to observations made by O’Donnell J. in the Supreme Court in *Balz and Heubach v. An Bord Pleanála & Ors.* [2019] IESC 90 (“*Balz*”). It submitted that bearing in mind the findings of objective bias made by the court, an order of *certiorari* with the application being remitted for further consideration and determination by the Board would be an inadequate remedy for the applicant and would further undermine public confidence in the Board’s decision-making process.

**65.** Third, the applicant sought to distinguish this case from other cases in which remittal orders were made in circumstances where the court found that the planning decision was unlawful on narrow or technical grounds, or where the Board or other planning authority made a concession to that effect, such as in *Clonres*, *Fitzpatrick* and *Barna*. The applicant

submitted that that sort of case was fundamentally different to the present case where the Board's decision-making process and the decision ultimately reached were affected by pervasive objective bias due to Mr. Boland's involvement from the outset.

**66.** Fourth, although accepting that the court tends to lean in favour of preserving the lawful part of the process by remitting the application to the point in time at which the process went wrong (as in *Clonres, Fitzgerald and Barna*), that would not be possible in the present case. It would not be possible to go back to a point in time where the process went wrong and to resume the process from that point as the objective bias found by the court by reason of Mr. Boland's involvement pervaded the entire process. It would, therefore, be impossible for the court to resume consideration of the remitted application at a point in time in which the process went wrong as Mr. Boland's condition of objective bias existed from the very outset. The applicant submitted, therefore, that it would not be possible to remit the application to any point in time on or after the planning application was submitted by Indaver.

**67.** Fifth, the applicant stressed that the objective bias which arose by reason of Mr. Boland's involvement existed throughout and pervaded the entirety of the process, in both the pre-application and application stages and that those procedures were, in any event, not hermetically sealed (in that regard the applicant also relied on the decision of the Supreme Court in *Callaghan*). It submitted that, contrary to the contentions advanced by Indaver and by the Board, the applicant did challenge from the outset the impugned decision on the basis of objective bias by reason of Mr. Boland's involvement at both stages of the process. The applicant referred to a number of paragraphs of the amended statement of grounds (including paras. 48(d) and (f)), a number of transcript references from the hearing and portions of the principal judgment (including paras. 149, 150 and 160). While the applicant accepted that it

was not open to it to make a new case on the remittal application, it maintained that it was not making a new case to that made at the substantive hearing.

**68.** Sixth, the applicant relied on the new and additional documents referred to earlier (the new ones being the subject of the applicant's motion and the additional ones being documents which were exhibited to Ms. O'Leary's original grounding affidavit) and maintained that they evidenced Mr. Boland's involvement in the pre-application process in terms of giving advice to the applicant and in terms of the engagement of Aquavision, the external consultants on coastal erosion, for the purposes of the pre-application process. The applicant also relied on the new documents to demonstrate Mr. Boland's involvement in the decisions made by the Board on 2<sup>nd</sup> March, 2016 and 18<sup>th</sup> April, 2016 to engage Aquavision as consultants on coastal erosion for the purpose of the planning application itself. The applicant pointed to the fact that coastal erosion was one of the reasons given by the Board in June, 2011 for refusing Indaver's 2008 planning application and was an issue expressly referred to by Inspector Gannon in her report of 10<sup>th</sup> December, 2015 which preceded the Board's SID decision of 23<sup>rd</sup> December, 2015.

**69.** Seventh, the applicant submitted that it was irrelevant that it did not challenge the SID decision of 23<sup>rd</sup> December, 2015 or other decisions in which Mr. Boland was involved after Indaver submitted the planning application in January, 2016 including the decisions of 2<sup>nd</sup> March, 2016 and 18<sup>th</sup> April, 2016 concerning the engagement of Aquavision and the decision of 20<sup>th</sup> March, 2017 requesting further information from Indaver. The applicant maintained that it did not have to challenge those decisions and that it did not have to make any particular complaints about them, save to refer to Mr. Boland's involvement and his role as an *ex officio* member of the SID division to whom was delegated the role of overseeing the coordination and day-to-day management of the division. The applicant submitted that the only decision in respect of which it required *certiorari* was the impugned decision itself and that what

happened in the earlier stages of the process, in which Mr. Boland was involved, formed part of the important factual context which was relied upon by the court in its principal judgment.

**70.** Eighth, the applicant engaged with the Board on the meaning and effect of s. 37C(2) of the 2000 Act and submitted that that provision did not prevent the applicant from relying on events which occurred at the pre-application consultation stage as it appeared to the applicant, from the Board's written submissions, that the Board was arguing that the applicant could not rely on such events. I observe here that the applicant and the Board appeared to be at cross purposes on that issue and, ultimately, it did not appear to me that there was any great dispute between the parties as to the interpretation and effect of s. 37C(2). However, I will set out my views very briefly on that issue later in this judgment.

**71.** Ninth, the applicant submitted that contrary to the urgings of the Board (and of Indaver), if the court were to make an order of *certiorari* simpliciter and not remit the application back to the Board, it would not "waste" the work done by the inspector on the addendum or supplemental report of 7<sup>th</sup> March, 2018 as the entire process had not been properly conducted by the Board because of Mr. Boland's pervasive and active involvement in the Board's consideration of Indaver's application.

**72.** Tenth, the applicant submitted that a delay which might arise as result of the refusal to remit the application to the Board should not outweigh the significance of the finding of objective bias made by the court and the consequent damage to public confidence in the integrity of the Board's decision-making processes. The applicant also made a number of other points in this context:-

- (a) It pointed out that, unlike in other cases such as *Usk (No. 1)*, if a fresh application were to be made by Indaver, it would be made to the Board and not to the planning authority, thereby lessening the delays that might otherwise arise;

(b) The delay which has occurred was due primarily to the Board's approach to disclosure and to potential conflicts of interest on the part of its members.

73. Eleventh, the applicant pointed out that, if remitted, the application would require to be considered under the 2011 EIA Directive which was significantly amended by the 2014 EIA Directive with effect from May, 2017 and that it would be "anachronistic" for the Board to consider in 2021 an application made in 2016 under the provisions of the 2011 EIA Directive in its unamended form. The applicant submitted that were a fresh application to be made, it would be considered under the terms of the amended 2014 EIA Directive.

74. Finally, in this context, the applicant argued that even if the court were to leave aside consideration of the pre-application consultation stage, there would be little point in remitting the application back to the Board in circumstances where, as early as March, 2016, Mr. Boland was involved in the Board's consideration of the application itself. He proposed the appointment of Aquavision as consultants at that stage and signed the Board minutes of 2<sup>nd</sup> March, 2016. The applicant submitted, therefore, that there was no point in time in the Board's consideration of that application which was unaffected by the involvement of Mr. Boland and the objective bias arising as a result of that involvement.

75. In those circumstances, the applicant submitted that the appropriate exercise of discretion by the court would be to grant an order of *certiorari* in respect of the impugned decision simpliciter and to refuse to remit the application for consideration by the Board.

#### **(ii) Ground 1**

76. With respect to ground 1, the applicant submitted that the court should grant an order of *certiorari* in respect of the impugned decision to give effect to its conclusions on this issue in the principal judgment and should not remit the application to the Board. Its principal contention in that regard was that the court's conclusion that the SID provisions, properly construed, require that the application for permission in respect of a SID be made by the

entity which was the “prospective applicant” was a conclusion on a jurisdiction issue, as appears from the principal judgment itself. The applicant noted that both Indaver and the Board accepted that the issue was a jurisdictional one. It submitted that that strongly suggested that the court should order *certiorari* and should not remit the application. The consequence of the court’s conclusion on the proper interpretation of the SID provisions, the applicant contended, is that the Board did not have jurisdiction to grant permission on foot of an application made by an entity which was not the “prospective applicant”.

**77.** In its written and oral submissions, the applicant addressed the observations which I made in the principal judgment (at paras. 244 to 250). The applicant did not accept that the court should proceed in the manner tentatively suggested and put forward for discussion in those paragraphs of the judgment. The applicant made a number of points in that regard which I summarise below.

**78.** First, while the making of the application in the name of Indaver Ireland Ltd rather than Indaver NV may have been a clerical error by Indaver, the consideration and determination of that application by the Board was not a clerical error on its part. Indaver informed the Board of the alleged error prior to and at the oral hearing. The applicant’s representatives also referred to the jurisdictional issue which arose as a consequence of the application having been made by an entity other than the “prospective applicant”. The Board did not consider it necessary or appropriate to amend the application to reflect the name of the intended applicant. The applicant referred to para. 4 of the affidavit sworn by Chris Clarke, the Board’s secretary, and paras. 10 to 15 of the Board’s statement of opposition which set out the Board’s defence to ground 1 in which it was asserted that it made no material difference whether the formal applicant for permission was Indaver Ireland Ltd or Indaver NV. The applicant submitted, therefore, that the Board’s decision to consider and



determine the application made in the name of an entity which was not the “prospective applicant” could not be regarded as a mere clerical error on its part.

**79.** Second, the applicant submitted that the consequence of the court’s conclusions as to the proper interpretation of the SID provisions is that the Board did not have jurisdiction to grant permission to Indaver Ireland Ltd which was not the “prospective applicant” and that *certiorari* should, therefore, be granted. Although *certiorari* is a discretionary remedy, and the applicant referred in that regard to the *dicta* of O’Higgins C.J. in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] IR 381 (“*Abenglen*”), the applicant also relied on the observations of Murray J. in the Court of Appeal in *Independent Newspapers (Ireland) Ltd v. IA* [2020] IECA 19 (“*Independent Newspapers*”). The applicant submitted, in reliance on those observations, that while the court did have a discretion to refuse to grant relief by way of judicial review, it was not at large in that regard. The discretionary factors traditionally considered by the court as justifying the exercise of a discretion to refuse to grant relief, while not closed, should, the applicant submitted, only be extended on a principled and reasoned basis. The applicant contended that there was no such basis for refusing to grant *certiorari* in the present case.

**80.** Third, the applicant did not accept that the statutory objective of the SID provisions which required the making of an application in the name of the entity which was the “prospective applicant” would not be frustrated by permitting an application to be made by an entity other than the “prospective applicant”. It was submitted by the applicants that that is what the SID provisions require and that judgements as to the precise relationship between different entities are not permitted by those provisions. If it were otherwise, the applicant submitted, the entire statutory scheme would be undermined. It was further submitted that the obligation could not have been simpler to comply with and that an entity such as Indaver should have got it right.

**81.** Fourth, the applicant contended that the decisions in *Toft* and *Schwestermann* have no application here and could not be relied upon, even by way of analogy, to support the conclusion that the Board has the power to amend the name of the applicant in the planning application. The applicant put forward a number of reasons for that submission, including (a) the fact that those cases were concerned with an entirely different statutory scheme to the scheme provided for in the SID provisions of the 2000 Act; and (b) the issue which arose as a consequence of the submission of the planning application by an entity which was not the “prospective applicant” is a jurisdiction issue, unlike the issues which arose in *Toft* and *Schwestermann*. The applicant further contended that the error made was a fundamental one and that compliance with the provisions was fundamental, unlike the position in *McDonagh*. Further, unlike *Toft* and *Schwestermann*, the Board was informed of the alleged error prior to making its decision on the application, which was quite different to the circumstances in *Toft* and *Schwestermann*. The applicant did not, therefore, accept that the Board has any power to amend the application. If no power to amend exists, the applicant contended that there was no point in remitting the application to the Board as it would be remitted in to a jurisdictional vacuum.

**82.** Fifth, the applicant submitted that s. 146A had no application to this case in that (a) there was no clerical error by the Board; and (b) as the impugned decision will be quashed under ground 4, there will be no extant permission or decision of the Board which could be amended under s. 146A.

**83.** Sixth, the applicant disagreed with the observations and conclusions of Owens J. in *Pembroke Road*. The applicant submitted that different statutory provisions were at issue in that case and that Owens J. had misapprehended the status of what I had said in my observations on this issue in the principal judgment. The applicant further submitted that Owens J. failed to recognise the significance of the fact that I had concluded that the

requirement that the application be made by the entity which was the “prospective applicant” was a matter of jurisdiction. It further submitted that the court was not bound by the conclusions reached, and observations made by Owens J. which could, in any event, be distinguished by virtue of the different statutory provisions at issue in *Pembroke Road*.

**84.** Seventh, the applicant relied on the decision of the Supreme Court in *Urrinbridge* and contended that the effect of that decision was that once the Board’s decision to grant permission was reduced to writing, it was irrevocable and could not be amended or corrected and that the Board was, at that point, *functus officio*.

**85.** In those circumstances, the applicant contended that the court should grant an order of *certiorari* of the impugned decision to give effect to the conclusions reached under ground 1 and should not remit the application to the Board for further consideration.

## **6. Decision on Reliefs and Remittal**

### ***(a) Ground 4***

**86.** There is no dispute between the parties that an order of *certiorari* should be made quashing the impugned decision on this ground (as sought in s. D(1) of the amended statement of grounds). I will, therefore, make such an order.

**87.** There is, however, a dispute as to whether I should make that order simpliciter, thereby requiring the applicant to make a fresh application for permission in respect of the proposed incinerator development at Ringaskiddy, or whether I should make an order under O. 84, r. 27(4) RSC remitting Indaver’s application for permission to a particular point in the process for the Board to consider and determine the application again in accordance with the terms of the principal judgment and in accordance with law. In the event that I decide to remit the application, there is also an issue as to the particular point in time to which the application should be remitted.

**88.** It should first be said that there is general agreement between the parties as to the principles to be applied in determining whether Indaver's application should be remitted to the Board. Those principles were set out in a series of important judgments including *Usk (No. 1)*, *Tristor Ltd v. The Minister for the Environment* [2010] IEHC 454 ("*Tristor*"), *Christian & Ors. v. Dublin City Council* [2012] IEHC 309 ("*Christian*") and *O Grianna & Ors. v. An Bord Pleanála* [2015] IEHC 248 ("*O Grianna*"). The principles set out in those cases were collated and summarised in *Clonres* and again in *Fitzgerald*. They were further refined and summarised by McDonald J. in *Barna* and have since been applied in a number of cases, including *Redmond* and *Kemper*. I cannot improve on the succinct summary of those principles set out by McDonald J. at para. 22 of his judgment in *Barna* which I set out below. I accept and approve that summary and apply the principles so summarised in reaching my conclusion on whether to remit Indaver's application to the Board. The principles were summarised by McDonald J. as follows:-

- “(a) The court has an express power to remit under O. 84, r. 27 (4);*
- (b) The court has a wide discretion to remit. The governing criteria in any decision to remit are fairness and justice.*
- (c) In considering the question of remittal, the court should aim to undo the consequences of any wrongful or invalid act but should go no further.*
- (d) Where the process undertaken by the Board has been conducted in a regular and lawful way up to a certain point in time, active consideration should be given by the court as to whether there is any good reason to start the process*

*from the outset again. The court should endeavour to avoid an unnecessary reproduction of a legitimate process.*

- (e) Among the factors to be weighed in the balance are the expense and inconvenience which may arise by sending the matter back to the drawing board;*
- (f) The court should treat the Board as a disinterested party which has no stake in the commercial venture being pursued by a developer. In cases where the Board, as the statutory decision maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it, the court should not lightly override that view.*
- (g) By remitting the matter, the court is not giving any advance imprimatur to the approach subsequently taken by the Board following remittal;*
- (h) Thus, any applicant who is not satisfied with the decision taken by the Board following remittal, will be entitled again to seek leave to challenge that decision.*
- (i) If the court decides to remit the matter to the Board, the court has an inherent power to give directions to the Board as to the process to be undertaken following remittal.*

(j) *It is also open to the court, if it is minded to remit the matter, to make non-binding recommendations which do not interfere or trespass upon the discretion vested in the Board.*” (per McDonald J. at para. 22)

**89.** I have considered the arguments advanced by Indaver in support of a remittal of the planning application to the Board and those advanced by the applicant by way of opposition to such remittal. I have also considered the views of the Board on that question. I have attempted to summarise the arguments in the previous section of this judgment but, irrespective of that summary, I have carefully reviewed all of the written and oral submissions of the parties on the issue as well as the pleadings and affidavits in the substantive proceedings. Having done so, I am satisfied that I should exercise my discretion to remit Indaver’s planning application to the Board. In my view, that approach is consistent with fairness and justice which are the overriding governing criteria in any decision to remit. I consider below and set out my conclusions on the arguments raised for and against a remittal of Indaver’s planning application.

**90.** The applicant argued that the principles governing remittal summarised in *Clonres* and in the other cases to which I have just referred are 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 in a case where the court has made a finding of objective bias. The applicant also argued that limited weight should be given to the Board’s view on remittal where the Board unsuccessfully defended proceedings in which an allegation of objective bias was made against it. I agree 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. However, in considering whether to remit an application to the Board consequent upon a finding of unlawfulness or invalidity, the

court must also be conscious of the case actually made by the successful applicant in the proceedings. 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.

**91.** The High Court has stressed the importance of the pleadings in judicial review proceedings, including in environmental and planning cases, in several judgments in reliance on the decision of the Supreme Court in *AP v. Director of Public Prosecutions* [2011] 1 IR 729, including *Alen- Buckley v. An Bord Pleanála* [2017] IEHC 311 (Costello J.), *Alen- Buckley v. An Bord Pleanála* [2017] IEHC 541 (Haughton J.), *Eoin Kelly v. An Bord Pleanála* [2019] IEHC 84 (Barniville J.), *Sweetman v. An Bord Pleanála* [2020] IEHC 39 (McDonald J.) and *Rushe v. An Bord Pleanála* [2020] IEHC 122 (Barniville J.). There is significant disagreement between the parties as to whether the case sought to be made by the applicant in response to Indaver's remittal application was a case which it was open to the applicant to make on the basis of the pleadings and on the basis of the case actually made at the substantive hearing. I address this question in detail below.

**92.** With respect to the applicant's contention that more limited weight than might normally be the case ought to be afforded to the Board's view on remittal on the basis that it chose to defend the proceedings, I disagree with that contention. It was perfectly open to the Board to defend the proceedings, in which one of the grounds of challenge to the impugned decision advanced by the applicant was that that decision was vitiated by the objective bias of one of the members of the Board who was involved in considering the application. The fact that the Board decided to defend the proceedings and was unsuccessful in doing so, does not, in my view, mean that the Board should not be seen as a dispassionate and disinterested party on the issue as to whether, if the application were remitted to it, it has the statutory powers to enable it to consider and determine the remitted application and that it does not see any

obstacle in dealing with the application. That is the view of the Board which is relevant to the court's consideration as to whether to remit the application to the Board. I do not accept that the Board's view on that issue is devalued or tainted in any way by virtue of its unsuccessful defence of the proceedings, including the allegation of objective bias. Irrespective of the defence of the proceedings, it remains the position that the Board is a disinterested party which has no stake in the development sought to be pursued by Indaver.

**93.** The applicant contended that a decision to remit Indaver's application to the Board in circumstances where the court found that the impugned decision was vitiated by objective bias would undermine the integrity of, and public confidence in, the Board's decision-making process and would be an inadequate remedy for the applicant. I do not accept that contention. The applicant's success in the principal judgment on the objective bias point preserves, protects and promotes the integrity of, and public confidence in, the integrity of the Board's processes and procedures. The applicant succeeded in the case it made that the Board's decision was vitiated by objective bias by reason of the involvement of one of its members in the making of the impugned decision. The court accepted the applicant's case in that regard and the applicant will now obtain an order of *certiorari* quashing the impugned decision to reflect its success on that issue. However, it is open to the court to determine whether or not it would be an appropriate exercise of its discretion to remit Indaver's application to the Board for further consideration and determination by it. Having regard to the case made by the applicant and the nature of the objective bias alleged and upheld by the court, I reject the applicant's contention that a remittal of Indaver's application to the Board would undermine the integrity of and public confidence in the Board. I have a number of reasons for so doing.

**94.** First, the objective bias upheld by the court arose by virtue of Mr. Boland's involvement in the impugned decision. The allegations made by the applicant were solely related to Mr. Boland's involvement. The applicant did not allege objective bias based on the



involvement of any other member of the Board involved in making the impugned decision. Mr. Boland ceased to be a member of the Board as of the end of December, 2018. He will, therefore, not be involved in the further consideration and determination of Indaver's application in the event that it is remitted to the Board. Nor will the then chairperson, Dr. Kelly, be involved as she has since also ceased to be a member of the Board.

**95.** While not expressly directing, I would recommend that, if practically possible, any member who remains on the Board and who was involved in the making of the impugned decision in May, 2018 should not be involved in the consideration and determination of the remitted application. If, however, that is not practically possible, the doctrine of necessity may arise, but I express no view whatsoever on that question at this stage. However, for present purposes, a critical factor in my view is the fact that Mr. Boland will not be involved when the Board comes to consider the remitted application.

**96.** Second, I see no reason in principle why the court should not remit the application to the Board on the ground that a case of objective bias was successfully made by the applicant in respect of the impugned decision. The court's reached its decision on that issue because of Mr. Boland's involvement and not otherwise. None of the parties could point to any case in which the question of remittal arose for consideration where a finding of objective bias had been made by the court in respect of a decision. One of the cases which was the subject of submissions at the substantive hearing and was referred to in the principal judgment was *Usk and District Residents Association Ltd v. An Bord Pleanála* [2010] 4 IR 113 ("*Usk (No. 2)*"). In that case, one of the grounds on which the applicant succeeded in obtaining an order of *certiorari* quashing a decision by the Board to grant permission was objective bias on the part of the Board in dealing with the application which had been remitted to it by Kelly J. on foot of his judgment in *Usk (No. 1)*. In *Usk (No. 2)* MacMenamin J. was satisfied that an objective observer would conclude that the Board's decision on the remitted application was affected

by objective bias on the basis that four of the six panel members had substantially determined the application the first time round prior to its remittal by Kelly J. MacMenamin J. granted an order of *certiorari* on this and several other grounds. However, perhaps understandably on the facts, no consideration was given to the question of a further remittal of the application.

**97.** It seems to me, however, that there is no reason in principle why an application cannot be remitted in circumstances where the decision is quashed by the court on the grounds of objective bias, where the circumstances which gave rise to the objective bias no longer exist and will not exist when the remitted application comes to be considered again by the Board. The position may be different in other factual circumstances, but I am satisfied that there is no overriding principle that remittal is not possible where a finding of objective bias in respect of a decision has been made.

**98.** Third, the applicant argued that the cases in which remittal has been ordered have tended to be those in which the Board or planning authority conceded the case on narrow or technical grounds or where the court found for an applicant on similarly narrow or technical grounds, and that the present case is different having regard to the ground on which the applicant did succeed. While the applicant may be correct that in a number of the cases the Board or planning authority did concede the point without a substantive contested hearing and the court decided to remit the application in such cases (as, for example, in *Clonres*, *Fitzgerald* and *Barna*), there were other cases in which the court found for an applicant after a substantive hearing and proceeded to remit the relevant applications to the Board or planning authority, such as *Tristor*, *Christian* and *Kemper*. Whether the grounds on which the applicants succeeded in those cases could be regarded as narrow or technical grounds is a matter for debate but, irrespective of whether they can be so described, those cases do show that the court can properly exercise its discretion to remit an application to the Board or planning authority in circumstances where the relevant body sought to defend, but did so

unsuccessfully, claims of unlawfulness or illegality in respect of the relevant decision or decision-making process. There was no barrier in those cases to the remittal being made. I do not accept, therefore, that there is any reason in principle why Indaver's application could not be remitted to the Board.

**99.** Fourth, I have carefully considered the case which the applicant sought to make in opposition to the remittal of Indaver's application to the Board, which relied considerably on the involvement of Mr. Boland in the latter stages of the pre-application consultation process, in the decision which brought that process to a conclusion in December, 2015, namely, the SID decision, and in decisions taken by the Board during the course of the Board's consideration of Indaver's planning application in the period from January, 2016 up to the date of the impugned decision in May, 2018. I am of the view that the applicant has sought to make a different case to that made in the pleadings and in argument before the court at the substantive hearing and has sought to do so, in part, on the basis of the new and additional documents which the applicant either had at the date on which it obtained leave to bring the proceedings on 24<sup>th</sup> July, 2018 or within a couple of days thereafter, on 26<sup>th</sup> July, 2018. Despite that, the applicant did not seek at any stage to amend its pleadings to expand the case which it wished to make by way of challenge to the impugned decision or in respect of earlier decisions made during the pre-planning application process or during the planning application process itself. The applicant put forward as a central plank of its objection to remittal the fact that Mr. Boland was involved at the pre-application consultation stage and in various decisions taken by the Board after Indaver's planning application was submitted and argued that, having regard to the finding of objective bias by the court, it would not be appropriate, and would undermine the integrity of, and public confidence in the Board's processes, for the court to remit the application to the Board. However, leaving aside the fact

that Mr. Boland will not be involved in the consideration of any remitted application, that was not the case made by the applicant in its pleadings and at the substantive hearing.

**100.** I have already referred to the importance of pleadings in judicial review proceedings, in general, and in planning and environmental cases, in particular, where the applicant will have obtained leave to bring the proceedings based on the grounds set out in the statement of grounds or in any amended statement of grounds put before the court. In judicial review proceedings, therefore, the point is not a purely technical one but is of substantive importance in that an applicant obtains leave to bring proceedings based on the pleaded case and it is that case which is in turn defended by the respondents to the case. In the present case, the applicant obtained leave to bring the proceedings on 24<sup>th</sup> July, 2018 based on the amended statement of grounds and supporting affidavits, including that of Mary O’Leary sworn on 17<sup>th</sup> July, 2018. The first relief sought in s. D of the amended statement of grounds was an order of *certiorari* of the impugned decision. No further order of *certiorari* was sought in the amended statement of grounds in respect of any other decision taken in the planning application process or in the pre-application consultation process.

**101.** The applicant did seek an order of *certiorari* in respect of the Environmental Impact Assessment and the appropriate assessment carried out by the Board on 23<sup>rd</sup> May, 2018 but that is not relevant for present purposes. The applicant sought several declarations reflecting the grounds of challenge on which the applicant obtained leave to bring the proceedings. For present purposes, the relevant declaration is that sought at s. D(3)(iv) where the applicant sought a declaration that the impugned decision was in breach of natural and constitutional justice and fair procedures. The only reliefs sought in s. D referable to the objective bias ground are (a) the order of *certiorari* quashing the impugned decision and (b) the declaration sought to the effect that the impugned decision was in breach of natural and constitutional justice and fair procedures. No relief was sought in s. D in respect of any other decision made

by the Board during the pre-application consultation process or during the planning application process itself.

**102.** Consideration must, of course, also be given to s. E of the amended statement of grounds which set out the grounds on which the reliefs in s. D were sought. However, it must be borne in mind that the grounds relate back to the particular reliefs sought in s. D.

Paragraphs (1) to (12) of s. E set out the background and detail of the decision-making process and referred to the parties, the planning process and the impugned decision itself.

Reference was made in that part of the amended statement of grounds to the pre-application consultation process and to the various meetings that took place during that process as well as to the SID decision made by the Board on 23<sup>rd</sup> December, 2015 (see, in particular, para. (7) of s. E). The amended statement of grounds then set out the grounds on which the relief at s.

D was sought going through each ground sequentially. Ground 4 was addressed at paras. (46) to (50). At para. 48(d), reference was made to the involvement of Mr. Boland in the pre-application consultation process where it was asserted that the involvement of Mr. Boland in work done for Indaver in 2004 *“gave rise to a significant and material conflict in his role in considering the 2012-2015 pre-planning consultation... and the planning application... made by the developer”*. Paragraph 48(d) then made various references to the February and May, 2004 submissions in which Mr. Boland was involved for Indaver. Paragraph 48(e) complained about the absence of any disclosure by Mr. Boland of his work in 2004 either during the pre-application consultation process or during the planning application process.

Paragraph 48(f) pleaded that Mr. Boland was the *“directing and presenting member at all times in respect of both the pre-planning consultation and the planning application”*.

Paragraph 49 stated that the matters pleaded in para. (48), if disclosed, would have given rise to a reasonable apprehension of bias including a perception that Mr. Boland had *“pre-determined the planning application”*. That paragraph also referred to the *“protracted nature*

*of the pre-planning phase*” and *“the extent of the advice provided by the Board to the developer”* (among other things) as having created a reasonable apprehension that the application had been predetermined by the Board. At para. (50), the conclusions from those various allegations were set out, in particular, that Mr. Boland ought to have excluded himself or to have been excluded and that the impugned decision was vitiated by his involvement in it and ought to be quashed.

**103.** While undoubtedly some reference was made to Mr. Boland’s involvement in the pre-application consultation process in the amended statement of grounds, it was all in the context of the impugned decision being vitiated by objective bias. Paragraph (50) set out the conclusions based on the matters pleaded earlier in that part of the amended statement of grounds. There was no reference to advice given by Mr. Boland himself during the course of the pre-application consultation process. There was no challenge to any decision made by the Board during that process in which Mr. Boland was involved. There was no challenge to the SID decision of 23<sup>rd</sup> December, 2015 in which Mr. Boland was involved. Apart from the challenge to the impugned decision, there was 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, including the decisions of March and April, 2016 concerning the engagement of Aquavision as consultants on coastal erosion, the decision of 10<sup>th</sup> March, 2017 requesting further information from Indaver or the decision of 23<sup>rd</sup> October, 2017 that it was not necessary to circulate Indaver’s response of earlier that month for further observations (although it was challenged on other grounds). Mr. Boland was involved in all of those decisions. Some of the decisions were referred to in the general background part of s. E of the amended statement of grounds but not in the context of any challenge being made to the decisions by reason of Mr. Boland’s involvement. There was a separate challenge to the Board’s decision of 23<sup>rd</sup> October, 2017 under ground 9 in which it was alleged that that

decision was in breach of s. 37F(2). Complaint was made about that decision in Ms. O’Leary’s affidavit of 17<sup>th</sup> July, 2018 (para. 45) and in Dr. Reid’s two affidavits (his first affidavit of 17<sup>th</sup> July, 2018 at paras. 35 and 26 and his second affidavit of 17<sup>th</sup> July, 2018 at para. 9). However, the complaints made in respect of the decision of 23<sup>rd</sup> October, 2017 were on the basis of an alleged breach of s. 37F(2) and not on the basis of objective bias by reason of Mr. Boland’s involvement.

**104.** In my view, the amended statement of grounds was very carefully and expertly drafted so as 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 the decision. The applicant contended that it did not have to seek relief in respect of decisions earlier in the process (such as the decisions in March and April, 2016, March, 2017 and October, 2017). While that may be so in terms of the overall relief which the applicant was seeking, which was *certiorari* in respect of the impugned decision and a declaration in respect of that decision, it is, in my view, very relevant when it comes to considering whether the court should remit the application or whether its conclusions on objective bias preclude the court from doing so.

**105.** I have also considered the transcript references provided by the applicant’s counsel during the course of the remittal hearing. He relied on comments by the applicant’s counsel on Days 1, 2, 3 and 8 of the substantive hearing. However, I have reviewed those transcript references and I do not believe that they demonstrate a challenge to, or relief being claimed, by the applicant in respect of any of the earlier decisions, either in the pre-application consultation process or in the planning process itself. Moreover, they could not do so in circumstances where the pleaded case was very clear. What the applicant was seeking on the ground of objective bias was relief in respect of the impugned decision by reason of Mr. Boland’s involvement in that decision.

**106.** I have also considered the references in the principal judgment on which the applicant relied. These were principally paras. 149, 150 and 160. At paras. 149 and 150 of the principal judgment, I was considering whether there was a “*cogent and rational*” link between the work done by Mr. Boland for Indaver in 2004 and Indaver’s planning application in 2016. In that context, I referred to the pre-application process which commenced in 2012. At para. 150, I referred to the period of time which passed between Mr. Boland’s previous professional association and the impugned decision. Part of that period of time included the period during which the pre-application process before the Board was being conducted. However, in neither of these paragraphs was I dealing with an argument or expressing any conclusions that any of the steps taken or decisions reached during the pre-application process or the planning application process itself were vitiated or invalid by reason of Mr. Boland’s involvement, as that was not the case made by the applicant. Similarly, at para. 160 of the principal judgment, I was considering an argument which had been raised by the Board and by Indaver that the work done in 2004 concerned waste management policy and waste management issues and that those issues were different to the issues which arose in the pre-application process and in the planning application process itself. Again, I was not dealing with an argument or expressing any conclusion that by virtue of Mr. Boland’s involvement in the pre-application process any decisions taken at that stage were legally questionable, as that was not a case made by the applicant.

**107.** I am satisfied, therefore, that there is nothing in the amended statement of grounds (or supporting affidavits) or in the submissions made at the substantive hearing or in the principal judgment which would preclude the court from remitting Indaver’s planning application to the Board for further consideration.

**108.** Fifth, and relatedly, I have considered the new and additional documentation sought to be relied upon by the applicant in order to demonstrate the extent of Mr. Boland’s



involvement in the pre-application consultation process and at the early stages of the planning application process itself. Four of the five new documents were obtained by the applicant on 26<sup>th</sup> July, 2018 following a freedom of information request. One of the documents (the second Aquavision report) was in the possession of the applicant when leave to bring the proceedings was sought and obtained on 24<sup>th</sup> July, 2018, as it was an appendix to the inspector's main report of 27<sup>th</sup> January, 2017 (appendix 3). However, inadvertently, it was not included in the materials exhibited to the applicant's affidavits. The six additional documents were before the court as they were exhibited at exhibit "MOL1" (tab 5 to Ms. O'Leary's affidavit of 17<sup>th</sup> July, 2018). That part of exhibit "MOL1" consisted of the Board's file and records in respect of the pre-application consultation process.

**109.** The new documents and the additional documents were relied upon by the applicant to demonstrate the extent of Mr. Boland's involvement during the pre-application consultation process (and principally his involvement in allegedly providing advice to Indaver) and in recommending and signing off on the appointment of Aquavision as coastal erosion consultants to the Board, and in the early stages of the planning application process itself and, in particular, Mr. Boland's involvement in proposing to the Board and participating in the Board's decision to engage Aquavision for the purposes of the planning application process, including the oral hearing in decisions made by the Board in March and April, 2016.

**110.** I accept that the documents show that Mr. Boland was involved in a discussion with the Board's inspectorate concerning one of the consultation meetings with Indaver on 11<sup>th</sup> September, 2015 and that he made a suggestion as to what Indaver might address in terms of community gain as part of its application (email chain of 24<sup>th</sup> September, 2015). That email was in tab 5 of exhibit "MOL1". However, it was not referred to at all at the hearing. I also accept that the documents disclose, that in a meeting of the Board on 5<sup>th</sup> October, 2015, the minutes of which were signed by Mr. Boland, Mr. Boland proposed and the Board agreed

that Aquavision be retained and that he similarly proposed its appointment and participated at meetings of the Board on 2<sup>nd</sup> March, 2016 and 18<sup>th</sup> April, 2016 at which Aquavision was again engaged by the Board, Indaver's planning application having in the meantime been submitted to the Board in January, 2016.

**111.** However, no issue was raised by the applicant in any of its affidavits or at the hearing concerning Mr. Boland's involvement in decisions concerning the engagement of Aquavision to address issues of coastal erosion or that, by reason of Mr. Boland's involvement, the decisions were tainted by objective bias. Coastal erosion was an issue in the proceedings and was one of the reasons why Indaver's 2008 planning application was refused by the Board in 2011. Coastal erosion arose as part of ground 11 of the applicant's grounds of challenge and was part of its case that the inspector had not provided the Board with a fair, complete and sufficient report. The applicant failed in respect of that part of its case. I addressed the issues raised in relation to coastal erosion at paras. 503 and 505 of the principal judgment. However, the applicant did not make any case in its amended statement of grounds or otherwise at the substantive hearing concerning any of the decisions of the Board to engage Aquavision on the issue of coastal erosion, still less the case that those decisions were tainted by objective bias by reason of Mr. Boland's involvement. As I have already observed, the decisions themselves were not expressly challenged by the applicant and no relief was sought with respect to those decisions.

**112.** In my view, by seeking to rely on the new and additional documents, the applicant was seeking to make a new case on the remittal application in order to resist the remittal sought by Indaver. The applicant was not entitled to do that. It is not a question of any blame or responsibility being attributed to the applicant or its advisers for not adverting to these documents or to their alleged significance at the substantive hearing or before the hearing of the remittal application. It is the position, however, that the applicant did not advance as part

of its objective bias case complaints about, or challenges to, decisions in which Mr. Boland was involved at the pre-application consultation stage or during the course of the planning application stage, apart from the impugned decision itself. The applicant's case was very expertly pleaded and argued by its counsel and solicitors and no criticism whatsoever is, or could be, made of them. On the contrary, it seems to me that they correctly and appropriately pleaded and argued the case which the applicant wished to make, namely, that the impugned decision itself was vitiated by objective bias and should be quashed. That is the case on objective bias which was pleaded, that is the case which was argued before the court at the substantive hearing and that is the case that was decided by the court in the principal judgment.

**113.** I agree with the applicant that it was not necessary, in order for the applicant to obtain the substantive relief which it was seeking, namely, an order of *certiorari* in respect of the impugned decision, to challenge and to seek relief in respect of earlier decisions in the pre-application consultation process and in the planning application process itself. However, not having done so, I do not believe that it is open to the applicant to resist remittal on the basis that those earlier decisions were also tainted by objective bias which cannot be undone or remedied in the course of the Board's consideration of a remitted application. That is particularly so in circumstances where the source and basis for the finding of objective bias, namely, Mr. Boland, no longer exists as he is no longer a member of the Board and will not be participating in the Board's consideration of the remitted application.

**114.** Sixth, I do not accept the applicant's contention that, in deciding whether to remit the application, the court should have to the forefront of its consideration the partisan or subjective concerns of the parties, including the applicant. The applicant argued, in reliance on certain *dicta* of O'Donnell J. in the Supreme Court in *Balz*, that in considering whether to remit the application or not, the court should have regard to the position of the applicant and

those involved with the applicant who counsel described as “*partisans who have for twenty years opposed this incinerator*” (transcript 8<sup>th</sup> June, 2021, p. 124). He contended that it was those people that O’Donnell J. had in mind when making his observations in *Balz*, although counsel accepted that they were made in a different context. O’Donnell J. in *Balz* was dealing with the requirement of the Board to give reasons and to explain why it had reached a particular decision. In that regard he stated (at para. 57):-

*“It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if, indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live...”*

**115.** I cannot make my decision on whether to remit the application or not based on whether my decision on that issue will be accepted or supported by the applicant or those involved with the applicant. I must make that decision in accordance with the legal principles which I have referred to earlier and by reference to the conclusion I reached on the objective bias ground in the principal judgment. That conclusion was reached on the basis of the pleaded case as to the reasonable apprehension of a reasonable objective observer that the Board might not be capable of considering and determining Indaver’s 2016 planning application in an unbiased and impartial manner. On that basis, I concluded that the impugned decision was tainted by objective bias and that an order of *certiorari* should be granted in respect of it. That conclusion and that remedy, in my view, address the reasonable apprehension of bias on the part of a reasonable objective observer. I cannot fashion a remedy based on the partisan or subjective views of those who might reasonably, and perhaps

understandably, oppose a particular course of action, such as the remittal of an application. I do not believe, therefore, that the observations of O'Donnell J. in *Balz*, which are perfectly correct and apposite in the context in which they were used, have any bearing on my decision as to whether to remit the application or not.

**116.** Seventh, while there was some debate between the parties as to the relevance and effect of s. 37C(2) of the 2000 Act and the decision of the Supreme Court in *Callaghan*, it does not seem to me that it is necessary for me to reach a conclusion on those submissions for the purpose of dealing with this remittal application. However, I should say that I am inclined to agree with the interpretation and effect of the equivalent provision in the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the “2016 Act”) (s. 6(9)) tentatively suggested by McDonald J. at para. 119 of his judgment in *O'Neill v An Bord Pleanála* [2020] IEHC 356. For what it is worth, I do not believe that s. 37C(2) precludes the applicant from referring to, or relying on, decisions made or procedures adopted by the Board during the pre-application consultation process, provided of course that this is done with reference to part of the pleaded case.

**117.** With respect to the decision of the Supreme Court in *Callaghan*, again it does not seem necessary for me to express any conclusion on the arguments made by the parties as to the effect of that case for the purposes of determining the remittal application. I would say, however, in passing, that it may be relevant that the decision which was challenged unsuccessfully in *Callaghan* was the Board's decision that the particular development was SID (being the equivalent of the SID decision in the present case). Having regard to what was said by Clarke C.J. at paras. 7.12 and 8.2, it does not seem to me that *Callaghan* provides any support for the applicant's objection to the remittal application. On the contrary, the observations of the Chief Justice in those paragraphs would tend to undermine the prospects

of a successful challenge to decisions taken at the pre-application consultation stage in the context of a challenge to the ultimate decision to grant or refuse permission.

**118.** Eighth, I am required to consider and determine Indaver's remittal application by reference to the well-established legal principles referred to earlier. The ultimate governing criteria in any decision to remit are fairness and justice. It seems to me that I must also consider whether *certiorari simpliciter* or *certiorari* with remittal would be a proportionate remedy for the applicant to reflect its success on the objective bias ground. It seems to me that *certiorari* with remittal would be. The applicant will obtain an order of *certiorari* quashing the impugned decision. 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.

**119.** I must also consider whether it would be fair and just to require Indaver to go back to the start of the process and to make a fresh application. It does not seem to me that it would be fair and just or a proportionate response to the conclusions I have reached on the objective bias ground, particularly having regard to the case actually made by the applicant. I must take into account the fact that there was a lengthy oral hearing 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. While a

number of the grounds of challenge made by the applicant involved criticisms of the inspector's report, I rejected those grounds in my principal judgment. Consistent with the principles which I must apply in deciding this application, I must give consideration as to whether I should seek to preserve parts of the process including the oral hearing and the decisions taken before and after the oral hearing. I will return to this point shortly when considering the point of time to which the application should be remitted.

**120.** I must also consider the assertion by Indaver that, if the application were not remitted, it would lead to further significant delay in the determination of its application. While that is undoubtedly so, I believe that relatively limited weight should be afforded to the question of delay in circumstances where the process itself has been a lengthy process commencing with the pre-application consultation stage in 2012. While the question of delay is relevant, I would not place great weight on the delay which would be occasioned in the event that it were necessary for Indaver to commence the process again.

**121.** There is, however, another point which, in my view, undermines the applicant's attempt to draw in, by way of its opposition to the remittal application, the decisions made and procedures adopted during the pre-application consultation stage, as well as the SID decision itself taken at the end of that process. As the Board pointed out in its submissions, whatever is the outcome of the remittal application, the SID decision will remain in existence as it has not been challenged. In light of that, the possible outcomes of the present application are that the court remits the application to a point in time in the planning application process or refuses to remit the application, meaning that the applicant would have to make a new application to the Board following the SID decision made by the Board on 23<sup>rd</sup> December, 2015. In my view, for the various reasons just discussed, the approach most consistent with the general principles on remittal is for the court to remit Indaver's application to a point in the planning application process.

**122.** Before addressing what that point in time should be, I should also deal briefly with another point of opposition made by the applicant which was that the court should refuse to remit Indaver's application on the basis that the Board would be considering and determining an application made by Indaver in 2016 on the basis of the 2011 EIA Directive, notwithstanding that that Directive was amended with effect from 2017 by the 2014 EU Directive. That point was made by the applicant in *Barna* in opposing a remittal of the application in that case. McDonald J. noted that while that consideration might carry very considerable weight in other cases, he did not believe that it was of sufficient weight in that case to outweigh the other factors in favour of remittal. As in *Barna*, the applicant in the present case did not point to any specific aspect of the changes made to the 2011 EIA Directive which might materially affect the Board's consideration of the remitted application or the outcome of its consideration of the application. In fairness to the applicant, while this point was made in its written submissions, it was not pursued in its oral submissions. I do not believe that it is a sufficiently weighty factor to outweigh the other factors which, in my view, point towards the remittal of Indaver's application.

**123.** Finally, as I have indicated earlier, I do not accept that the Board's views as to whether it has the necessary powers to exercise its statutory functions in the case of a remittal application have been devalued or should be disregarded by reason of the Board's defence of the proceedings. On the contrary, I am satisfied that the Board is and remains a dispassionate and disinterested party and that its views as to whether it has sufficient powers to exercise its statutory functions in respect of the remitted application carry significant weight and should not be lightly disregarded (para. 6 of the principles summarised in *Clonres* and para. 22(f) of the further summary of those principles in *Barna*).

**124.** I have concluded, therefore, that it would be a proper exercise of my discretion, would be consistent with fairness and justice and would be a proportionate remedy to reflect the



applicant's success on the objective bias ground, for the court to quash the impugned decision and to remit Indaver's planning application to the Board for further consideration and determination in accordance with the terms of the principal judgment and in accordance with law.

**125.** The question then arises as to the particular point in time in the process to which the application should be remitted. I have referred earlier to the positions adopted by the parties on that issue. While their positions may have waived somewhat in between the written submissions and the oral submissions at the hearing, the preference of Indaver and the Board was ultimately a remittal to a point in early May, 2018. However, neither strenuously objected to a remittal to an earlier point in time such as the point just prior to the decision of 23<sup>rd</sup> October, 2017, when the decision in relation to the circulation of the additional information and material provided by Indaver was made.

**126.** Having regard to its reliance in the remittal application on Mr. Boland's involvement in the decisions in March and April, 2016 concerning the engagement of Aquavision as consultants on coastal erosion, the applicant contended that the application should not be remitted to any point after those decisions and, indeed, since they were taken so close to the submission of the planning application on January, 2016, there seemed little point in remitting the application at all. I do not agree.

**127.** For the reasons outlined earlier, I do not believe that I can have regard to Mr. Boland's involvement in those decisions in March and April, 2016 in considering the point in time at which to remit the application. Nor do I believe that it would be appropriate to set aside the oral hearing and the conclusions arising from that hearing. It would, in my view, be a tremendous waste of time and resources to do so and I do not believe that it would be appropriate having regard to the case made by the applicant on which it succeeded. Nor do I believe that I should remit it to a point prior to the Board's request for further information on

10<sup>th</sup> March, 2017. The applicant made no complaint about that decision or about Mr. Boland's involvement in it in its pleadings or in its submissions at the oral hearing. The applicant maintained, in the course of the remittal application, that it did not have to do so. However, I do not accept that that is so when it comes to considering whether to remit and the point in time to which to remit Indaver's application.

**128.** I am more troubled about whether the application should be remitted to a point before or after the Board's decision of 23<sup>rd</sup> October, 2017 concerning the circulation of the additional material and information provided by Indaver. It is true that while the applicant did criticise that decision as part of ground 9 of its grounds of challenge and was unsuccessful in that challenge, it did not challenge the decision on the basis of objective bias by reason of Mr. Boland's involvement in the decision. It could be said, therefore, that consistent with the approach taken in respect of the earlier decisions of the Board in the process, the court should not remit the application to a point in time prior to that decision. However, my concern, as I expressed at the hearing, is that the decision to refuse the applicant and others the opportunity to make submissions in response to the additional information provided by Indaver had the consequence that they did not have an input into, or the opportunity to address that additional information and material for the purposes of the inspector's addendum or supplemental report of 7<sup>th</sup> March, 2017. Dr. Reid sought to make a submission in April, 2018, after the addendum/supplemental report and obviously that could not have been considered by the inspector when preparing his report (which had already been completed). It seems to me that a reasonable objective observer could well have a reasonable apprehension of bias based on Mr. Boland's involvement in the decision of 23<sup>rd</sup> October, 2017, and the outcome of that decision could have prejudiced the applicant in terms of its ability to address the additional information and material provided to the Board by Indaver. I believe that a reasonable objective observer could reasonably have a lingering feeling of unease as a result of that

decision, which may well have had real consequences for the applicant in not having the opportunity to comment on the information and material prior to the preparation of the addendum/supplemental report. While I appreciate that the court might be criticised for reaching that conclusion with respect to the 23<sup>rd</sup> October, 2017 decision and not with respect to the earlier decisions, I believe that there is a significant qualitative difference between that decision and other decisions taken by the Board during the course of the planning application process and that I would be failing in my duty to exercise my discretion in a fair, just and proportionate way, were I not to consider remitting the application to a point immediately prior to the decision of 23<sup>rd</sup> October, 2017. I am satisfied that notwithstanding that such criticism might be made, it would be an appropriate exercise of my discretion to remit Indaver's application to a point immediately prior to 23<sup>rd</sup> October, 2017. I note that neither Indaver nor the Board strenuously opposed a remittal to that point. In my view, a remittal to that point best reflects the fairness, justice and proportionality of the situation for all of the reasons just discussed.

**129.** I will, therefore, exercise my discretion to remit Indaver's application to a point immediately prior to 23<sup>rd</sup> October, 2017. That of course means that the Board will not be in a position to rely on the inspector's addendum or supplemental report.

**130.** I have considered whether I should give any direction to the Board as to whether it should exercise any of the powers contained in s. 37F(1) and (2) or its discretion under s. 134 of the 2000 Act to hold a further oral hearing. I recommend that the Board give consideration to exercising these powers and I note from what was said on behalf of the Board during the hearing of the remittal application that it is highly likely that the Board will exercise at least some of these powers in light of the lapse of time since the impugned decision and the earlier decision of 23<sup>rd</sup> October, 2017 were made. Clearly, if the Board does not give proper consideration exercising those powers, it may well be open to the applicant to bring further

proceedings arising out of such failure. However, at this stage, I do not believe that I should go further than recommending that consideration be given to the exercise of some or all of those powers. I will not direct that the Board does so. I have also recommended that, if practically possible, the panel of members of the Board which considers the remitted application should not include members who participated in the impugned decision.

**(b) Ground 1**

**131.** The first dispute between the parties in respect of the relief to be granted following the court's conclusions on ground 1 in the principal judgment is whether an order of *certiorari* should be made to give effect to those conclusions. The second dispute in respect of this ground is whether the Board has the power to amend, or whether the court can in the exercise of its discretion direct the Board to amend, the name of the applicant in the planning application where that application is remitted to the Board for further consideration and determination. There would be little point in the court remitting the application to the Board for further consideration, if the Board were not empowered to amend the name of the applicant in that application to reflect the name of the intended applicant which was the "prospective applicant", namely Indaver NV, or if the court could not direct the Board to amend the application in that way. The resolution of the second issue is, therefore, relevant not only to ground 1 but it is also relevant to what is to happen to the application once remitted to the Board.

**132.** On the first issue, namely, whether an order of *certiorari* should be granted in respect of the application, the most obvious point to make is that the court has already concluded that an order of *certiorari* should be made quashing the impugned decision on the ground contained in ground 4 (objective bias) and has directed that the application be remitted to the Board for further consideration and determination. Once the impugned decision has been quashed on another ground, it is probably unnecessary to resolve the issue as to whether it

should also be quashed under ground 1. It seems to me that since the impugned decision is being quashed on another ground, an appropriately worded declaration would be an adequate and appropriate remedy to reflect the applicant's success on the issue of statutory interpretation which arose under ground 1.

**133.** The second issue which falls for consideration under this ground, however, does have to be resolved, as the applicant understandably contended that there would be little point in the court remitting the application to the Board if the Board did not have the power to amend, or if the court did not have the power to direct the Board to amend, the name of the applicant in the remitted application as otherwise the remittal would be taking place in a legal or jurisdictional vacuum. I agree that it is necessary to determine that issue so that there is clarity as to what is to happen when the Board comes to considering the remitted application.

**134.** Before addressing the question of amendment, and in the event that I am wrong in my view that it is unnecessary to resolve the issue between the parties as to whether *certiorari* should also be granted under ground 1 as well as under ground 4, I will now briefly address that question. I am satisfied that I would, in the exercise of my discretion, be entitled to refuse to grant an order of *certiorari* with regard to the impugned decision in respect of the "prospective applicant"/applicant issue raised in ground 1. In my view, if the impugned decision was not being quashed under ground 4, it would be open to the court to refuse to exercise its discretion to grant an order of *certiorari* in respect of the impugned decision under ground 1 for various reasons.

**135.** First, I concluded in the principal judgment that the error made by Indaver in submitting the planning application in the name of Indaver Ireland Ltd and not Indaver NV was a clerical error and I rejected the applicant's contention to the contrary (para. 243 of the principal judgment). The applicant argued at the remittal hearing that while Indaver may have made a clerical error in submitting the planning application in the name of Indaver Ireland

Ltd, which was not the “prospective applicant” under the SID provisions, rather than in the name of Indaver NV, which was the “prospective applicant”, the Board could not be said to have made a clerical error. The applicant relied in that regard on an averment in the affidavit of Mr. Clarke, the Board’s secretary, and on paras. 10 to 15 of the Board’s statement of opposition. It argued that the alleged error having been brought to the Board’s attention and the Board having proceeded nonetheless to consider and determine the application in the name of the wrong applicant, the Board could not claim that the error was a clerical error. I do not agree. The Board was entitled to defend the proceedings. It did so unsuccessfully. I concluded that the error in the name of the applicant was a clerical error. The status of that error as a clerical error is not, in my view, altered by virtue of the fact that the Board unsuccessfully defended the applicant’s case on this ground. The error is and remains, in my view, a clerical error.

**136.** Second, *certiorari* and the other judicial reliefs are discretionary remedies. That is very clear from the authorities and it is unnecessary to reproduce in full here the well-known *dicta* of O’Higgins C.J. in *Abenglen* and in the many subsequent cases in which they have been applied. While acknowledging that *certiorari* will generally issue *ex debito justitiae*, O’Higgins C.J. stated that that should not be taken as meaning that the High Court does not retain a discretion as to whether to grant the relief or to refuse it and that there may be circumstances in which the court could refuse to exercise its discretion to grant such relief, such as where the conduct of the applicant was such as to disentitle it to relief or where the relief was not necessary for the protection of the rights involved (see the *dicta* of O’Higgins C.J. at 392-393). I made a similar point at paras. 244 and 247 of the principal judgment.

**137.** I accept the submission made by the applicant concerning basis on which the court should exercise its discretion to grant or to refuse relief by way of judicial review (including

*certiorari*) which was recently discussed by Murray J. in the Court of Appeal in *Independent Newspapers*.

**138.** At para. 77 of his judgment in that case, Murray J. stated:-

*“The discretionary power of the Court to refuse relief by way of Judicial Review is an inherent aspect of the remedy. However, the fact that a remedy may be discretionary does not imply that the court is, in any real sense, at large in determining to grant the relief (Shell E&P Ireland Limited v. McGrath [2013] 1 IR 247, 271). It means no more than that the court can take into account a range of factors in determining whether to grant relief and in fashioning the terms of any such relief (De Roiste v. Minister for Defence [2001] 1 IR 190, 209 (Denham J.)). The interposition of a discretion does not mean that a Judge can either override in any way the law, nor interfere with the rights of any individual as such (Smith v. Minister for Justice and Equality [2013] IESC 4 at [6.1]). The discretion must be exercised either within the framework of recognised categories of case, or by reference to an identified principle...”*

**139.** At para. 78, Murray J. continued:-

*“The discretionary factors by reference to which Judicial Review has been refused have tended to fall into three broad groups – grounds relating to the action or inaction of the claimant (such as a failure to exhaust an alternative remedy, delay, laches, waiver, acquiescence or misconduct in connection with the proceedings), grounds relating to the impact a remedy will have on others (such as where the grant of relief would represent an unwarranted interference with the settled rights or expectations of third parties) and grounds relating to the practical value of the remedy (such as mootness or futility), (see Auburn Judicial Review Principles and Procedure (2013) para. 32.03). While these categories are in no sense closed, where*

*they are to be extended that development must be justified on a principled and reasoned basis (see De Blacam Judicial Review 3rd Ed. Para. 33.15)...”*

**140.** I completely agree that, if *certiorari* was not being granted under another ground, and if the court had to consider whether to exercise its discretion to grant or refuse *certiorari* under this ground, there would have to be a principled and reasoned basis for refusing to grant that relief. I am satisfied that there would be a principled and reasoned basis for doing so. I identified some potential reasons at paras. 245 to 250 of the principal judgment. Having now heard further argument from the parties on this issue, I am reinforced in my view that if *certiorari* were not being granted on another ground, I would exercise my discretion to refuse to grant *certiorari* in this case and would instead grant an appropriately worded declaration, having regard to the following matters:-

- (a) The nature of the clerical error involved;
- (b) The fact that the objective (or at least a very significant objective) of the SID provisions, namely, the importance of the applicant for permission having the benefit of the consultations and advice in the pre-application procedure, would not be undermined in this case where there is such a close relationship between the applicant and the entity which was the “prospective applicant” (the applicant being a subsidiary of the “prospective applicant”);
- (c) No other statutory objective would be undermined;
- (d) No issue as to compliance with the terms of the planning permission or enforcement of that permission would arise since such compliance can be enforced against the party carrying out the development or operating the facility outside the terms of the planning permission;



- (e) The applicant would not otherwise be prejudiced as a result of the fact that the application was made in the name of the wrong applicant due to a clerical error; and
- (f) The Board would have the power to amend the planning permission and the impugned decision to correct the clerical error under s. 146A of the 2000 Act (assuming of course that the impugned decision was not being quashed on another ground).

**141.** Third, the fact that the issue is one of jurisdiction in the sense that the Board's jurisdiction to grant permission exists in the case of an application made by an entity which was the "prospective applicant", does not, in my view, mean that the court must inevitably grant an order of *certiorari* in respect of the relevant decisions. That is particularly so in circumstances where, for reasons set out below, I am satisfied that the Board does in any event have the power to amend the name of an applicant for permission in the course of its consideration of the application for that permission and before it makes a decision on that application. I agree entirely with the views expressed in that regard by Owens J. in *Pembroke Road* to which I will turn shortly.

**142.** Were I not making an order of *certiorari* under another ground and were it necessary to consider whether to grant an order of *certiorari* on ground 1 only, I would, for the reasons just explained, exercise my discretion to refuse to grant an order of *certiorari* under ground 1.

**143.** However, since I am making an order of *certiorari* in respect of ground 4 and since the applicant has succeeded in its case that the application for permission for a SID should be made by the entity which was the "prospective applicant", having regard to the proper interpretation of the relevant SID provisions, it is necessary for me to consider now whether the Board has the power to amend, or whether the court has the power to direct the Board to

amend, the application so as to reflect the name of the originally intended applicant, Indaver NV, which was the “prospective applicant”.

**144.** I am satisfied that the Board does have the power to amend Indaver’s planning application when remitted to it, so as to insert the name of Indaver NV as the applicant in place of Indaver Ireland Ltd. That was Indaver’s original intention and I have concluded that the reason the application was submitted to the Board in the name of Indaver Ireland Ltd was due to a clerical error. I made some preliminary and tentative observations on this issue at para. 249 of the principal judgment by reference to the decision of the High Court (Costello J.) in *Toft* and the decision of the High Court (O’Hanlon J.) in *Schwestermann*. I made clear, however, that I was not expressing a concluded view at that stage on the question as to whether I should exercise my discretion to refuse to grant an order of *certiorari* in respect of the impugned decision under ground 1 or whether the Board had the power to amend the application, if remitted to it. I have since had the benefit of further and extremely helpful extensive written and oral submissions from the parties on these issues. Having considered those submissions, I am reinforced in the tentative and preliminary views which I set out for discussion in that part of the principal judgment.

**145.** I accept, of course, that *Toft* and *Schwestermann* dealt with different statutory provisions and also that the circumstances in which the error considered in those cases came to light were different to the present case. In those cases, the relevant errors emerged after the permissions were granted. In the present case, the error was brought to the attention of the Board by Indaver prior to and at the oral hearing as well as by the applicant’s representative at the hearing. Nonetheless, the Board proceeded to consider the application and to grant permission to Indaver Ireland Ltd which was not the intended Indaver entity. While the facts of *Toft* and *Schwestermann* were different and while the statutory provisions at issue were also different, they are both important in demonstrating that errors in the name of an applicant

for permission in a planning application do not necessarily have the effect of invalidating the ensuing grant of permission. The High Court and Supreme Court in *Toft* and the High Court in *Schwestermann* were satisfied that the relevant planning authority had the power to correct the error in the name of the applicant company in each case after the permission was granted. The Supreme Court in *Toft* went further and directed the planning authority to exercise its powers under s. 8 of the Local Government (Planning and Development) Act, 1963 to correct the entry in the planning register by substituting the correct name for the incorrect name. In *McDonagh*, while acknowledging that noncompliance with the planning regulations (including a misdescription of the owner of the relevant lands) may in certain cases be “*fundamental*”, it was not always so (per Finlay C.J. at 202). I do not believe that the error in the present case was “*fundamental*” in the sense of that term used by Finlay C.J. in *McDonagh*.

**146.** Owens J. gave judgment in *Pembroke Road* between the first and second day of the remittal hearing. The judgment in *Pembroke Road* became available the day before the second day of the hearing. One of the issues considered by Owens J. in that case was quite similar but not identical to the issue raised in ground 1 of these proceedings. *Pembroke Road* concerned permission granted under the 2016 Act. The 2016 Act which provides for strategic housing development, also provides for the concept of a “prospective applicant” and an “applicant” for permission. However, the term “prospective applicant” is defined in s. 3 of the 2016 Act. There is no such equivalent definition in the SID provisions of the 2000 Act. The definition of that term in s. 3 of the 2016 Act required that a “prospective applicant” have a sufficient interest in the site. On the facts of that case, the applicant which obtained permission for the development was different to the “prospective applicant”. A similar point was made as the point made by the applicant in ground 1 of the proceedings. However, by reason of the definition of “prospective applicant” and the statutory objective involved,

Owens J. considered the issue in a slightly different way to the way I considered it in the principal judgment. Owens J. did, however, make reference to the preliminary observations I made on this issue in the principal judgment. Owens J. went further than I did (as I had not formed any concluded view in my principal judgment) and rejected the contention that there could never be room for the exercise of discretion by the Board in deciding on the admissibility of a planning application in circumstances such as those presented in that case, or that the court did not have any discretion to refuse judicial review in those circumstances (para. 26). Owens J. looked at the purpose of the relevant provisions in the 2016 Act and the objectives sought to be achieved by those provisions. He did not consider it fatal to the permission granted that the application was made by a company which was not the “prospective applicant” although both were “*controlled by the same directing minds*” (para. 28).

**147.** Owens J. referred to various different situations where an application may be progressed by a person other than the originally identified applicant and stated:-

*“There is no reason in principle why things must grind to a halt or that an application must recommence from the beginning where this type of event occurs during the process. I can see no reason why a permission cannot be amended, if necessary, to reflect the reality arising from any such change. Courts should be reluctant to construe or give effect to legislation which may not expressly cover or provide for a particular happening or eventuality in a manner which would produce bizarre results.”* (para. 34)

**148.** Owens J. did not regard the fact that the application was made, and the permission granted, in the name of an entity which was not the entity which was the “prospective applicant” under the 2016 Act as fatal to the permission granted. He agreed with the observations I made at para. 245 of the principal judgment that it is relevant to consider the

objective of the statutory provisions at issue and whether any objective would be undermined by the grant of permission to an applicant which was not the “prospective applicant” under the relevant legislation. He held that no objective would be undermined.

**149.** While Owens J. was dealing with slightly different statutory provisions and while he was considering the position from the point in time at which the permission had been granted, his comments undermine the contentions of the applicant that (a) *certiorari* of the impugned decision must follow as a matter of course as the decision was to grant permission to an entity which was not the “prospective applicant” and (b) that there was no power to amend to reflect the reality of the situation. Paragraphs 26 and 34 of the judgment of Owens J. in *Pembroke Road* are, in my view, inconsistent with both contentions. I agree with what Owens J. stated there. In my view, the court must have a discretion to refuse relief in such circumstances as arose in that case and in the present case, albeit one which must be exercised on a principled and reasoned basis. Further, a finding that the Board has the power to amend an application before it makes a decision to grant permission is consistent with the observations made by Owens J. in those paragraphs of his judgment in *Pembroke Road*.

**150.** The fact that ground 1 raises an issue of jurisdiction does not, in my view and, it seems, in the view of Owens J., mean that the Board cannot amend an application if remitted to it. To classify the issue as one of jurisdiction does not advance the position at all since I am now considering whether the power to amend the application exists in circumstances where the decision has been quashed under ground 4 and where the application is being remitted to the Board at a particular point in time in the process.

**151.** While the power to amend under s. 146A of the 2000 Act does not arise here, since the impugned decision is being quashed under ground 4, it would, in my view, be surprising and would “*produce bizarre results*” (in the words of Owens J. at para. 34 of his judgment in *Pembroke Road*) if the Board could amend its decision or a permission granted in the case of

a clerical error but could not amend a planning application before it which contains the same clerical error.

**152.** While the parties did not expressly address any submissions on the topic of implied powers, it seems to me that the Board must have an implied power to amend a clerical error in an application before it prior to deciding to grant or refuse permission. Otherwise, there would be “*bizarre results*” of the kind to which Owens J. was referring.

**153.** The classic statement on implied powers of public bodies is that of Lord Selborne in *Attorney General v. Great Eastern Railway Co* (1880) 5 App. Cas. 473 where he said:-

*“whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.”* (at 478)

**154.** That statement has been approved of by the Supreme Court in numerous Irish cases including *Keane v. An Bord Pleanála* [1997] 1 IR 184 and *McCarron v. Kearney* [2010] 3 IR 302 (“*McCarron*”). In *Magee v. Murray* [2008] IEHC 371, Birmingham J. in the High Court took as the starting point in the three tier test that an implied power “*could only ever be implied where (1) that is justified by the statutory context; (2) the power contended for is not of such a nature that one would expect to see [it] set out specifically and (3) the power contended for is consistent with the statutory scheme*” (paras. 29 and 32). However, the Supreme Court in *McCarron* felt it was not necessary to adopt that three stage analysis as the correct test was whether the relevant power was “*incidental to or consequential upon*” the express power.

**155.** I have no doubt that the power of the Board to amend a clerical error in an application which is before it is incidental or consequential upon its express powers to determine the application under s. 37 or under the SID provisions contained in ss. 37A to 37J of the 2000 Act.

**156.** I conclude, therefore, for the reasons just discussed that the Board does have the power to amend the application so as to refer to the name of the applicant originally intended, namely, Indaver NV which was the “prospective applicant”.

**157.** The Board has requested the court when remitting the application to give a direction to the Board to rectify the clerical error and to correct the name of the applicant. As noted earlier, the court has the power to give directions in the case of a remittal. I am satisfied that it would be an appropriate exercise of the court’s discretion and would ensure certainty for all concerned to direct that the Board correct the name of the applicant in the remitted application so that it reads Indaver NV t/a Indaver Ireland rather than Indaver Ireland Ltd and to make any other changes directly arising from or consequential on the change in name.

**158.** Finally, the applicant relied on the decision of the Supreme Court in *Urrinbridge* and contended that once the Board’s decision to grant permission was reduced to writing, it was irrevocable and could not be amended or corrected as the Board was at that stage *functus officio*. However, I agree with the Board that that argument cannot succeed, not least because the impugned decision is being quashed under ground 4. There will, therefore, be no valid decision which could be said to be irrevocable. Further, the Board will not be *functus officio* as Indaver’s application is being remitted to the Board for further consideration and determination. *Urrinbridge* does not, therefore, provide any obstacle to the Board correcting the clerical error in the application.

### **7. Summary of Conclusions**

**159.** In summary, I have concluded that in respect of ground 4 (objective bias), the court should grant an order of *certiorari* quashing the impugned decision of the Board. However, I consider that, having regard to the relevant legal principles on remittal, it is an appropriate exercise of my discretion to remit Indaver’s application to the Board for further consideration and determination. I have concluded that the appropriate point in time to which the

application should be remitted is immediately prior to 23<sup>rd</sup> October, 2017 (as that was the date on which, in a decision, taken on its behalf by the deputy chairperson, Mr. Boland, the Board decided not to afford the applicant and others the opportunity of responding to further information and submissions received from Indaver earlier that month). The consequence of remittal to that point in time is that the addendum or supplemental report of the inspector dated 7<sup>th</sup> March, 2018 should not be considered by the Board in the course of its consideration of the remitted application. I have decided that it is not necessary for the court to direct the Board to exercise all or any of the statutory powers available to it but have recommended that the Board consider exercising some or all of those powers. It is inconceivable that the Board would not do so in light of the passage of time since the impugned decision was made. I have also recommended that, if practically possible, any member who remains on the Board and who was involved in the making of the impugned decision in May, 2018 should not be involved in the consideration and determination of the remitted application.

**160.** I have concluded that since the court is granting an order of *certiorari* under ground 4, it is not necessary for it to do so also under ground 1. However, even if the court were not making an order of *certiorari* under ground 4, I would nonetheless exercise my discretion to refuse to grant an order of *certiorari* under ground 1 and would instead make an appropriate declaration to reflect the applicant's success on this ground. I have set out in the course of this judgment the reasons why I would exercise my discretion in that way. I have also concluded that the Board does have the power to correct the clerical error and to amend the name of the applicant for permission to Indaver NV t/a Indaver Ireland in the remitted application and have directed that the Board make that amendment and any necessary consequential amendment resulting from the change in name.



**161.** It seems to me that an appropriate declaration to reflect the applicant’s success under ground 1 would be along the following lines:-

*“A declaration that an application for permission for development under section 37E of the Planning and Development Act, 2000 (as amended) should be made by the “prospective applicant” under sections 37A to 37D, without prejudice to the power of An Bord Pleanála, where necessary and appropriate, to amend the name of the applicant in the application, should it not have been made in the name of the “prospective applicant” and to make any necessary consequential amendments thereto.”*

I will afford the parties an opportunity of considering this proposed declaration. If the parties cannot agree that this is the appropriate declaration to be made, each party should submit the declaration it proposes within seven days of the date of delivery of this judgment which I will then consider.

**162.** I will list the matter for mention and for any further orders in the first half of October, 2021.

### **8. High Court Practice Direction HC 101**

**163.** Finally, in accordance with Practice Direction HC 101, I direct the parties to file the written submissions exchanged for the purposes of the present application (subject to any redactions that may be permitted or required under the Practice Direction) in the Central Office within 28 days from the date of the delivery of this judgment.