THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW
IN THE MATTER OF SECTION 73 OF THE FISHERIES (AMENDMENT) ACT 1997 (AS AMENDED)

2021/823JR

BETWEEN

SALMON WATCH IRELAND CLG

APPLICANT

AND

THE AQUACULTURE LICENCES APPEALS BOARD
AND
THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE,
THE MINISTER FOR ENVIRONMENT, CLIMATE AND COMMUNICATIONS,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BRADÁN FANAD TEO TRADING AS MARINE HARVEST IRELAND
COMHLUCHT IASCAIREACHTA FANAD TEORANTA TRADING AS MOWI IRELAND
SAVE BANTRY BAY, CARE OF ALEC O'DONOVAN,
BREDA O'SULLIVAN,
JOHN BRENDAN O'KEEFFE
DENIS O'SHEA, KIERAN O'SHEA AND JASON O'SHEA
BANTRY SALMON AND TROUT ANGLERS' ASSOCIATION
CHRIS HARRINGTON, VINCENT O'SULLIVAN, PETER MURPHY AND CHRIS FORKER
GALWAY BAY AGAINST SALMON CAGES
JOHN HUNT
FRIENDS OF THE IRISH ENVIRONMENT
INLAND FISHERIES IRELAND
FEDERATION OF IRISH SALMON AND SEA TROUT ANGLERS

NOTICE PARTIES

AND

2021/828JR

BETWEEN:

INLAND FISHERIES IRELAND

APPLICANT

AND

AQUACULTURE LICENCES APPEALS BOARD
THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENTS

AND

BRADÁN FANAD TEORANTA TRADING AS MARINE HARVEST IRELAND,

SAVE BANTRY BAY,
THE RESIDENTS OF ROOSK, ADRIGOLE,
JOHN BRENDAN O'KEEFFE,
DENIS O'SHEA, KIERAN O'SHEA AND JASON O'SHEA,
BANTRY SALMON AND TROUT ANGLERS' ASSOCIATION,
C. HARRINGTON, V. O'SULLIVAN, P. MURPHY, C. FORKER,
COOMHOLA SALMON & TROUT ANGLERS' ASSOCIATION,
GALWAY BAY AGAINST SALMON CAGES,
SALMON WATCH IRELAND,
JOHN HUNT,
FRIENDS OF THE IRISH ENVIRONMENT,
FEDERATION OF IRISH SALMON AND SEA TROUT ANGLERS

NOTICE PARTIES

AND

2021/831 JR

BETWEEN:

PETER SWEETMAN
FEDERATION OF IRISH SALMON AND SEA TROUT ANGLERS
JOHN BRENDAN O'KEEFFE

APPLICANTS

AND

AQUACULTURE LICENCE APPEALS BOARD
MINISTER FOR AGRICULTURE FOOD AND THE MARINE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BRADAN FANAD TEORANTA T/A MARINE HARVEST IRELAND
COMHLUCHT IASCAIREACHTA FANAD TEORANTA T/A MOWI IRELAND
INLAND FISHERIES IRELAND

NOTICE PARTIES

Judgment of Mr Justice Holland delivered on 31 October 2024

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Introduction

1. By judgment delivered 12 July 2024, I decided to quash by certiorari:

- an Aquaculture Licence dated 26 January 2022 (the "Aquaculture Licence") issued by the respondent Aquaculture Licence Appeals Board ("ALAB"), on foot of its determination dated 29 June 2021, to MOWI,[1] pursuant to the Fisheries (Amendment) Act 1997 (as amended) ("the 1997 Act") for the cultivation of Atlantic salmon in cages on a site of 42.49 hectares in Outer Bantry Bay, south of Shot Head, near Adrigole, County Cork (the "Site") for, in effect, the lesser of 10 years and the continuance in force of the associated Foreshore Licence.

- the associated Foreshore Licence, also dated 26 January 2022 (the "Foreshore Licence"), issued by the respondent Minister for Agriculture, Food and the Marine ("the Minister" and "DAFM") to MOWI in accordance with his determination of 5 September, 2015, and in exercise of the powers conferred by s.3 of the Foreshore Act, 1933 ("the 1933 Act") for the purpose of the salmon cultivation described in the Aquaculture Licence, on the Site - such Foreshore Licence to remain in force so long as the Aquaculture Licence remains in force. Foreshore Licence conditions require, inter alia, MOWI to,
  - use the Site only for the cultivation licensed by the Aquaculture Licence and for no other purpose.
  - comply fully with all terms and conditions of the Aquaculture Licence.

2. I will refer to the subject of the licence applications as the "Shot Head Salmon Farm". MOWI applied for the Aquaculture Licence in June 2011. The Minister for the Marine granted it in September 2015. Various appeals of that decision ensued (the Appeals"), ALAB's Aquaculture Licence decision was made on foot of those Appeals.

3. Briefly put, by the judgment of 12 July 2024 the Aquaculture Licence will be quashed for inadequate:

i. AA Screening of the risk of effects of seal scarers on seals of the SAC.

ii. EIA as to the risks of escape of salmon from the Shot Head Salmon Farm. This finding relates to
   - necessity of re-consideration of bespeaking the DAFM reports on the 2014 farmed salmon escape in Bantry Bay,
     and
   - comprehensiveness of the EIA as it related to the specification and structural integrity of the cage installation.

[1] In my judgment of 12 July 2024, I noted at §2 that "For present purposes, Bradan Fanad Teoranta and Comhlucht Iascaireachta Fanad Teoranta can be regarded, as both having formerly traded as "Marine Harvest Ireland" ("MHI") and as trading now as MOWI Ireland and I need not distinguish between them. I will refer to them collectively as "MOWI"."

iii. reasons for the conclusion that the proposed Shot Head Salmon Farm will not lead to a breach of WFD limits as to Dissolved Inorganic Nitrogen – specifically, reasons for reliance on RPS's "typical" data in reaching that conclusion.

4. In addition, I held that I would

- declare that ALAB delayed unreasonably as to AA Screening from the making of the Appeals in October 2015 to embarking on AA Screening after the Oral Hearing Report of November 2017.
- grant no further relief on that account.

5. Also briefly put, the Foreshore Licence will be quashed as

- contingent on the Aquaculture Licence to be quashed, Ministerial regard to which was a statutory requirement of granting the Foreshore Licence.

- the Minister erred, in breach of s.82 of the 1997 Act, in granting the Foreshore Licence in 2022, in having regard to his Aquaculture Licence decision of 2015 rather than to ALAB's impugned Aquaculture Licence determination of 29th June 2021.

6. I also held that the effect of s.13A(6) of the Foreshore Act, 1933 is that no EIA was required in the Foreshore Licence application in this case and that the relevant EIA requirement arose and arose only in the Aquaculture Licence application and Appeals. However, the Minister in deciding the Foreshore Licence application will have regard to ALAB's EIA done in the Aquaculture Licence Appeals.

7. In my judgment of 12 July 2024,[2] I expressed provisional views[3] that the decisions to be quashed should be remitted for re-decision by ALAB and the Minister and made various observations as to the conduct of any remitted processes which I need not repeat here.

The Parties' Essential Positions on Remittal & What does IFI Want?

8. All respondents and MOWI argue for remittal. ALAB submit that remittal is permissible in principle and that it can determine the Aquaculture Licence appeals on any remittal. IFI,[4] SWI[5] and the Sweetman Applicants[6] oppose remittal but SWI[7] and the Sweetman Applicants left argument of the issue to IFI. They did

[2] Primarily §§845, 1045, 1384, 1398, 1451.
[3] Though assuming remittal at certain points in the judgment.
[4] Inland Fisheries Ireland.
[5] Salmon Watch Ireland CLG.
[6] i.e. all applicants in proceedings 2021/831 JR.
[7] Salmon Watch Ireland CLG.

not participate in the hearing of the remittal issue. All parties agree that my decision as remittal in the IFI proceedings[8] should be replicated in the other two proceedings.

9. As argued, there really was no dispute but that, if I have jurisdiction to remit, I am likely to do so in my discretion, on general principle and in view of such decisions as **Usk,**[9] **Clonres,**[10] **Barna Wind**,[11] and **Crofton**.[12] I confirm that view and consider that I need not much elaborate it here. IFI's only real argument is that the decision in **Deerland**[13] prevents remittal. IFI says not that I shouldn't remit but that I can't. It submits:

> *"There is no issue between the parties as regards the general power of remittal pursuant to Order 84 Rule 27(4) RSC, nor the principles applicable to the exercise of that power (Kelly J. in **Usk** and **Clonres**). Rather the question is whether there is a jurisdiction to remit under the 1997 Act having regard to the findings of Kelly J. in **Deerland**."*

10. As I understand IFI's submission it is essentially that:

- It's not that I shouldn't, but that I can't, remit to ALAB.
- S.40(6) of the 1997 Act, as interpreted in Deerland, has the effect that certiorari of ALAB's decision does not reverse its statutory annulment of the Minister's Decision.
- As the Minister's decision is annulled, there can in logic remain extant no appeal of that decision for ALAB to decide. So, remittal to ALAB is impossible as it lacks jurisdiction absent an appeal.[14] It follows that I lack jurisdiction to remit to ALAB.
- All that remains extant of the Aquaculture Licence process is MOWI's application to the Minster for an Aquaculture Licence, so the matter should be remitted - but not to ALAB. It should be remitted to the Minister to decide.
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11. At one point, I asked counsel for IFI where the practical sense was in IFI's position. It is no criticism of him to say that I found his reply illuminating. He did not seek to persuade me that IFI's position had any merit other than technical legality. He replied "*of course the Court is faced with a practical difficulty …… we do appreciate that. I'm not suggesting to the Court that this is not without its difficulties in terms of the consequences of the argument, …".* Ultimately he said, "*it's not a question of looking for sense in this*

[8] 2021/828JR.
[9] Usk and District Residents Association Ltd. v An Bord Pleanála [2007] IEHC 86.
[10] Clonres CLG v An Bord Pleanála and Others [2018] IEHC 473. Barniville J summarised the relevant principles on remittal at §44.
[11] Barna Wind Action Group v An Bord Pleanála [2020] IEHC 177 §22.
[12] Crofton Buildings & Anor v An Bord Pleanála [2024] IESC 12 §33.
[13] Deerland Construction v Aquaculture Licences Appeals Board [2009] 1 IR 673.
[14] See below, s.40 of the 1997 Act.

particular situation …". At other points he said that "*there are problems with the statute that we identify in IFI"* and cited "*a concern I suppose which has mutated into an application* [by IFI] *as regards the question of remittal*". He described a "*conundrum*" inherent in the fact that s.40(6) did not annul a ministerial decision which ALAB had simply confirmed.[15]

12. It bears observing that IFI cited no case in which a quashed decision had been remitted to a body other than the body which had made that decision or to a body which had made a first instance decision when the quashed decision had been made on appeal from that first instance decision.

13. It also bears observing that, inasmuch as this issue is of statutory interpretation, I bear in mind the principles stated by Murray J in **Heather Hill**[16] and **A.B. & C. (A Minor)**.[17]

Statutory Provisions & the Planning Law Analogy

14. **S.40 of the 1997 Act**, as relevant, provides as follows:

> *"40.—(1) A person aggrieved by a decision of the Minister on an application for an aquaculture licence …. may, ……. appeal to the Board against the decision,*
> *…(4) Where an appeal is brought under this section and is not withdrawn, the Board shall, …. determine the appeal by—*
> *(a) confirming the decision or action of the Minister,*
> *(b) determining the application for the licence as if the application had been made to the Board in the first instance, or*
> *(c) in relation to the revocation or amendment of a licence, substituting its decision on the matter for that of the Minister.*
> *…*
> *(6) The determination under subsection (4)(b) or (c) of an appeal shall annul the decision or action of the Minister immediately the determination is made."*

IFI cites s.40, correctly, as the sole basis of ALAB's jurisdiction: absent an appeal to decide, it has nothing to decide.

15. **S.73 of the 1997 Act**, as relevant, provides as follows:

> *"73.—(1) A person shall not question—*
> *(a) a decision on an application for a licence or the revocation or amendment of a licence, or*

[15] Inder s.40(4)(a) of the 1997 Act. I need not embark on a discussion of that conundrum here.
[16] Heather Hill Management Company v An Bord Pleanála and Burkeway Homes [2022] 2 ILRM 313.
[17] A, B & C (A Minor) v Minister for Foreign Affairs & Trade [2022] IESC 10.

(b) a determination of the Board on an appeal,
otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts ……..”

16. **S.16 of the 1997 Act**, as relevant, provides as follows:

“16.—(1) A licence is binding on the State and on all persons whomsoever, and, …. shall operate to enable the licensee to carry on, in accordance with the licence, such operations as are specified in the licence, free from all prior or other rights, titles, estates or interests, if any.
(2) In addition ……., a licensee …… shall, by virtue of, but subject to the conditions of, the licence ……. have the exclusive right to do within the boundaries or limits specified in the licence anything authorised by the licence or necessary or expedient to conduct the operations specified in the licence.”

17. To put the argument in some context, **s.37(1)(b) PDA 2000**[18] is in similar terms to s.40(6) of the 1997 Act. S.37(1)(b), as relevant, provides as follows:

“37.—(1)(b) …where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; ……”.

18. Likewise, **s.50(2) PDA 2000** is in similar terms to s.73 of the 1997 Act. s.50(2), as relevant, provides as follows:

“A person shall not question the validity of any decision made or other act done by — (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act, … otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts …”.

19. Since 2022, **s.50A(9A) PDA 2000**[19] as interpreted in **Crofton**,[20] has provided in effect that where the Board’s decision on a planning appeal is quashed on judicial review and the applicant for permission or approval requests remittal to the Board, the Court must remit unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so. Thus, there is now a clear statutory jurisdiction on the planning side to remit. In **Crofton**, the Supreme Court held that s.50A(9a) PDA 2000 did not merely reinforce and put the preceding discretionary jurisdiction to remit on a statutory footing – it created a statutory imperative to remit unless it would not be lawful to do so.

[18] Planning and Development Act 2000, as amended.
[19] Inserted (20/10/2022) by Planning and Development, Maritime and Valuation (Amendment) Act 2022 (29/2022), s.22(a)(iii), (b), SI No. 523 of 2022.
[20] Crofton Buildings & Anor v An Bord Pleanála [2024] IESC 12.

20. However, prior to 2022, the Court had been in no different a jurisdictional position on the planning side to remit to the Board than I now am to remit to ALAB. The statutory architecture was essentially the same. Remittal to the Board prior to 2022 was a commonplace and the proper approach to the exercise of that discretionary jurisdiction had been the subject matter of multiple judgments - such as **Usk,**[21] **Clonres,**[22] **Barna Wind**.[23] So, in my view, s.40(6) of the 1997 Act does not set the 1997 Act regime apart from other statutory regimes in which remittal has been a commonplace. However, the analysis in the cases starts from O. 84, r. 27(4) RSC[24] and the parties here were unable to unearth any planning case in which, prior to the commencement of s.50A(9A), the existence and source of the underlying jurisdiction to remit had been interrogated to a conclusion – not least in the context of the annulling effect of s.37(1)(b) PDA 2000.

O. 84, r. 27(4) RSC & Inherent Jurisdiction to Remit

21. **O. 84, r. 27(4) RSC**, as relevant, provides that where certiorari of an impugned decision is granted,

> *"…… the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."*

22. This explicit provision for a power of remittal was a novelty of the 1986 Rules and its jurisdictional status has been the subject of some debate as recorded by **Hogan, Morgan & Daly**.[25] They observe that *"*[t]*here is no statutory grounding for this power and, again, it may be questioned as to whether this rule is, in fact, intra vires the powers of the Superior Courts Rules Committee."* – citing the comments of Finlay CJ in **Sheehan v Reilly**,*[26]* and of McKechnie J in **Stephens v Connellan**.*[27]* **Hogan, Morgan & Daly** cite Keane J in **Bord na Móna v An Bord Pleanála and Galway County Council**[28] as having held, pre-1986, that he had no jurisdiction to remit and they comment that this decision must have been wrongly decided if, as has been suggested, the High Court always had a jurisdiction to remit to rehearing. To this latter effect, they cite Kelly J in **Usk**[29] - which canvassed but did not decide the issue - Denning LJ in 1951 in **Shaw**,[30] and **Collins and O'Reilly**.[31] They cite Shaw for the proposition that it follows from Sheehan that the High Court has always had jurisdiction to remit. While in England and Wales the power to remit was statutorily established in 1981[32] as late as 1997 the **White Book**[33] cited Shaw as authority for the power to quash and remit – and if Shaw is authority for a jurisdiction to remit it must be for an inherent jurisdiction to do so.

[21] Usk and District Residents Association Ltd v An Bord Pleanála [2007] IEHC 86.
[22] Clonres CLG v An Bord Pleanála and Others [2018] IEHC 473. Barniville J summarised the relevant principles on remittal at §44.
[23] Barna Wind Action Group v An Bord Pleanála [2020] IEHC 177 §22.
[24] Order 84, Rule 27(4) of the Rules of the Superior Courts.
[25] Hogan, Morgan & Daly, Administrative Law in Ireland, 5th edn, §18-106 et seq.
[26] [1993] 2 IR 81 at 92–93.
[27] [2002] 4 IR 321 at 359.
[28] [1985] IR 205.
[29] Usk and District Residents Association Ltd v An Bord Pleanála, Ireland and the Attorney General, Greenstar Recycling Holdings Ltd and Kildare County Council [2007] 2 ILRM 378.
[30] R (Shaw) v Northumberland Compensation Appeal Tribunal [1951] 1 KB 338, p347.
[31] Collins and O'Reilly, Civil Proceedings and the State, 3rd edn (Dublin: Round Hall, 2019), pp.196–198.
[32] Senior Courts Act 1981, s.31(5)(a).
[33] The Supreme Court Practice 1997, Volume 1 53/1-14/51, p874. This volume preceded the adoption of CPR in England & Wales.

23. While an operative, but brief, observation in **Bord na Móna** weighs against the inherence of the jurisdiction to remit, its terms suggest that the argument for remittal had fallen away in argument at trial absent a statutory jurisdiction and it is not clear that an argument for an inherent jurisdiction was much pressed, if at all. I do not read it as definitively deciding the issue. In **Sheehan,** the High Court had quashed a conviction and remitted the matter to the District Court for reconsideration. Finlay CJ allowed the appeal, declining on discretionary grounds to remit. In so doing he said of O. 84, r. 26(4):

> *"Neither this provision nor any rule similar to it was contained in the Rules of the Superior Courts, 1962. It must first clearly be stated that this rule which, on the face of it, gives to the court a discretion as to whether or not to remit a matter in which an order has been quashed for further consideration, cannot, having regard to the limitation of the powers vested in the rule-making authority pursuant to the Courts of Justice Acts be the grant of any new or different power that is not already vested in the court by virtue of statute or by virtue of inherent jurisdiction."*

Finlay CJ accordingly held that the question of remittal fell to be decided "*in accordance with the general principles applicable to the retrial of a person*". McKechnie J in **Stephens** considered **Sheehan** and held that ***"****The making of O.84, r 26(4) in 1986, given the limitations imposed on the Rules Making Committee, did not alter the general principles applicable to the retrial of an accused person".* He clearly accepted the view of Finlay CJ that O.84, r. 26(4) did not confer "*any new or different power that is not already vested in the court".*

24. **Costello**[34] cites Sheehan and opines that "*the historical evidence certainly supports*" the conclusion that the remittal jurisdiction described in O.84, r. 26(4) does not exceed any power already vested in the High Court. He states that "*direct evidence that 'remittal' ancillary to certiorari was known to the law before the 1986 Rules can be extracted from the law reports, especially from a period around the middle of the nineteenth century. These sources establish the early usage of remittal, and also establish that historically the procedure emerged as an informal version of the writ of mandamus."* He cites **R v Thompson**[35] for the view that *"[i]t really seems incidental to our jurisdiction that we should be able to order justices to proceed rightly."* Costello says that *"*[c]*ases like Thompson furnish direct evidence, therefore, that 'remittal' is no more than a strain of mandamus and that it emerged as an order in the nature of mandamus"* and "*[a] small body of local historical precedent confirms, therefore, that certiorari followed by remittal has, indeed, relatively venerable antecedents. It can be seen to have emerged as an informal strain of the earlier procedure of certiorari followed by mandamus.*" He observes[36] that *"*[t]he *only point of distinction is that whereas under the old procedure the prosecution would apply for both certiorari to quash (a dismissal) and, in consequence, a mandamus, under the new procedure it is the defendant (applicant) who seeks the certiorari, and the prosecution which, in consequence, seeks the mandamus. There are several examples of*

[34] "Certiorari followed by remittal", Irish Criminal Law Journal 1993, 3(2), 145-160. Kevin Costello was then a lecturer in law at University College Dublin. Dr Costello is now a Senior Lecturer there and his publications include 'The Law of Habeas Corpus in Ireland' (2006). His UCD profile describes his principal current research interest as the history of judicial review of administrative action in English law between the seventeenth and twentieth centuries.
[35] (1855) 7 Ir Jur 124.
[36] Footnote 15.

this latter procedure occurring prior to the Rules of 1986 …" He cites **McGroddy**[37] and **de Burca**.[38] Of course, Mr Costello's examples are of certiorari of criminal convictions by lower courts. But his analysis is explicitly not limited to reliance on the *"learning that a void conviction does not attract autrefois convict". "Having established a jurisdictional basis for the power to remit …"* in his view, the Mr Costello proceeds to consider the limits on that jurisdiction, but I need not.

25. In **Usk**, Kelly J considered, but did not decide, an argument that O. 84, r. 26(4) is declaratory of an inherent jurisdiction of the court. He considered it to be supported by Collins and O'Reilly, Shaw and Mr Costello's article and to be "*supported by the observations of Finlay C.J. in Sheehan*" which he cites verbatim.

26. Humphreys J in **Barry**[39] considered the position as it existed prior to the 1986 Rules and as depicted by the Law Reform Commission.[40] The LRC noted[41] that certiorari *"quashes – i.e. positively invalidates – the impugned decision. The person who (or body which) took that decision is thus free to consider the matter afresh".* It said also that certiorari "*will quash the administrative decision, thereby conferring implicit authority to reconsider the matter*".[42] So, Humphreys J suggested that on certiorari and hence *"in the absence of a decision, the body is free to consider the matter afresh. Implicit in that is the notion that the materials previously before the decision-maker remain before the decision-maker."* Indeed, he considered that *"strictly speaking, given the legal position as noted by the Law Reform Commission, the order for reference back seems to be declaratory in the sense that that possibility follows from certiorari anyway. The new rule goes beyond the declaratory if there are to be specific directions given by the court as to how the referral back is to take place. So even in the absence of an order for remittal back, the decision-maker can make a fresh decision, …".*

27. Judicial review is regulated by statute in certain respects but is a creature of the common law. Indeed, its burgeoning development in recent decades has been characterised by development by caselaw. Further, the fashioning of remedies in the interests of justice and to meet the circumstances of the case, though requiring caution, is not an area obviously without the inherent jurisdiction of the courts. A view that remittal is not within the inherent jurisdiction of the courts would require a view that, in the absence of statutory provision for remittal, O. 84, r. 26(4) is ultra vires the Superior Courts Rules-Making Committee. While that is not impossible, it is at least unlikely and is not a conclusion lightly to be drawn. In my view, even though Finlay CJ declined remittal on discretionary grounds in Sheehan, he went out of his way to address the question of the jurisdiction to remit and yet did not suggest that O. 84, r. 26(4) was ultra vires the committee which made the 1986 Rules – a committee of which he was himself a member. I am fortified by the view taken in the White Book of Shaw, by the view of Costello and by the view of Humphreys J in Barry and, so, by the view of the Law Reform Commission as set out above. In my view the better view is that the jurisdiction to remit has its origin in the inherent jurisdiction of the High Court.

[37] The order of Walsh J in The State (McGroddy) v Carr; [1975] IR 275, 284.
[38] Specifically "*the order of Pringle J of 8 February 1981, reported in The State (de Burca) v Ó hUadhaigh* [1976] IR 85, 91." The anachronism suggests that Mr Costello intended to refer to the order of Pringle J of 12 February 1973.
[39] Barry v Commissioner of An Garda Síochána [2020] IEHC 307.
[40] Law Reform Commission, "Judicial Review of Administrative Action: the problem of remedies" (LRC WP 8-1979).
[41] §2.5.
[42] LRC §1.5.

28. However, while I consider that the jurisdiction to remit in judicial review is inherent in the High Court and ALAB urged the inherent jurisdiction on me as the solution to the present issue, clearly the general inherent jurisdiction cannot, in a particular regulatory context, survive a statute incompatible with it. And that is what IFI argues.

A Statutory Jurisdiction to Remit

29. However, I find a statutory jurisdiction to remit in the 1997 Act at the invitation of those opposing IFI's submission. As has been seen, s.73 of the 1997 Act and s.50(2) PDA 2000 identically prohibit challenge to ALAB's and the Board's decisions respectively "*otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts".* While framed as prohibitions, these sections must also be understood in a positive sense: ALAB's and the Board's decisions may be questioned "*by way of an application for judicial review under Order 84 …"* (albeit subject to the requirement to obtain leave to seek judicial review). This general statutory invocation of Order 84 necessarily encompasses O. 84 r. 27(4) and hence the power of remittal for which O. 84 r. 27(4) provides. Even if O. 84 r. 27(4) were ultra vires the Committee for want of an inherent jurisdiction to remit – which I do not accept – in the particular instances of planning law and aquaculture licensing decisions, the power to remit has a valid statutory basis in s.73 of the 1997 Act and s.50(2) PDA 2000. I note that in **Delaney**[43] similar reasoning was applied to the retroactive effect on the validity of the Personal Injury Guidelines of March 2021 of s.30 of the Family Leave and Miscellaneous Provisions Act 2021 which entered into force on 24 April 2021. As to an argument that, in effect, what s.73 of the 1997 Act gave with one hand, ss. 40(6) of the 1997 Act took away with the other, I accept the State's invocation of the principle that clear legislation is required to deprive the High Court of a jurisdiction it would otherwise have. I find a statutory jurisdiction to remit in s.73 of the 1997 Act.

Deerland

30. Deerland loomed large in submissions but, to be clear, IFI accepts that Kelly J in Deerland did not explicitly consider or decide an argument that he lacked jurisdiction to remit. And IFI accepts that Kelly J's refusal to remit in that case was in the exercise of his discretion – not for want of jurisdiction. However, IFI says that the logic of Deerland, and its analysis of the effect of s.40(6), require a conclusion that I lack jurisdiction to remit to the Minister.

31. In Deerland, Kelly J quashed, for want of adequate reasons, ALAB's decision to grant an aquaculture licence to the notice party ("Lett") to cultivate mussels on a site in Wexford Harbour. He refused to remit the matter to ALAB for re-decision. The facts, as in the present cases, involved the interplay between an aquaculture licence and a foreshore licence. In fact, in Deerland a foreshore lease was in issue but no

[43] Delaney v PIAB et al [2024] IESC 10.

argument was made in this case or, it seems in Deerland, that anything turns on any distinction between a lease and a licence for any purpose relevant to remittal. But, whereas in the present cases the aquaculture and foreshore licenses would be mutually supportive, in Deerland they were antagonistic. Lett's aquaculture licence for mussel beds was incompatible in practical terms with Deerlands' application for a lease allowing it reclaim foreshore for a hotel building project.

32. Lett had farmed the mussel beds pursuant to an aquaculture licence since 2001. It had got an updated licence in 2006 from the Minister which, on appeal by Deerland, had been upheld by ALAB in 2007. Deerland got planning permission in 2007 for a hotel which would extend into the harbour and so require reclamation of lands overlapping in part with the mussel beds. A week before ALAB upheld the aquaculture licence, Deerland had applied to the Minister for a foreshore lease to allow it effect the reclamation works for the hotel in accordance with its planning permission.

33. After, and in reliance on ALAB's decision, the Minister refused to process Deerland's foreshore lease application. Kelly J held[44] that such refusal had been by reason of s.16 of the 1997 Act. It provided[45] that a licence

- binds the State and all other persons
- enables the licensee to operate as "*specified in the licence, free from all prior or other rights, titles, estates or interests, if any*."
- confers on the licensee the exclusive right to do within the licence area *"anything authorised by the licence or necessary or expedient to conduct the operations specified in the licence."*

In substance, Kelly J held that the Minister had correctly taken the view that Lett's aquaculture licence and s.16 prohibited the grant to Deerland of a foreshore lease relating to the same locus.

34. Deerland sought certiorari quashing ALAB's grant of the aquaculture licence and the Minister's refusal to consider its foreshore lease application – in the latter case asserting that the Minister had unlawfully abdicated his statutory duty to substantively decide the foreshore lease application.

35. On Deerland's obtaining certiorari of ALAB's decision, Lett courageously argued that the Minister's decision on the aquaculture licence was revived, such that it still had an aquaculture licence.[46] Unsurprisingly in my view, the argument failed as likely to give rise, in the view of Kelly J, to "*absurd results*". Not least, I imagine, those absurdities would have consisted in depriving Deerland of the fruits of both its successful judicial review and its right of appeal from the Minister to ALAB. Lett's submission amounted to a "Catch 22"[47] argument.

[44] §107.
[45] I have omitted content not here relevant.
[46] §98 et seq.
[47] Catch-22 is a satirical World War II novel published by American author Joseph Heller in 1961. A "Catch-22" is "a problem for which the only solution is denied by a circumstance inherent in the problem or by a rule" (Mirriam-Webster). The term "Catch-22" is also used more broadly to mean a tricky problem or a no-win or absurd situation. It is "a dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions." (Oxford). It is "a situation in which a person is frustrated by a paradoxical rule or set of circumstances that preclude any attempt to escape from them" (Collins).

36.

37. Kelly J also observed that:

- by s.40(6) of the 1997 Act, ALAB's determination *"of an appeal shall annul the decision or action of the Minister immediately the determination is made.*"
- the argument that the Minister's original grant of the aquaculture licence would revive if ALAB's decision were quashed on certiorari is not correct. It could yield absurd results.
- though defective and quashed accordingly, ALAB's decision was nonetheless an effective determination for the purposes of s.40(6) of the 1997 Act such that, once ALAB's decision was made (though defectively) the Minister's decision was annulled.
- the Minister's decision was not revived by certiorari of ALAB's decision.

Accordingly, Kelly J held that "[t]he *net effect therefore of quashing the first respondent's determination is that there is now no aquaculture licence in place*".

38. However, it does not seem that Kelly J regarded this conclusion as, ipso facto, precluding remittal to ALAB. He said "[i]*t is in this context that I now consider both the two remaining issues and the question of remittal of the matter to the first respondent*."[48] He dealt with those issues together.[49]

39. First, Kelly J noted that, given certiorari of ALAB's decision did not revive the Minister's grant of the aquaculture licence, if he refused remittal to ALAB, Lett would have to apply afresh to the Minister and it was the Minister who also had the power to decide Deerland's foreshore lease application.

Second, as there was now (by reason of certiorari quashing it) no clashing prior aquaculture licence, s.16 no longer prevented the Minister from deciding Deerland's foreshore lease application. The Minister could accordingly consider Lett's fresh aquaculture licence application and Deerland's foreshore licence application "*in tandem"* and on their respective, contending and conflicting merits: *"*[t]hus *this matter can be resolved where it ought to be resolved, by the two contending parties seeking from the licensing authority at first instance whatever rights they wish to obtain in respect of Wexford harbour."*[50] Turning to the particular issue of remittal to ALAB, Kelly J said *"*[h]aving *regard to the considerations which I have just outlined I do not consider that that would be appropriate in the circumstances."* Kelly J concluded:

> *"The order which I make is one which will allow the licensing authority at first instance, ie the second respondent, to decide on the competing alleged rights and entitlements of the applicant and the notice party in respect of this comparatively small area of land in Wexford harbour."*

40. This last sentence seems to me important. The "*considerations just outlined*" are those relating to the practical possibility of having the "*contending parties seeking from the licensing authority at first instance whatever rights they wish to obtain",* such that the Minister would decide their contending

[48] §105.
[49] §106 et seq.
[50] §109 & 110.

applications on their respective merits and "*in tandem*". In observing that he did not consider it "*appropriate in the circumstances",* Kelly J seems to me to have been recognising that he had a discretion to remit. His language is consistent with an exercise of judgment, in light of the practicalities of the situation, not to remit - as opposed to a view that he lacked jurisdiction to remit. While I don't over-interpret it, given the particular statutory context,[51] I note that in **Crofton**[52] the Supreme Court contrasted "*a statutory imperative to remit unless it would not be lawful to do so*" and hence the question whether remittal would be "*unlawful*" with the question whether remittal would be "appropriate" – observing that they do not equate. In any event, IFI accept that Kelly J's refusal to remit was couched in discretionary, not jurisdictional, terms.

41. Counsel for IFI says Kelly J was silent on the question of his jurisdiction to remit - though he says that Kelly J had no jurisdiction is the logic of the decision of Kelly J. Counsel fairly said that "*everybody has puzzled over Deerland*" and agreed that if his argument is correct that jurisdiction was probably not argued in Deerland then Deerland does not bind me in this matter. It seems to me that if Kelly J had considered that he had no jurisdiction to remit, he would have said so – and said so immediately on his determination of the effect of s.40(6) and the continuing effect of the quashed decision in annulling the Minister's decision on Lett's aquaculture licence application. Instead, he embarked on an analysis of the practicalities of the precise circumstances of the case and made a discretion-based decision – needlessly on IFI's argument.

Annulment - Vestiges of Decisions

42. IFI's argument turns on ALAB' statutory annulment of the Minister's Aquaculture Licence decision. No doubt "annulment" generally sounds like, and may in many instances be, absolute - a complete obliteration of an administrative decision in the sense for which IFI contends. But that is not always so.

43. Certiorari in its effect is also an "annulment" – of a decision impugned in judicial review. The following appears in the judgment of Hogan J in **Waltham Abbey:**[53]

> *" … it is first appropriate to consider the nature of the remedy of certiorari. Certiorari is, of course, the traditional remedy granted in the course of judicial review proceedings. It serves to quash and set aside the administrative decision which has been impugned by means of a judicial annulment. The remedy is - for good reasons - a powerful and effective one. Experience has, however, shown that the remedy of annulment may sometimes amount to a form of excessive enthusiasm on the part of the legal system and that a more finely tuned remedy may be required."*

44. Deerland itself throws up an example of incomplete annulment by certiorari – as Kelly J said, *"the decision of the first respondent whilst invalid as a matter of law, still has some legal effects*." The quashed ALAB licence in that case was accorded a vestigial persistence in preserving its statutory annulment of the

[51] S.50A(9A) of the Planning and Development Act 2000 which imposed.
[52] §36.
[53] Waltham Abbey Residents Association v An Bord Pleanála and Ireland and the Attorney General and O'Flynn Construction [2022] 2 ILRM 417.

Minister's decision. Kelly J cited **Abenglen**,[54] in which the annulment by certiorari of the relevant planning decision did not deprive that decision of its efficacy as a decision for the purpose of complying with the obligation to decide a planning application – such that no default planning permission ensued. Again, we see the vestigial existence of an annulled decision. No reason has been suggested why the statutory concept of annulment should, a priori, necessarily and always be any more absolute than the concept of annulment in judicial review. It is a matter of interpretation, as a whole, of the statute in which the concept appears.

45. At this point I return to s.73 of the 1997 Act. As I have said, I interpret it as providing a statutory basis for remittal orders in judicial reviews of aquaculture licences by, in the words of O. 87 r. 27(4) RSC, remitting *"the matter to the Court, tribunal or authority concerned with a direction to reconsider it".* The "matter" is clearly the process which resulted in the quashed decision and the "authority concerned" is the body which made the quashed decision. And, as I have already noted, IFI cited no case in which a quashed decision had been remitted to a body other than the body which had made that decision or to a body which had made a first instance decision when the quashed decision had been made on appeal of that first instance decision. I accept the submission of counsel for MOWI that a remitted decision goes back to the decision-maker (even if differently constituted as to personnel) whose decision has been quashed.

46. Accordingly, in my view, s.73 of the 1997 Act and O. 87 r. 27(4) RSC combine to authorise remittal to ALAB of quashed decisions by ALAB. It follows that the statutory annulment of the Minister's decision by ALAB's decision does not undermine the existence of a statutory appeal before ALAB to which its quashed decision can be remitted.

47. I consider that this conclusion accords with the "*clear judicial authority*" for the principle that statutory interpretation should, ceteris paribus, aim at a "*workable and coherent"* interpretation of a statute. Notably, Hogan J in **Waltham Abbey**[55] did not set a requirement of absurdity or absolute unworkability as the trigger for the application of this principle. Rather he sought to avoid interpretations which were "*either incongruous or which imposed unfair or anomalous obligations on private citizens in particular*." He cited **Frescati***[56]* as authority that the planning acts should, where possible, not be interpreted in a way which would lead to "*strange incongruities*." I consider that a similar view should be taken of the 1997 Act – which is analogous.

48. While it is not an authority, I am happy that the Supreme Court's determination in **CHASE**[57] accurately states the law as to the purpose of the remittal power provided by O. 86, r. 24(7) RSC, to the effect that:

[54] The State (Abenglen Properties) v Corporation of Dublin [1984] IR 381.
[55] Hogan J §43; Also Save Cork City Community Association CLG v An Bord Pleanála [2022] IESC 52; and Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525 §283.
[56] Frescati Estates Ltd v Walker [1975] IR 177 at 187.
[57] Cork Harbour Alliance for a Safe Environment v An Bord Pleanála & Indaver Ireland Limited [2022] IESCDET 108.

> *"… the principles governing the exercise of this power in a case of this nature are clear and uncomplicated. The remittal power is essentially designed to ensure that the appropriate response and remedy is provided to an applicant following the quashing of an ultra vires administrative decision. In most cases, the appropriate remedy will be to quash the decision and to remit the decision to the decision maker so that the administrative power can be fairly exercised in the light of the court's judgment. The existence of a power to remit seeks to minimise the extent of the disruption and inconvenience to the administrative process, while at the same time ensuring that the applicant enjoys an effective remedy.*
> *Absent such a power there would be a risk that the relief afforded to a successful applicant might be disproportionate, since in such circumstances the administrative process would have to start again, often with needless expense and delay. Such expense and delay might well be very significant. There may be, of course, particular cases where it would not be appropriate to remit."*

Ordinarily, one cannot interpret a statute by reference to the content of statutory instrument. But here the latter preceded the former and the former explicitly, by s.73, adopted the latter. Presumably it did so in part to achieve and avail of the purposes of O. 86, r. 24(7) RSC as identified above. Remittal to ALAB as opposed to the Minister seems to me to accord with those purposes.

49. In my view, IFI's suggested interpretation of the 1997 Act would produce incongruity in the sense contemplated in Waltham Abbey for the reasons I have stated. That is so also in the particular context of a statute – the 1997 Act - which (however ineffectively in practice) explicitly requires expedition. Ceteris paribus, remittal to ALAB will involve no structural unfairness: it will take the form commonplace in judicial review. Remittal to the Minister would confer no proper advantage on anyone, would be anomalous as remittal to a body other than the decision-maker whose decision was quashed. It would lengthen the time to a final decision, as counsel for IFI fairly agreed and as I think it proper to assume an appeal of any Ministerial decision favouring MOWI.

50. In short, it seems to me that the proper interpretation of s.40(6) of the 1997 Act is that, when annulling the Minister's decision, ALAB's decision leaves a vestigial element of the Minister's decision in place capable of supporting the appeal which provides ALAB with a jurisdiction to which I can remit the quashed decision. If it needs to be put slightly differently and pithily, I accept the submission of counsel for MOWI that the appeals to ALAB, including MOWI's appeal, survived the effect of s.40(6). I also accept the State's argument that s.40(6) of the 1997 Act does not clearly display the legislative intent required to strip the High Court of the jurisdiction to remit otherwise conferred by s.73 of the 1997 Act.

Decision

51. Accordingly, and despite IFI's well-argued submissions to the contrary, I hold that I have jurisdiction to remit the Aquaculture Licence decision to ALAB and to remit the Foreshore Licence decision to the Minister to await ALAB's decision on remittal. As the parties argued only the jurisdiction issue, as I have in

the main judgment provisionally indicated my intention to remit to ALAB and as counsel for IFI helpfully agreed that if he fails on that jurisdictional issue he anticipates remittal to ALAB without agreeing with it, I need say little more than that I intend to exercise that jurisdiction.

52. However, and while I have decided the jurisdictional issue without regard to the merits of remittal, I confess to the view that remittal also accords with my view of the justice of this case. Putting it mildly and regardless of the reasons, MOWI's applications have not benefitted from the expedition required by the 1997 Act. In my view, it would be quite wrong, at least in principle, to exacerbate that circumstance by sending MOWI unnecessarily back to the drawing board of a fresh aquaculture licence application and a fresh foreshore licence application to the Minster. For similar reasons I consider that it would be quite wrong to remit MOWI back any further in the process than is required to rectify ALAB's errors as identified in the main judgment. Whether, given my various observations in that judgment, MOWI might more practically avail of the tabula rasa which fresh applications would provide is a matter as to which, at least in principle, MOWI is entitled to be the best judge of where its interest lies.

53. I will hear the parties as to the precise forms of order which should be made. In this regard, I note the views recently expressed by the Supreme Court in **Crofton**[58] as to the possibilities of and limits on the scope of directions to be given on remittal – though in that case in the context of mandatory remittal. In **DAA v Fingal**[59] Humphreys J recently described Crofton as militating against micromanagement of the remittal stage. The costs issues already stand adjourned to 11 November and I will hear the parties as to all final orders on that occasion. I invite the parties to liaise with a view to agreement on all such issues.

David Holland
31/10/2431 October 2024

[58] Crofton Buildings & Anor v An Bord Pleanála [2024] IESC 12 §55 et seq.
[59] DAA PLC v Fingal County Council [2024] IEHC 589.