

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 542

Record No. 2018/661 JR

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS
AMENDED**

BETWEEN

PKB PARTNERSHIP

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

SOUTH DUBLIN COUNTY COUNCIL

FIRST NOTICE PARTY

AND

POUNDLAND LIMITED TRADING AS DEALZ

SECOND NOTICE PARTY

Judgment of Mr Justice Cian Ferriter dated this 3rd day of October 2022

Introduction

1. In these judicial review proceedings, the applicant, PKB Partnership ("PKB"), seeks an order of *certiorari* quashing the decision of the respondent, An Bord Pleanála (the "Board") dated 12th June 2018 (the "decision"). The decision represents the outcome of a review by the Board of a decision made by the first notice party, South Dublin County Council (the "Council" or "the planning authority") on a referral made by PKB pursuant to s.5 of the Planning and Development 2000 Act as amended ("s.5") whereby the Board decided "*that the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Fonthill Road, Dublin is development and is not exempted development*".

2. Section 5 provides for a procedure whereby any question as to what is or is not development or is or is not exempted development for the purposes of the Planning and Development 2000 Act as amended ("the 2000 Act") may be referred to a planning authority for a declaration on that question. The section provides for a determination, initially, by the planning authority and, thereafter, on review by the Board. *Simons on Planning Law* (third edition, 2021) ("*Simons*"), at para. 2-293, observes as follows in relation to the s.5 procedure:- "*The s. 5 procedure is unusual in that it confers a jurisdiction upon a public authority to determine issues which, in many instances, will necessitate an adjudication on questions of law. That is the limit of the scope of s. 5. It does not grant permission for development and it is not a mechanism for the enforcement of compliance with the Planning and Development Acts but rather provides clarity on the status of an existing or prospective development*" (citing, in this regard, *Friends of the Irish Environment Ltd v. An Bord Pleanála* [2020] IESC 14 at paras. 56-58).
3. The second notice party to these proceedings ("Poundland") did not actively participate in these proceedings. Rather, Poundland brought its own proceedings separately challenging the same decision of the Board (being High Court proceedings, Record No.2018/666JR between Poundland as applicant and the Board, Ireland and the Attorney General as respondents (with the Council and PKB as notice parties)). I will refer to those proceedings as the Poundland proceedings. The two matters were heard together before me. I am today also delivering a separate judgment in the Poundland proceedings. Poundland's challenge was based on different grounds to those of PKB, being grounds related to fair procedures as regards Poundland.

Background

4. PKB is the owner of Unit Number 3, Fonthill Retail Park, Fonthill Road, Dublin (the "premises" or "unit 3" as appropriate) which was developed as part of the Fonthill Industrial Park in the late 1990's. Unit 3 is currently occupied by Poundland, who operate a shop from the unit that sells discounted goods.

The 1998 permission

5. The Fonthill Retail Park has been developed subject to a number of permissions. By Order dated 19th March 1998, the Council granted planning permission to Integrated Development Services (PKB's predecessor in title) for a "retail warehouse development" of c.4,210sq metres at the Fonthill Industrial Park, Fonthill Road, Dublin 22 (Reg. Ref. S97A/0791) (the "1998 permission"). The development consisted of three retail warehouse units. None of the conditions attached to the 1998 permission addressed the

type of retail activity permitted in the retail warehouse development. There was no evidence before me of the type of use made of the premises immediately following the grant of the 1998 permission.

The 2015 permission

6. On 8th June 2015, PKB sought planning permission from the Council to subdivide unit 3 (Reg. Ref. SD15A/0152). The stated reason for the application was to make the premises more attractive to the market. I will address in more detail the basis of that application later in this judgment.
7. By Order dated 4th September 2015, the Council granted planning permission for the subdivision of unit 3 subject to 5 no. conditions (the "2015 permission").
8. Condition 2 of the 2015 permission ("condition 2") provided as follows:

"The range of goods to be sold in the extended retail warehouse unit shall be limited solely to 'bulky goods' (as defined in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in April 2012) and shall not include the sale of toys, footwear, sportswear or other clothing.

Reason: In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area."

9. The 2015 permission created two permitted units by subdivision. As we shall come to, there is a dispute in these proceedings as to the proper meaning of the phrase "*the extended retail warehouse unit*" in condition 2.
10. In or about September 2015, Poundland (trading as "Dealz") commenced trading from unit 3 (being the description given to one of the two units following sub-division of the original unit 3), selling discounted goods.

Save Our Town Centres s.5 declaration – June 2016

11. By Order dated 3rd June 2016, the Council, on foot of a declaration sought by “Save Our Town Centres”, declared pursuant to s.5 that the change of use from the former retail warehouse to use as a discount store for the sale of non-bulky convenience goods was development and was not exempted development (Reg. Ref. ED16/0025). I might note in passing that the Council, in that case, did not place any reliance on the 1998 permission and rather arrived at its decision based on condition 2 of the 2015 permission.

Planning Authority’s Enforcement Proceedings – June 2016

12. Pursuant to s.152 of the 2000 Act, the Council issued a warning letter, dated 27th June 2016, to PKB in respect of unit 3 and alleging an unauthorised development consisting of the change of use from a retail warehouse to use as a discount store for the sale of non-bulky convenience goods without planning permission. The warning letter invited PKB to make submissions to the Council in respect of the alleged unauthorised development by 27th July 2016. By letter dated 25th July 2016, a submission was made by Bilfinger GVA, Planning Consultants on behalf of PKB. This letter sought further time to make a detailed submission to the Council. It appears that no substantive follow up response was made by or on behalf of PKB, presumably pending the outcome of this judicial review.

PKB’s s.5 referral – August 2016

PKB’s s.5 referral

13. On 12th August 2016, PKB sought a s.5 declaration from the Council as to:

“whether a material change of use at retail unit no. 3 Fonthill Retail Park, Fonthill Road, Dublin 22 arises by reason of the type of goods being sold and consequently whether it is or is not development or is or is not exempted development”

PKB's submissions in support of its s.5 application

14. On 14th September 2016, the Council sought further information from PKB in respect of the type of goods being sold at the premises. On 12th October 2016, detailed submissions were made in reply to the Council by GVA, planning consultants on behalf of PKB. In its submissions, GVA contended that the use of the unit was governed by the 1998 Permission. The principal point made was that permission was granted for the retail use of the premises *simpliciter* and there was no planning condition attached to the grant of permission that restricted the type of retail goods that could be sold from the premises. Issue was further taken with any approach by the Council which would involve applying current planning policy retrospectively to the 1998 permitted use.

15. In this submission, an argument was made that the 2015 permission, and its restriction on the type of goods to be sold, related to the newly created unit 3A and did not apply to unit 3, the unit occupied by Poundland. This submission contained a description of the type of goods then being sold as being "*the type of goods broadly covered under the goods-based retail classification set out in the Retail Planning Guidelines 2012 for convenience and comparison goods, and include products relating to the following categories: food and drink; health and beauty; home and pet; gardening; leisure and entertainment; stationary and crafts; and party and celebrations*"). The submission then noted that "*should the planning authority deem it necessary, our client would welcome a site visit to clarify any outstanding questions with regards to the type of goods that are currently being sold*".

Council's decision on PKB s.5 referral – 1st November 2016

16. By Order dated 1st November 2016 pursuant to s.5, the Council declared that a material change of use at unit 3 arose by reason of the type of goods being sold and that it was not exempted development and therefore required planning permission. In its decision the Council specifically noted that the 2015 planning permission referred to a retail warehouse on site for the sale of bulky goods and the permission referred to both units 3 and 3A.

17. The Council in its Order concluded that:- "*Having regard to the planning history on site it is considered that a retail warehouse was permitted on site and unit 3 was then subdivided into two units for the sale of bulky goods. It is considered therefore that the sale of non-bulky goods would constitute non-compliance with planning permission*

previously granted on site and would constitute a material change of use and would require further grant of planning permission in the opinion of the planning authority."

S.5 review by Board

PKB's referral of Council declaration for review by Board

18. On 28th November 2016 GVA, on behalf of PKB, submitted a detailed "*referral report*" to the Board in support of PKB's request for a review of the planning authority's decision, pursuant to s.5(3). S.5(3) makes clear that, where a declaration is issued under s.5, any person "*issued*" with the declaration may, on payment to the Board of the prescribed fee "*refer a declaration for review by the Board within four weeks of the date of the issuing of the declaration*". It seems clear that the entitlement to refer a declaration for review by the Board is confined to the person issued with the declaration i.e. the person who requested a declaration on the question of development or exempted development from the relevant planning authority and where appropriate the owner and occupier of the property in question (s.5(2)(a)).
19. In this submission, GVA contended that condition 2 of the 2015 permission was unenforceable given that there was no "*extended*" retail warehouse unit; no extension of the unit was either applied for or granted. It was submitted as a fallback that if the condition was enforceable, the term "*extended retail warehouse unit*" referred to the newly created unit 3A and not unit 3 (unit 3 being the unit occupied by Poundland and unit 3A being the description given to the other unit following subdivision).
20. It was submitted that the retail goods being sold were within the remit of the original planning permission for the unit (i.e. the 1998 permission) and, as such, did not constitute development by way of change of use. It was further submitted that, if there was development, the development was exempted development. This was said to be so on the basis that, given that condition 2 of the 2015 permission was not applicable and there was no restriction of the type of retail goods that could be sold pursuant to the 1998 permission, any change in the type of retail goods sold would comply as an exempted change of use within class 1 of Part 4 of Schedule 2 of the Planning and Development Regulations 2001 issued under the 2000 Act.

21. An Inspector prepared a report on the referral dated the 21st March 2017 ("the Inspector's report"). I will come to the terms of the Inspector's report in some detail later in the judgment. For present purposes, it suffices to note that the Inspector concluded that the then use of the premises constituted a material change of use, and was therefore "development" and was not exempted development.

22. The Board in a memo dated 7th April 2017 requested the Inspector to confirm whether the 2015 permission "has been carried out". The Inspector then prepared an additional memo dated 4th July 2017. In her additional memo, the Inspector expressed her opinion that both units (i.e. the subdivided units 3 and 3A) were governed by condition 2 of the 2015 permission. I will come in more detail later in the judgment to the analysis of the Inspector on this issue. PKB did not become aware of this memo until after the commencement of these proceedings.

Amendment of applicant's grounds

23. I made an order (not opposed by the Board) at the outset of the hearing permitting PKB to amend its Amended Statement of Grounds, dated 30th July 2018, pursuant to Order 84, rule 23(2) of the Rules of the Superior Courts, to allow PKB advance grounds of challenge to the decision arising from the view of the Board's Inspector in her additional memo of 4th July 2017 (and, by incorporation, the view of the Board) as to the scope and application of condition 2 of the 2015 permission.

Board's Decision of 12th June 2018

24. The Board met on 1st June 2018 to consider the referral. The Board's direction of that date notes as follows:-

"The submissions on this file and the inspector's report were considered at a Board meeting held on 1st June 2018. The Board decided, generally in accordance with the inspector's recommendation, that the change to the type of goods being sold in the subject unit is development and is not exempted development."

25. While the note of the Board's decision at its meeting of 1st June 2018 does not reference, in terms, the Inspector's additional memo on the question of the application of condition 2 of the 2015 permission to unit 3, it is common case that the Board's decision should be analysed on the basis that this memo was also incorporated into the Board's decision-making.
26. The Board's decision was formalised in the Board's order of 12th June 2018 (i.e. "the decision" or "the Board's decision"). This is the decision under challenge in these proceedings.
27. In the decision, the Board reformulated the question in the following terms:
- "Whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Retail Road, Dublin is or is not development or is or is not exempted development"*
28. The Board decided that *"the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Fonthill Road, Dublin is development and is not exempted development"*.
29. I will analyse the basis of the Board's decision and conclusions in more detail shortly.

Enforcement Notice – February 2017

30. While not relevant to the issues in the case, for completeness I should note that the Council served an enforcement notice, dated 2nd February 2017, pursuant to s.154 of the 2000 Act, on the members of the PKB Partnership which required specified steps to be taken by 6th March 2017. The enforcement notice was issued after PKB had referred the Council's decision to the Board pursuant to s.5. PKB did not comply with the enforcement notice and a Summons, dated 23rd May 2017, was issued out of the District Court Office returnable before the District Court on 18th July 2017. The Summons related to alleged non-compliance with the terms of the enforcement notice. The enforcement proceedings have been adjourned from time to time, initially to allow the Board determine the s.5 reference and thereafter to allow these judicial review proceedings be determined.

Retention Permission application

31. Finally, I should note that on 24th March 2017, Poundland applied to the Council for retention permission for change of use of 670 sq.m from retail warehousing to 'shop', internal alteration consisting of the erection of internal walls, and all associated works at unit 3 (Reg. Ref. SD17A/0094), without conceding that any permission was required for any change of use comprised in the application. By Order dated 17th May 2017, the Council refused the retention application. This decision was appealed to the Board and by Order dated 15th February 2018, the Board upheld the decision of the Council and refused retention permission (Reg. ref. PL06.248674).

Summary of PKB's grounds of challenge

32. PKB advanced four grounds of challenge to the decision which can be summarised as follows.
33. Firstly, PKB contended that the Board erred in determining that a "retail warehouse" was not a "shop".
34. Secondly, PKB contended that the Board had regard to an irrelevant consideration, in interpreting the proper meaning and scope of the term "*retail warehouse*" (being the permitted use in the 1998 permission), by having regard to post-1998 material and, in particular, to retail planning guidelines promulgated in 2000 which had not been present in the legislative scheme at the time of the 1998 permission and which introduced a definition of "*retail warehouse*" not found in the 1998 permission.
35. Thirdly, PKB contended that the Board took into account irrelevant statutory provisions, being Regulations 6 and 9 of the Planning and Development Regulations 2001 (the "2001 regulations") which deal with categories of exempted development which PKB says were not relevant to its case.
36. Finally, PKB contended that, insofar as condition 2 of the 2015 permission applied to unit 3 at all (and PKB contended that it did not so apply), condition 2 was said to be so

uncertain and imprecise as to be incapable of invocation by the Board in arriving at the question of whether there was development or exempted development on the s.5 referral.

37. PKB was also granted leave to argue a further point (to the effect that, in the formulation of the question the subject of the referral, the Board acted in breach of fair procedures) but did not pursue this ground at the hearing before me and, accordingly, I do not consider that ground any further.

Summary of Board's response

38. The Board's position in response can be summarised as follows:

- (i) unit 3 is governed by condition 2 of the 2015 permission as condition 2 clearly applies to both units 3 and 3A;
- (ii) the Board was clearly correct in determining that there had been "*development*" which was not "*exempted development*" in light of condition 2;
- (iii) it was valid of the Inspector and the Board to take the view that the 1998 permission in permitting use for a "retail warehouse" was seeking to distinguish such use from general convenience store type retail use, the latter type of use not being permitted under the 1998 permission;
- (iv) that if the Inspector and Board were wrong in that regard, that error was immaterial and was not relevant to the ultimate analysis of the question of material change of use, which was governed by condition 2;
- (v) that the reference to Articles 6 and 9 of the 2001 Regulations could not be regarded as a material consideration and any error in relation to same in the decision could not be such as to vitiate the decision.

Discussion

Application of condition 2 to unit 3

39. Counsel for the Board submitted that the case was effectively determined by the Court's view on whether or not condition 2 of the 2015 permission applied to unit 3. If condition 2 does apply to unit 3, the Board submitted that PKB was not in a position to contend that the current use was consistent with condition 2 thus rendering correct the Board's essential finding that there had been development in relation to the unit which was not exempted development.
40. PKB's position on this issue was that the Board did not in fact rely on the terms of condition 2 in any material way in arriving at its decision, and that the starting premise, and process of reasoning, in the Board's decision (and, indeed, in the Inspector's report) was based on legal errors as regards the scope of the "*retail warehouse*" use permitted by the 1998 permission. Accordingly, PKB submitted that even if the Board was right as to its arguments on condition 2 (a position which was hotly disputed, as we shall see) this was not sufficient to rescue the decision from the illegality with which it was otherwise tainted.
41. In light of the centrality of the issue of the scope and application of condition 2 to the Board's case, I propose to look at that issue first.
42. In the amendment to PKB's statement of grounds which I permitted at the outset of the hearing, PKB pleaded that the Inspector erred in law in concluding that condition 2 applied to "*unit 3 and/or unit 3A*" as a consequence of which the Board's decision was invalid. In the alternative, PKB pleaded that the Inspector had no reasonable basis for concluding that unit 3 and/or 3A constituted an "*extended retail warehouse unit*" for the purposes of condition 2. In its pleading in this regard, PKB relied on the fact that the reasons for the Inspector's conclusion that condition 2 applied to unit 3 were flawed and/or irrational. It contended that the permitted development was not for an "*extended retail warehouse unit*" and, as a consequence, condition 2 could not apply to or otherwise affect unit 3. It contended, as a fallback, that if the reference to "*the extended retail warehouse unit*" in condition 2 was intended to refer to either unit 3 or unit 3A, it was not clear as to which unit it was intended to refer and, in any event, it could not refer to both units 3 and 3A in circumstances where the reference in condition 2 is to a unit singular.

43. PKB's essential case at the hearing was to the effect that condition 2 was too uncertain and imprecise such that it was not capable of invocation by the Inspector or the Board in the s.5 referral. It was further contended that neither the Inspector nor the Board sought to suggest that the current use of unit 3 amounted to a contravention of condition 2 as a basis of de-exempting the use under Article 10(1)(b) of the 2001 Regulations, as amended, or that, as a fallback, the condition was simply not applicable to unit 3 but, rather, if applicable at all, was applicable to unit 3A. Article 10 (1)(b) of the 2001 Regulations provides that "*development which consists of a change of use within any one of the classes of use specified in part 4 of schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not... (b) contravene a condition attached to a permission under the act*".
44. The Board pleaded in its amended statement of opposition that:-

"The Inspector determined that condition 2 applied to both unit 3 and unit 3A in circumstances where the plans submitted to SDCC indicated that both units were for retail purposes and the terms of condition 2 do not draw a distinction between unit 3 and unit 3A. The interpretation of condition 2 is reasonable in light of the terminology used in the grant of planning permission and the documents submitted with the application for permission. There is nothing in the terminology used in condition 2 attached to [the 2015 permission] which alters the manner in which condition 2 ought to have been interpreted by the Inspector or the Board."

Factual position

45. In order to evaluate the parties' contentions as to the application or otherwise of condition 2 to unit 3, it is necessary to briefly survey the relevant factual background to the Board's consideration of condition 2.
46. On 7th April 2017, the Board sent a memo to the Board's Executive stating that it decided to:
- "defer this case on 5th April 2017. The Board needs to have sight of both the drawings and the conditions attached to the two previous permissions relevant to this site, namely S97A/0791 and SD15A/0791 [i.e. the 1998 and 2015 permissions]. The Board also needs confirmation from the inspector on whether the permission granted under SD15A/0791 [i.e. the 2015 permission] has been carried out."*

47. As noted earlier, the Inspector prepared an additional memo, dated 4th July 2017 on foot of the above request.

48. The additional memo, after setting out the terms of condition 2, stated as follows:

"The unit was subdivided into two units, 3 and 3A. On the plans it states both units are for 'Retail'. Therefore in my opinion both units are governed by Condition No. 2. The referrer has tried to argue Condition No. 2 relates to unit 3A and not unit 3. However there is no distinction between the units in Condition No. 2."

49. As I have already noted, on 1st June 2018, the Board's direction document notes that:

"The submissions on this file and the Inspector's report were considered at a Board meeting held on 1st June 2018. The Board decided, generally in accordance with the Inspector's recommendation, that the change in the type of goods being sold in the subject unit is development and is not exempted development."

Legal principles

50. In *Camiveo v Dunnes Stores* [2019] IECA 138, Costello J. considered the principles by which grants of planning permissions should be construed. She stated as follows:

"21. The starting point is the decision of the Supreme Court in *Re XJS Investments Ltd.* [1986] I.R. 750. At p.756, Mc Carthy J. held that planning permissions are not to be construed in the manner in which statutes or statutory instruments are construed,

'they are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning.'

22. In *Kenny v. Dublin City Council & Anor.* [2009] IESC 19, Fennelly J. approved of the following passage from Simons on *Planning and Development Law* (2nd Ed, 2007, paras. 5.06-5.07):-

'a planning permission is a public document; it is not personal to the applicant, but rather ensures for the benefit of the land. It follows as a consequence that a planning permission is to be interpreted objectively, and not in the light of subjective considerations peculiar to the applicant or those responsible for the grant of planning permission. A planning permission is to be given its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning.'

23. Fennelly J. emphasised that planning permission is to be interpreted according to objective criteria but an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal interpretation. Having quoted with approval from the decision in *Re XJS Investment Ltd.*, he held:-

'A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context.' (para 28)

24. Fennelly J. held that the principle of objective interpretation excludes purely subjective considerations, but it does not provide a result where a provision is unclear, ambiguous or contradictory. In that situation, the court does not confine itself to a purely literal interpretation of a condition; it will seek to ascertain its true meaning from its context in the planning process (paras 34-35)."

51. Costello J. then cited from the judgment of Clarke J. (as he then was) in *Lanigan v. Barry* [2016] 1 I.R. 656. In that case, Clarke J. stated that "[26] ...It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application." Clarke J. followed *Re XJS Investments Ltd.* in holding that the 'text in context' approach required the court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself.

52. In approaching the question of the proper interpretation of condition 2, I have applied the above summary of the applicable legal principles.

Council's previous views on scope of condition 2

53. While counsel for PKB brought my attention to the views of the planning authority in an enforcement report to the effect that condition 2 only applied to unit 3A, it is clear from the applicable principles set out above that the subjective view of the planning authority (or any other body) is not relevant to the interpretive exercise. (I might note, in passing, for completeness that the planning authority had twice prior to the Board's review decision taken the view that condition 2 applied to both units, namely in the planning authority's decision on the original referral by Save Our Town Centres and in its decision on Poundland's application for a declaration pursuant to s.5).

Application of principles to proper scope of condition 2

54. It is clear from the applicable legal principles summarised above that while the Court is not entitled to rely on the subjective views of parties (or prior views of the planning authority) as to the scope of the condition in seeking to objectively interpret the relevant permission, it can have regard to the materials submitted to and considered by the planning authority in the context of the grant of the permission whose interpretation is in issue. I will now turn to that material.
55. The Board put before the Court various documents which were contained on the planning authority's file in relation to the application for the 2015 permission and the grant of that permission including drawings which were submitted on behalf of PKB in respect of its application. In the drawings which show the proposed units following subdivision (i.e. units 3 and 3A), the term "*retail*" appears in respect of each of the two subunits. The 2015 permission contained the standard condition (at condition no.1) that "*the development shall be carried out and completed in its entirety fully in accordance with the plans, particulars and specifications lodged with the application, save as may be required by the other conditions attached hereto.*"

56. The application for the 2015 permission submitted on 5th June 2015 by consultants on behalf of PKB is entitled:

"Re Permission sought by PKB Partnership for new internal subdivision walls, new loading door arrangement at south elevation, new toilets, 2 no. new fire exit doors to north elevation, new glazed double doors/screen to the east elevation and signage to west elevation at the Unit 3 Fonthill Retail Park, Fonthill Road, Dublin 22."

57. The application letter stated that:

"In the present depressed market it is proving difficult to find a tenant willing to take a lease on this entire building (2044.7 Sq.m). The purpose of the subdivision is to make the premises more attractive to the market. Retail warehousing on a very large scale has been destroyed by Dublin City Council's permission to allow Ikea set up in Ballymun at the M50 junction. Our experience is that operators are moving to industrially rated warehouses which have much lower rates and are cheaper to operate. No new area is being provided and car parking is more than adequate with 202 parking spaces."

58. The planning authority's decision on the 2015 application was made on 13th July 2015. The record of the planning authority's decision to grant the 2015 permission notes, under the heading *"Relevant Policy on South Dublin County Council Development Plan (2010-2016)"*, that *"It is the policy of the Council to facilitate the provision of retail warehousing and retail parks in the County. These will be assessed taking into account the need to protect the centres in the retail hierarchy as a priority and the need to confine their use to the sale of bulky goods"*.

59. In its assessment, the planning authority notes that:

"Retail warehousing is permitted in principle. The site is a permitted retail warehouse. The proposed development would involve the subdivision of the unit into two units... (3... and 3A). The proposed use of unit 3A is not detailed. The cover letter submits that the purpose of the subdivision is to make the premises more attractive to the market. The proposed subdivision of an existing retail warehouse would be acceptable in terms of the zoning objective..."

"No retail impact assessment has been submitted with the proposal however it is noted that no additional retail floor space is proposed... It is considered that the proposed subdivision would therefore not impact on the vitality or viability of established town centres subject to the use of premises for retail warehousing only."

60. The planning authority's conclusion was as follows:

"Having regard to the zoning objective for the area and the pattern of development in the area it is considered that in subdividing the existing retail warehouse unit into two units, the proposed development would comply with the terms of the Retail Planning Guidelines for planning authorities and the County Development Plan and would not have any negative impact on the vitality and viability of existing retail centres in the area, including the Liffey Valley Centre. The proposed development would, therefore, be in accordance with the proper planning and development of the area."

61. The reason expressed by the planning authority for condition 2 is stated to be:

"In order to prevent an adverse impact on the viability and vitality of the town area and so as not to undermine the retail hierarchy of the area."

62. PKB placed considerable reliance in its submission on the decision of Quirke J. in *Dublin City Council v. Liffey Beat* [2005] 1 IR 478 ("*Liffey Beat*"). That case concerned enforcement action by the applicant planning authority pursuant to s.160 of the 2000 Act on the grounds of the respondent's alleged failure to comply, *inter alia*, with the conditions of its planning permission relating to the use of any part of the premises as a nightclub. The condition in issue in the relevant planning permission provided that:

"The use of the premises shall be confined to:

...

the ground floor being used as a public entertainment area (music) with emphasis on seated entertainment where food is served...

no part of this permission entitles the use of any part of the premises as a nightclub or similar function type of premises other than those as stated... unless prior planning permission has been obtained for this use from the Planning Authority or An Bord Pleanála on appeal."

63. The term "*public entertainment area*" was not defined and was not confined in any respect by time. In the view of Quirke J., the kernel of the planning authority's case was summarised as "*The problem exists when the live show ends and the nightclub use commences*", the planning authority thereby acknowledging that up to a particular time each evening the use of the premises by the respondent had been broadly in compliance with the permitted use.
64. Quirke J. held that there is a requirement that planning permission documents "*should be couched in terms which are comprehensible and capable of construction "in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents". That requirement imposes an obligation upon planning authorities (and An Bord Pleanála) to take reasonable steps to ensure that, insofar as is practicable, the terms of documents granting or refusing planning permission will be comprehensible to members of the public*" (paragraphs 78 and 79, page 494 of the reported judgment). Quirke J. stated that "*Where a restrictive condition is imposed confining the use of property in a particular manner, then some care should be exercised by the party which is imposing the condition to clarify the nature and extent of the restriction imposed by the condition.*" (paragraph 82, page 495).
65. Quirke J. concluded on the facts of that case that he was "*not satisfied that the applicant has established on the evidence and on the balance of probabilities that there has been an unauthorised use of any part of the premises other than the basement. I say this because no evidence has been adduced which has enabled this court to decide what use "as a nightclub or similar function type of premises other than as stated in condition 4(a) and (b)" comprises.*" (paragraph 92, page 496).
66. I do not see that the judgment in *Liffey Beats* assists PKB in this case. In my view, this is not a scenario where there was a level of vagueness, imprecision or uncertainty such as to render condition 2 unworkable or incapable of being relied on by the planning authority in the s.5 process.

67. The law makes clear that I am entitled to have regard to the planning application and the planning authority's decision when seeking to construe the scope of condition 2. In my view, it is clear that the planning authority was imposing condition 2 in respect of both unit 3 and unit 3A. The condition does not in any way seek to differentiate between the two newly sub-divided units. It clearly envisaged an entire retail warehouse in 2015 subject at that point to the retail planning guidelines and essentially involving retail premises for the sale of bulky goods. The planning authority's analysis leading to the conclusion that the permission should be granted emphasises the distinction between retail warehousing and existing retail centres in the area including the Liffey Valley Centre, and the importance of preventing an adverse impact on the viability and vitality of the town area and of not undermining the retail hierarchy of the area; this rationale was clearly intended to apply to both of the newly sub-divided units.
68. As regards the wording of condition 2 and in particular the words "the extended retail warehouse unit", the term "*extended*" is perhaps an inelegant one in the circumstances. However, it seems to me that the word was simply seeking to convey the extension of the number of units from one existing unit to two units following the subdivision. It was clearly not intended to address, and was not in fact addressing, an actual physical extension of the existing retail warehouse premises; no such extension was sought or is indicated on the planning application plans or in the grant of planning permission documentation.
69. With respect, there was an air of unreality to the case advanced by PKB in respect of the condition. PKB was the entity which sought the subdivision of the units. It did not challenge the grant of the permission at the time. Nor did it bring an appeal against the condition as it would have been entitled to under section 139 of the 2000 Act. There was simply no basis in the planning authority's decision, which contains condition 2, or in the material submitted in respect of the application (including the plans and drawings), for a contention that condition 2 was restricted to unit 3A. Such a contention makes no sense in light of the overall terms of both the application and the permission granted on foot of the application. In my view, it would entirely subvert the stated reasons for the grant of the 2015 permission to hold that only bulky retail goods could be sold from one of the subdivided units with no such restriction applying to the retail use of the other subdivided unit.
70. In my view, the correct interpretation of the phrase "*extended retail warehouse unit*" is the overall retail warehouse premises originally consisting of one unit which unit was extended by number into two subunits following the implementation of the 2015 permission. I arrive at that conclusion having taken a common sense approach to the matter, giving the permission a purposive interpretation and having regard to the context

in which the permission was granted and the documents on the planning file as a whole, including the plans and drawings submitted in support of the application and the terms of the planning authority's decision and its reasoning in granting the permission with condition 2 attached.

71. In the circumstances, I believe the Inspector was correct in her memo of 4th July 2017 where, in relation to condition 2, she stated that:

"The unit was subdivided into two units, 3 and 3A. On the plans it states both units are for 'retail'. Therefore in my opinion both units are governed by condition number 2. The referrer has tried to argue that condition number 2 relates to unit 3A and not to unit 3. However there is not [sic] distinction between the units in condition number 2. Having examined the property internally and externally again on 27 May 2017 at the request of the Board, I can confirm that the permission granted under the 2015 permission has been carried out. Unit 3A is occupied by Cash and Carry Kitchens and in my opinion complies with condition number 2 in that I would consider the use of the unit to be the sale of bulky goods. The residual part of the building is a Dealz shop, associated storage area, loading bay and staff facilities. I do not consider this element to be in compliance with condition number 2 of SD15A/0591."

Scope of condition 2 as applying to unit 3 dispositive of issues in case?

72. It follows from the foregoing that I have agreed with the Board's submission as to the proper scope of condition 2. As noted earlier, the Board contends that this is effectively dispositive as regards any remaining issues in the case on the basis that, as the current use of the premises is clearly not compliant with condition 2, it follows that there has been a material change of use which is development and is not exempted development.
73. It might be noted that the Board's decision does not rely, in terms, on condition 2, although it does (in consideration (c) of the considerations section of the decision) refer to the planning history of the premises and references the 1998 permission for a retail warehouse *"and also the subsequent permission for a subdivision of this unit under planning reference number SD15A/0152 [i.e. the 2015 permission]"*. The Board in the conclusions part of its order references the 2015 permission simply to note that this permission *"did not alter the retail warehouse use of any element of the unit"*. It did not reference condition 2 in this context and its analysis rests on the contention that the initial permitted use as a retail warehouse under the 1998 permission did not permit the

retail sale of convenience goods and that this was not changed by the 2015 permission. Furthermore, the Board does not, in its recitation of the statutory provisions it had regard to, cite Regulation 10(1)(b) of the 2001 Regulations (which I set out earlier) which is the regulation which deals with contravention of a condition attached to a permission under the Act.

74. I think it is a fair summary of the approach of the Board (and, indeed, that of the Inspector) to the issue to say that its decision and reasoning was not premised on there being development as a result of a material change of use from the use permitted by condition 2 of the 2015 permission; rather, the material change of use analysis is premised on a determination that the permitted use for the premises (being that of "*retail warehouse*" in the 1998 permission) did not extend to retail use as a convenience store selling non-bulky goods and this remained essentially unaltered by the 2015 permission.
75. PKB maintains that the Board's decision reflects the Inspector's erroneous view that the 1998 use was restricted to the retail sale of bulky goods and that as the Board's decision rests primarily on that erroneous view, the decision should be quashed even (without so conceding) if the Board might have been permitted to arrive at a decision to similar effect by reliance on condition 2 alone.
76. I turn now to consider whether PKB's contention is correct.

Board's Decision re scope of permitted use

77. It seems to me that the issues raised by PKB in its pleading on this part of the case (being those of an alleged error by the Board in not finding that "*retail warehouse*" was within the definition of "*shop*" for the purposes of the exempted development provisions of the relevant regulations, and the contention that the Inspector (and, therefore, the Board) had regard to the irrelevant consideration of the Retail Planning Guidelines 2000 in determining the proper scope of the 1998 permission) resolve back to the fundamental question of the proper scope of the permitted use in 1998 and what the Inspector and Board were entitled to have regard to in arriving at a view on that question. In order to evaluate PKB's arguments on that question and the Board's response, it is necessary to consider in a little detail the terms of the Inspector's report and the Board's decision.

Inspector's Report of 21st March 2017

78. The Inspector's report of 21st March 2017 (prepared by her following her site visit to the premises on 28th February 2017) was largely incorporated into the Board's decision. The key elements of the Inspector's report can be summarised as follows.

Inspector's summary of PKB's case

79. After referencing the request for the declaration under s.5, which PKB submitted to the Council on 12th August 2016 and the Council's order of 2nd November 2017 declaring that a change of use at the retail unit by reason of the goods being sold within unit 3 was not exempt and, therefore, did require planning permission, the Inspector set out PKB's case in some detail. The Inspector, at paragraph 4.10 of her report, then summarised PKB's submissions as follows:-

"4.10 Conclusion

The Board has to take into consideration the following:

- *Planning permission Reg. Ref S97A/0791 [i.e. the 1998 permission] granted permission for a retail use within a warehouse structure. No conditions were attached to the grant of planning permission restricting the type of retail goods to be sold from the unit.*
- *Legislation in place at the time of granting planning permission provided that the use of the unit was a 'shop' for the retail sale of goods.*
- *Changing the type of goods sold from the unit falls within the scope of the original planning permission for the unit and as such does not constitute development by way of a change of use.*
- *It is considered that the materiality of changing the type of retail goods sold at the unit falls within the scope of the original permission for the unit and does not constitute development by way of condition.*
- *It is considered that the materiality of changing the type of retail goods sold at the unit falls within the scope of the original permission for the unit and as such does not constitute development by way of a change of use.*
- *Applying current planning legislation and guidance in the assessment of the unit is legally questionable as these documents did not form part of the decision making process.*

- *The provisions of the exempted development are not applicable as a development has not taken place.*

Inspector's references to "relevant legislation"

80. In the next section of her report, headed "*Relevant Legislation*", the Inspector stated that, in order to assess whether or not the works to be carried out constitute development or exempted development, regard must be had to the definition of "*development*" in s.3(1) of the 2000 Act (as amended); the Planning and Development Regulations 2001, Article 5(1) Part 2 which provides interpretations for the purposes of exempted development, with the definition of "*shop*" meaning a structure used for the purpose, *inter alia*, of the "*retail sale of goods*" for sale principally to visiting members of the public; Article 6(1) of the 2001 Regulations which refers to development of a class specified in column 1 of Part 1 of Schedule 2; Article 9(1)(a) of the 2001 Regulations which relates to an exclusion from exempted development for the purposes of the 2000 Act if the carrying out of works would (in sub-article (i)) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in the permission under the Act; and Article 10(1) relating to "*change of use*".

81. Article 10(1) relating to changes of use states as follows:

"Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not-

(a) Involve the carrying out of any works other than works which are exempted development,

(b) Contravene a condition attached to a permission under the Act,

(c) Be inconsistent with any use specified or included in such a permission,

or

(d) Be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned."

Inspector's assessment of issues

82. After referencing a number of precedents said to be relevant, the Inspector sets out her assessment of the issues in section 10 of her report.

83. At paragraph 10.1 of her report, the Inspector notes that PKB *"has built its case to the Board on the basis that unit 3 was originally granted planning permission for a 'retail warehouse' and that the conditions attached to the original planning permission [i.e. the 1998 permission] did not include any restrictive conditions in limiting the type of goods sold within the unit"*. She notes PKB's case as being that the relevant planning legislation was the 1963 Act and the Regulations under that Act (being the Planning and Development Regulations 1994) as the decision to grant permission predated the retail planning guidelines and the first South Dublin County Development Plan 1998. The Inspector then states:

"The referrer [i.e. PKB] makes the claim that the parent permission is for a 'shop' as defined by the Planning and Development Regulations 1994. It is further submitted that the structure is a warehouse for retailing, the development description relates to the building only, which it is, and used for retailing products. I do not agree with this argument for the simple reason being that even though the terminology 'retail warehouse' predates the Retail Planning Guidelines definition in 2000, the permitted development at that time, given its scale and located [sic] within a large Retail Park, is not fundamentally a 'shop'. It is not reasonable to suggest that because the permitted 'retail warehouse' predated the Retail Planning Guidelines and an informed definition of retail warehouses, that the structure is not a retail warehouse but is in fact a shop."

84. I will return to the above analysis of the Inspector presently.

85. The Inspector noted, in the next part of paragraph 10.1 of her report, that as PKB had failed to outline a detailed history of goods sold within the premises since its first occupation and it was not specified when the unit became occupied by Poundland, the Board could only assess the case on the permitted use as a retail warehouse against the current use as a discount store. On this basis, the Inspector expressed the view that the question arising in the referral needed to be reformatted to take account of the permitted and the existing use of the premises in order to establish if a change of use had occurred. She, therefore, sought to reformulate the question as follows: -

"10.2 Therefore, the question should be reformatted to give a clear and accurate description of the activities which have taken place at the subject site to the following:

Whether change of use from a permitted retail warehouse to use as a discount store for the sale of non-bulky goods, including the retail sale of convenience goods No.3 Fonthill Retail Park, Fonthill Road, Dublin 22 is or is not development or is or is not exempted development."

86. As we shall come to, the Board accepted the substance of the Inspector's view on this issue and it decided to reformulate the question as follows:

"Whether the use of a permitted retail warehouse unit to use as a discount store for the small scale convenience goods at Unit Number 3, Fonthill Retail Park, Fonthill Road, Dublin is or is not development or is or is not exempted development."

87. The Inspector went on, in the next section of her assessment, to address *"the question of whether or not a material change of use has occurred"*. She stated, at paragraph 10.4 of her report, that:

"The development as permitted under [the 1998 permission] was for a 'retail warehouse', as stated above in my opinion, this is not a shop as defined by the current and preceding planning legislative framework. At the time of the permission there was no clear definition of a retail warehouse, which came two years later with the publication of the Retail Planning Guidelines 2000."

88. The Inspector went on to set out the definition of retail warehouse in annex 1 of the Retail Planning Guidelines 2000 as follows:

"A large single-level store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers and often in out-of-central locations."

89. The Inspector went on to then quote the definition of “bulky goods” in that annex. She then stated that “*In order to establish whether a change of use has occurred it is necessary to look at the existing retail activity carried out at the store*” and described the existing retailing activity of the occupier, Poundland, in its Dealz store noting that:

“The majority of the products for sale within the premises were small costing €1.50 per item. The items are displayed in rows of shelves similar to a supermarket outlet. It is clear from the site inspection that the retail warehouse unit is used for the sale of non-bulky items of merchandise. In my opinion, it cannot be concluded the unit specialises in the sale of bulky goods, as required by the guidelines... It is my opinion, that the retail format employed by occupier fails to satisfy the requirements for retail warehousing (the permitted use on the subject site) as set out in the guidelines.”

90. The Inspector then went on to reference that the new Retail Planning Guidelines published in May 2012 did not fundamentally alter the definition of retail warehouse contained in the 2000 Guidelines. She went on to express the view that there had been a change of use which was material in planning terms and that the “*use of unit 3 for retail use other than retail warehouse use constituted development under section 3 of the 2000 Act*”.

91. At paragraph 10.8, under the heading “*Is the development considered to be exempted development*”, the Inspector referenced Article 10(1) of the 2001 Regulations (which deals with exempted development) and stated:

“It is my opinion that the change of use is not exempt under [Article] 10(1)(c) in that the current use of the warehouse is inconsistent with use specified in the permission (i.e. retail warehousing).”

92. As noted earlier, Article 10(1)(c) provides that: “*Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2 shall be exempted development for the purposes of the Act, provided that the development, if carried out would not – (c) be inconsistent with any use specified or included in such a permission.*”

93. It will be noted that Article 10(1)(b) refers to “*contravening condition attached to a permission under the Act*” and the Inspector did not invoke that sub-article (nor, as we shall see, did the Board).

94. The Inspector then set out her recommendations. In her formulation of her recommendations she stated:

“(a) The permitted use of the premises, as stipulated by the permitted use of the unit granted under [the 1998 permission] is restricted to retail warehousing only as defined in the Retail Planning Guidelines for Planning Authorities issued by the Department of Environment and Local Government 2000.”

Discussion of Inspector’s analysis

95. Insofar as the Inspector was interpreting the scope of the permitted use of the premises as a retail warehouse under the 1998 permission, and putting aside for the moment the fact that the definition of “*shop*” in the 1994 Regulations was a definition set out in the context of what might constitute exempted development, I do not believe the Inspector was correct in paragraph 10.1 of her report (as set out above) to effectively determine that only a “*shop*” as she saw it could sell non-bulky convenience goods and that a “*retail warehouse*” within the meaning of that term objectively construed in the 1998 permission precluded such type of retail use. There was no condition in the 1998 permission which restricted the type of goods which could be retailed from the retail warehouse. In that regard, as I shall come to shortly, I believe PKB’s reliance on the decision of Simons J. in *Waterford City and County Council v. Centz Retail Holdings Ltd* [2020] IEHC 634 (“*Centz*”) is well-founded.

96. As we have seen, the Inspector states in paragraph 10.3 of her report that “*At the time of the permission there was no clear definition of a retail warehouse, which came two years later with the publication of the Retail Planning Guidelines 2000*”. The Inspector then went on to consider and rely on the definition of “*retail warehouse*” in the Retail Planning Guidelines 2000 in order to determine the meaning of that term in the 1998 permission. Accordingly, the Inspector, in interpreting the permitted use of “*retail warehouse*” in the 1998 permission, sought to rely on a subsequently promulgated definition of retail warehouse which was not in place at the time of the grant of the 1998 permission and therefore not applicable to that permission.

97. It is clear from the terms of the judgment of Simons J. in *Centz* that such an approach to the interpretation of the scope of a permitted use is not legitimate. In that case, Simons J. held on the version of s.28 of the 2000 Act applicable as of December 2000 (the date of the relevant permission in issue in those proceedings), local planning authorities were obliged to “*have regard to*” Ministerial guidelines in the performance of their functions: “*Such guidelines would thus form part of the overall policy context in which the planning permission had been granted, and can fairly inform the interpretation of the permission*” (at paragraph 17). He held that this rationale could not apply to draft guidelines which had been in circulation at the time of the relevant permission. Simons J. held (at paragraph 19) that:

“The meaning of a planning permission cannot change as a result of guidelines issued subsequently. The general obligation on a planning authority to ‘have regard to’ Ministerial guidelines cannot be relied upon so as to read into an earlier planning permission the requirements of the guidelines for the time being in force. See Ogalas Ltd v. An Bord Pleanála [2014] IEHC 487 (‘express language of the condition could [not] be displaced or replaced by a later administrative act of the Minister in issuing new Guidelines’).”

98. He went on (at paragraph 20) to hold that:

“The 2000 planning permission must, therefore, be interpreted by reference to its own terms. There is nothing on the face of the planning permission which draws the distinction between bulky and non-bulky goods now sought to be relied upon by the planning authority.”

99. The relevant planning permission in that case granted planning permission for use of the premises in question as “*retail warehousing*”. On the facts of that case, one of the planning conditions had specified that “*the use of the building for wholesale/retail warehousing shall be limited to use as ‘wholesale warehouse’ as defined in Article 8 of the Local Government (Planning and Development) Regulations 1994-1999, and to use for retailing of non-convenience goods. In particular, the sale of foods, clothing and footwear shall be excluded from the permitted use...*”.

100. Simons J. noted in his analysis (at paragraph 22) that had the planning authority intended to further restrict the nature of the goods to be sold (beyond the restriction applied to “*convenience goods*”) by reference to the (then) draft guidelines so as to

preclude the sale of non-bulky goods, then that should have been set out in clear terms in the 2000 planning permission itself.

101. In my view, the analysis of Simons J. as regards an attempt to use subsequently published statutory guidelines to interpret a prior planning permission is correct in principle. When applied to the facts of this case, I am led to the conclusion that the Inspector fell into error when interpreting the scope of the use permitted by the 1998 permission by having regard to the content of the Retail Planning Guidelines 2000 which post-dated the 1998 permission. I also believe that the Inspector was in error in effectively construing the 1998 permitted "*retail warehouse*" use as being confined to the retail sale of bulky goods when no such restriction was stipulated in the terms of the 1998 permission itself.
102. It is common case that the Inspector's Report and the Board decision must be read together and, in the absence of any express disagreement, the reasoning in the Inspector's Report may be imputed to the Board decision (see generally *Connelly v An Bord Pleanála* [2018] IESC 31; [2018] 2 ILRM 453). I will accordingly turn now to see whether there is any basis in the Board's decision to believe the Board was not accepting the Inspector's views. As I shall explain, in my judgment, far from the Board not accepting or departing from the Inspector's views, it is clear that the Board followed those views in arriving at its decision.

Board's analysis

103. The recitals of the Board's decision note that "*Whereas the question has arisen as to whether a material change of use arises by reason of the type of goods being sold at Unit 3, Fonthill Retail park, Fonthill Road, Dublin and consequently whether it is or is not development or is or is not exempted development*" and then go on to note that "*the Board decided to reformulate the question*".
104. The Board reformulated the question in the following terms:

"Whether the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Retail Road, Dublin is or is not development or is or is not exempted development"

105. The decision then notes that:

"An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section (3)1 of the Planning and Development Act 2000,*
- (b) Articles 5(1), 6(1), 9(1), 10(1), 10(1)(c) of the Planning and Development Regulations, 2001, as amended,*
- (c) The planning history of the premises, in particular the permissions granted under planning register reference number S97A/0791 [i.e. the 1998 permission] for a Retail Warehouse, and also the subsequent permission for a subdivision of this unit under planning register reference number SD15A/0152 [i.e. the 2015 permission],*
- (d) The definition of a retail warehouse as set out in Annex 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment and Local Government in 2000, (as updated by the revision of these Guidelines in 2005 and 2012), and*
- (e) The documentation on file including the Inspector's Report."*

106. The Board then reasoned its "conclusion" as follows:

- "(a) The permitted use of the premises, as stipulated by the permitted use of the unit granted under planning reference number S97A/0791 [i.e. the 1998 permission] is as a Retail Warehouse,*
- (b) The subsequent permission to subdivide the unit (planning register reference number SD15A/0152 [i.e. the 2015 permission]) did not alter the retail warehouse use of any element of the unit,*
- (c) The retailing activity currently carried out at the premises involves the retail sale of small scale convenience goods directly to members of the public,*
- (d) The retail sale of convenience goods is not consistent with the permitted use, and does not come within the scope of the definition of activities of a retail warehouse as set out in the said Retail Planning Guidelines,*
- (e) Accordingly, the use of the unit as a discount store for the sale of small scale convenience goods constitutes a change of use, and the said change of use constitutes development being a material change of use by reason of the character of the retailing being undertaken and its material external impacts on the proper*

planning and sustainable development of the area (including its impacts on town centre retailing, traffic movements and parking)."

107. For ease, I will refer to these conclusions as "conclusion (a)", "conclusion (b)" and so on.
108. On the basis of the considerations identified and the conclusions set out, the Board decided that *"the use of a permitted retail warehouse unit to use as a discount store for the sale of small scale convenience goods at Unit Number 3, Fonthill Retail Park, Fonthill Road, Dublin is development and is not exempted development"*.
109. In my view, the Board erred in law in its conclusions (b) and (d). The permitted use in 1998 as a retail warehouse was not confined to use for the retail sale of bulky goods. The subsequent permission in 2015, while not altering the use as a retail warehouse, did introduce a new condition in respect of unit 3 (and, indeed, unit 3A) to the effect that the units could not be used for the sale of non-bulky goods. Conclusion (b) (that "[the 2015 permission] *to subdivide the unit did not alter the retail warehouse use of any element of the unit*" was accordingly incorrect in so far as it sought to assume that the retail sale of non-bulky goods was impermissible under *both* the 1998 permission and the 2015 permission.
110. Conclusion (d) (that *"The retail sale of convenience goods is not consistent with the permitted use, and does not come within the scope of the definition of activities of a retail warehouse as set out in the said Retail Planning Guidelines"*) is also incorrect insofar as it applies to the 1998 permission; on the basis of the Inspector's recommendation and the wording of conclusion (b), it is clear that the Board's reference to "permitted use" in conclusion (d) necessarily involved a reference to the 1998 permission. In my view, for the reasons set out earlier, it was not legitimate to rely on the Retail Planning Guidelines 2000 in interpreting the scope of the permitted use under the 1998 permission. Accordingly, the change of use analysis at conclusion (e) started from a flawed premise (in conclusion (b)) and doubled-down on this flawed premise (in conclusion (d)) in arriving at the Board's ultimate decision.
111. It will be recalled that the Board contended that it was valid for the Inspector and the Board to take the view that the 1998 permission in permitting use for a *"retail warehouse"* was seeking to distinguish such use from general convenience store type retail use, the latter type of use not been permitted under the 1998 permission, but that if the Inspector and Board were wrong in that regard, that error was not material and not

relevant to the ultimate analysis of the question of material change of use, which was governed by condition 2. The Board contended that it would be futile to grant any relief in those circumstances.

112. I do not accept the Board's submission that these errors are immaterial. Nor do I believe that it would be futile to grant the relief sought. The fact that the Board may have been able to arrive at a similar conclusion in a lawful fashion does not, of itself, provide a basis for overlooking or excusing the legal error into which the Inspector and the Board fell in this matter.
113. It must be recalled that the s.5 process provides for a *sui generis* mechanism for declaring, as a matter of law, the planning status of a particular property or premises. A declaration or referral decision made under s.5 is entered on the public register in relation to the property in question. A decision on the issues the subject of a s.5 referral (such as whether a particular use constitutes development) is likely to be binding on the same parties in any subsequent proceedings in which that issue arises (such as a subsequent s.5 process or enforcement proceedings), absent exceptional circumstances. Accordingly, the s.5 referral decision and the reasoning by which that decision is arrived at have a significant and consequential status as a matter of law. While one can readily envisage immaterial errors which would not lead to an invalidation of the lawfulness of a s. 5 declaration, I do not believe the errors I have identified above fall into the category of immaterial; rather, they go to the core of the reasoning of the Inspector and the Board.
114. I do not think it would be appropriate to leave this s.5 referral decision on the planning register in all the circumstances. In my view, it would be more consistent with good administrative decision making in this important area for the matter to be remitted to the Board and for the Board to reach a lawful decision in accordance with the findings in this judgment.
115. I will accordingly grant an order of *certiorari* of the Board's decision and remit the matter to the Board to reconsider its decision and reach a decision in accordance with the findings of the Court.

116. In light of the conclusions reached above, it is not necessary to address PKB's contention that the Board took into account irrelevant statutory provisions in arriving at its decision, namely article 6(1) and 9(1) of the 2001 Regulations. The Board will presumably address what it regards as the most relevant provisions of the applicable regulations when carrying out its fresh assessment following remittal.

Conclusion

117. For the reasons outlined above, I will grant an order of *certiorari* of the Board's decision and make an order of remittal, pursuant to Order 84, rule 27, directing that the Board reconsider the matter and reach a decision in accordance with the findings of the Court. For the Board's assistance following remittal, for the reasons set out in detail in this judgment, I have decided that 1998 permission does not entail a restriction on retail warehouse use equivalent to that now found in the various iterations of the retail planning guidelines. However, I have also found that condition 2 of the 2015 permission is enforceable and effective and applies to both unit 3 and unit 3A. It is now over to the Board to apply those findings to the facts of case.