

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 543

Record No: 2018/666 JR

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A AND 50B OF
THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)**

BETWEEN:

POUNDLAND LIMITED

APPLICANT

AND

AN BORD PLEANÁLA AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL AND PKB PARTNERSHIP

NOTICE PARTIES

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

Introduction

1. In these judicial review proceedings, the applicant ("Poundland") seeks an order of *certiorari* quashing the decision of the first respondent ("the Board") dated 12th June 2018 on a referral to the Board by the second notice party ("PKB") made pursuant to s.5 of the Planning and Development Act 2000 (as amended) ("the decision" or "the Board's decision").
2. The referral came before the Board pursuant to s.5 of the Planning and Development Act 2000 (as amended) ("s.5") by way of review from a decision of the relevant planning authority on an application by PKB for a declaration regarding questions of development and exempted development in relation to one of its Poundland retail units which is located in Fonthill, Clondalkin, Co. Dublin. The Board's decision on the s.5 referral was that "*the use of a permitted retail warehouse unit to use as discount store for the sale of small*

scale convenience goods at Unit 3 Fonthill Retail Park, Fonthill, Dublin is development and not exempted development”.

3. Poundland is the occupier of the premises at Unit 3 Fonthill Retail Park, Fonthill Road, Dublin 22 (the “premises” or “unit 3”), the subject matter of the decision. Poundland has exclusive occupation of the premises pursuant to a lease made between it and PKB dated 26th September 2015 and is the person carrying out the alleged development the subject matter of the Board’s decision.
4. It is important to note that Poundland was not a party to the Board’s decision; the decision was, rather, directed to PKB as the party who initially sought a declaration under s.5 from the planning authority and who thereafter sought the s.5 review from the Board. The decision has been separately challenged by PKB as owner of the premises, in judicial review proceedings bearing record number 2018/661 JR between PKB and the Board (“the PKB proceedings”). Poundland was a notice party to the PKB proceedings.
5. The principal issue that arises in these proceedings (“the Poundland proceedings”) is whether the Board had an obligation, as a matter of fair procedures, to exercise its discretionary powers under s.131 of Planning and Development Act 2000 (as amended) (“the 2000 Act”) to invite Poundland, as a third party, to make submissions in the s.5 referral process in relation to the planning status of the premises where Poundland was in occupation of the premises and therefore stood to be adversely affected by the s.5 referral decision. S.131 empowers the Board to request any person (including a non-party to the s.5 planning authority declaration decision) to make submissions or observations on the referral where it is of the opinion that it is appropriate in the interests of justice to do so.
6. The PKB proceedings and these proceedings were heard together over three days. I am delivering a separate judgment in the PKB proceedings today. As will be seen from my judgment in the PKB proceedings, I have decided that PKB is entitled to an order of *certiorari* quashing the Board’s decision. In the circumstances, the issues arising in these (the Poundland) proceedings, are technically moot. However, as I have decided in the PKB proceedings that the s.5 referral review should be remitted to the Board for a fresh determination, I believe it is appropriate to give my views on the principal issue raised by Poundland in these proceedings, namely that of fair procedures as regards its participation in any s.5 review process by the Board, as my determination on the fair procedures issue may well be relevant to the manner in which the Board conducts its

fresh s.5 referral review following remittal and/or Poundland's approach to the fresh s.5 referral review process.

Material Facts

7. The factual background to the Board's decision, including the process that led to that decision, is set out in some detail in my judgment in the PKB proceedings ("the PKB judgment"). I do not propose to rehearse that detailed factual background here. I will make reference to those aspects of the factual background which are relevant to Poundland's case during the course of this judgment. For present purposes, it suffices to say that it is not in dispute that Poundland was not a party to the s.5 referral; Poundland was not invited by the Board, in exercise of the Board's powers pursuant to s.131 of the 2000 Act, to make submissions on the s.5 referral and Poundland did not seek to participate in the s.5 process or otherwise request the Board to invite it into the process.

8. As we shall see, it is clear that Poundland was aware that PKB had brought the s.5 referral, and the basis of that referral; this is evident from the contents of submissions made on behalf of Poundland in an application for retention permission brought by Poundland without prejudice to the position adopted by PKB in the s.5 referral process to the effect that the use of the premises did not constitute "*development*" or, if it did, that such development was "*exempted development*".

Relevant legislative provisions

9. I propose to set out the provisions of s.5 and s.131 of the 2000 Act which were in force at the time of the Board's decision.

10. The terms of s.5 at the time of the Board's decision were as follows (there have been amendments to the section since then but these are not applicable for present purposes):

"Declaration and referral on development and exempted development.

5.—(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

(2) (a) Subject to paragraph (b) a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

(b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.

(c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.

(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

(b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

(5) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register.

(6) (a) The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection.

(b) The Board may charge a specified fee, not exceeding the cost of making the copy, for the purchase of a copy of the record referred to in paragraph (a).

(c) The Board shall, from time to time and at least once a year, forward to each planning authority a copy of the record referred to in paragraph (a).

(d) A copy of the said record shall, at the request of a member of a planning authority, be given to that member by the planning authority concerned.

(7) A planning authority, before making a declaration under this section, shall consider the record forwarded to it in accordance with subsection (6)(c)."

11. At the time of the Board's decision, s.131 provided as follows:

"Power of Board to request submissions or observations.

131.—Where the Board is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to request—

(a) any party to the appeal or referral,

(b) any person who has made submissions or observations to the Board in relation to the appeal or referral, or

(c) any other person or body,

to make submissions or observations in relation to any matter which has arisen in relation to the appeal or referral, the Board may, in its discretion, notwithstanding section 127(3), 129(4), 130(4) or 137(4)(b), serve on any such person a notice under this section—

(i) requesting that person, within a period specified in the notice (not being less than 2 weeks or more than 4 weeks beginning on the date of service of the notice) to submit to the Board submissions or observations in relation to the matter in question, and

(ii) stating that, if submissions or observations are not received before the expiration of the period specified in the notice, the Board will, after the expiration of that period and without further notice to the person, pursuant to section 133, determine the appeal or referral."

12. It should further be noted that pursuant to s.130(1)(a) "Any person other than a party may make submissions or observations in writing to the Board in relation to an appeal or referral.." (subject to an exception which is not applicable here). S.130(4) provides that "Without prejudice to section 131 or 134, a person who makes submissions or observations to the Board in accordance with this section shall not be entitled to elaborate in writing upon the submissions or observations or make further submissions or observations in writing in relation to the appeal or other matter and any such elaboration,

submissions or observations that is or are received by the Board shall not be considered by it."

13. Accordingly, on the face of it, a person who is not a party to a referral to the Board under s.5 but who is aware of a s.5 referral may actively seek to make submissions on the referral pursuant to s.130(1) and may be the subject of an invitation from the Board to make further submissions pursuant to s.131 if the Board considers it in the interests of justice to do so; even where that person has not made submissions on the referral pursuant to s.130(1), they may be the subject of an invitation from the Board to make submissions, pursuant to s.131, if the Board considers it in the interests of justice to do so.

14. I will discuss the parties' submissions on the application of these provisions to the facts of this case later in the judgment.

Summary of Poundland's case

15. Poundland's essential case is that the decision was arrived at in breach of its rights to fair procedures in the s.5 referral decision-making process. The essential building blocks of Poundland's case are as follows.

16. Firstly, Poundland submits that, given that the Board in its decision made findings as to the actual use by Poundland of the premises, and further made findings as to the legal nature of that use without having heard from Poundland in respect of these matters, at a minimum the Board was under an obligation to invite Poundland to make representations in the course of the decision-making process, before the decision was reached, and to do so pursuant to s.131 of the 2000 Act.

17. Secondly, Poundland submits that there was no facility for Poundland to "*invite itself in*" to the s.5 referral decision making process. The Board, of its own motion, in exercise of its powers under s.131, should have identified Poundland as a necessary party to invite submissions from and should thereafter have invited submissions from Poundland. Had Poundland proactively written to the Board seeking to be involved in the process or to make submissions in the process, Poundland maintains that the Board would not have had jurisdiction to entertain that request; rather, the Board could only have lawfully taken its own view (without request) to invoke s.131 to invite submissions from Poundland.

18. Thirdly, Poundland contends that the Board, in any event, appears to have expressly considered whether or not Poundland should be invited into the process and decided not to do so. This is said in reliance on an averment in the affidavit of Chris Clarke, Secretary of the Board. In his affidavit of 11th February 2019 verifying the Board's statement of opposition, Mr. Clarke averred as follows:-

"I do not believe that the Board were obligated to join the applicant to the referral in the manner contended in the proceedings. The Board has certain statutory powers that permit it to seek submissions or observations on any party to a referral, any person who has made submissions or observations to the Board in relation to a referral or any other person or body where the Board is of the opinion that, in particular circumstances of the case, it is in the interest of justice to do so. In the circumstances outlined above, it is clear that the Board did not consider it necessary to exercise those statutory powers in this case."

19. The references to "*the circumstances outlined above*" appear to be a reference to an averment of Mr. Clarke in the preceding paragraph of his affidavit where he states "*I believe it is evident from the appeal lodged with the Board in the retention application that, at all material times, the applicant was aware of the referral and did liaise with PKB, the owner of the units during the lifetime of the referral*". Poundland contends that the Board erred insofar as it expressly considered whether or not it was necessary to exercise its powers under s.131 in relation to Poundland but decided it was not so necessary. It is said that this was an unlawful determination given the vital interests of Poundland engaged by the decision-making process and the decision.
20. The necessity for the Board to have exercised its powers under s.131 to invite Poundland to make submissions is said to flow from the consequences for Poundland of an adverse decision on the s.5 referral. It was submitted that, as a s.5 referral review decision of the Board is entered on the planning register in respect of the premises, the decision is attached to the premises "*in perpetuity*" and, critically, became binding on Poundland even though Poundland was not a party to the s.5 proceedings.
21. Finally, Poundland contended that, in practical terms, Poundland should have been invited into the process to avoid the same issues being ventilated and determined in different processes. The potential issue common to both the s.5 referral process as regards PKB, and any subsequent enforcement process as regards Poundland, was the question of whether or not there had been a material change of use or a use in breach of condition 2 of the 2015 permission, if condition 2 applied. (The background to condition 2 of the 2015

permission is explained in detail in my judgment in the PKB proceedings). It was submitted that this was a factor which engaged Poundland's right, as a matter of fair procedures, to be invited into the s.5 process by the Board, pursuant to s.131, even if the s.5 decision was not in law binding in its consequences on Poundland.

Summary of the Board's case

22. The Board's case in reply can be summarised as follows.

23. Firstly, despite Poundland's awareness of the s.5 referral process and despite the fact that it was working in cooperation with PKB on the planning issues arising, Poundland never asked for an invitation from the Board pursuant to s.131 to make submissions nor did Poundland seek its own s.5 declaration. It was, accordingly, a voluntary non-participant in the process, with knowledge of the process, and could not complain of any breach of fair procedures in the circumstances.

24. Secondly, the Board contended that the premise for the adverse consequences said by Poundland to flow from the decision, i.e. the contention that once a s.5 referral decision was made by the Board, Poundland was bound for evermore by that decision notwithstanding that it had not been a party to the s.5 referral process, was incorrect and unsupported by authority. The Board submitted that the fact that Poundland had not participated in the process meant that it would be open to Poundland, as a matter of law, to seek to challenge the underlying conclusions of the s.5 decision in any subsequent proceedings involving Poundland (such as enforcement proceedings against Poundland for unauthorised use or material change of use).

25. Thirdly, the Board submitted that Poundland's challenge based on exclusion from the process could not succeed in circumstances where it had not complied with the requirement in the case law that to advance such a case it must identify the evidence it would have tendered and submissions it would have made if it had not been excluded from the process.

26. Fourthly, the Board pointed out that, on Poundland's own case, if a s.5 referral decision is binding on "*all comers*", including those not a party to the s.5 process, these proceedings were futile because no challenge had been brought to the s.5 declaration granted in favour of Save Our Town Centre Ltd. ("SOTC") in respect of SOTC's separate s.5 declaration application which resulted in a declaration that the current use of the

premises was development and not exempted development. As explained in my judgment in the PKB proceedings, SOTC had obtained that s.5 declaration prior to PKB's application for a s.5 declaration.

27. Finally, the Board submitted that the relief sought by Poundland should be refused, in any event, on the basis of alleged material non-disclosure by Poundland and a lack of candour in the proceedings in failing to disclose its knowledge of PKB's s.5 referral application.

Discussion

28. As noted earlier, on the face of it, a person who is not a party to a s.5 referral but who is aware of a s.5 referral may actively seek to make submissions on the referral pursuant to s.130(1) and may be the subject of an invitation from the Board to make further submissions, pursuant to s.131 if the Board considers it in the interests of justice to do so; alternatively, even where such a person has not made submissions on the referral pursuant to s.130(1), such a person may be the subject of an invitation from the Board to make submissions, pursuant to s.131, if the Board considers it in the interests of justice to do so.

29. As regards the contention that the Board had an obligation to invite Poundland into the s.5 process, Counsel for the Board drew attention to the following paragraph in *Simons on Planning Law* (3rd Ed., 2021) ("*Simons*") (at para. 2-338):-

"There is no express requirement that third parties be notified of the making of a reference under s. 5 of the PDA 2000, still less that the third party should be permitted to participate in the process. As Haughton J. noted in Sweetman v. An Bord Pleanála [2017] IEHC 46, s. 5 does not require that there be any public notification of a referral, and there are no statutory consultees, and no right of the public to participate."

30. That section in *Simons* goes on (at para. 2-340) to note that:-

"In Treacy v. An Bord Pleanála [2010] IEHC 13, MacMenamin J. stated (obiter) that one could envisage a hypothetical situation where a procedure of this type might have the effect of constituting an unwarranted prejudice or detriment to the interests of

a party not properly informed or on notice. However, he noted that that was not the case here as it was the choice of the potentially affected notice party not to make submissions before the court."

31. *Simons* then goes on (at para. 2-341) to make adverse comment as to the adequacy of the s.5 procedure, pointing out, *inter alia*, that *"there is no obligation to seek submissions or observations from third parties where a s. 5 request is made."*
32. Counsel for Poundland sought to emphasise that, in practice, the Board is sparing in its use of s.131. He pointed out that s.131 was a discretionary power that applied to both s.5 referrals but also planning appeals to the Board more generally and that, in practice, the Board tended to take a narrow view of the circumstances in which it was legitimate to seek to add a third party to an appeal or referral process before it. It is only fair to point out that those observations were not supported by any evidence as to the Board's general practice on these issues.
33. It was not disputed by Poundland that it was aware of the fact that PKB had made a referral under s.5 and that PKB was appealing the planning authority's decision on that referral to the Board.
34. Poundland's knowledge in that regard is evident from a submission on its behalf made to the Board in the context of an appeal against an application for retention made by Poundland to the planning authority (without prejudice to its position that no such retention was required). In that detailed submission to the Board dated 6th June 2017 (some twelve months before the Board's decision under challenge in these proceedings), a consultant on behalf of Poundland stated, *inter alia*, that *"when Dealz first occupied unit 3 they did so under the assumption that planning permission was not required, a view that is shared by the owners of the subject unit PKB Partnership"*. The submission went on to say that *"It is possible that the outcome of the s. 5 referral to the Board may negate the need for this planning application in the first instance"*. The submission also references the separate s.5 declaration decision issued by the planning authority on 3rd June 2016 to Save Our Town Centres Ltd, and a warning letter of alleged unauthorised development issued to PKB arising from that decision. It was stated that *"this warning letter prompted a requirement for a planning application and subsequently this appeal"*. The submission further referenced PKB's s.5 declaration application and the arguments advanced by PKB in support of its application.

35. It is quite clear from the foregoing that Poundland had access to the relevant papers in respect of PKB's s.5 declaration application to the Council and subsequent s.5 referral to the Board and that it liaised with PKB in relation to the asserted planning status of Poundland's unit. I will come presently to the consequences of that fact for the fair procedures case made by Poundland in these proceedings.
36. Before doing so, I will digress briefly to deal with the Board's contention that there was material non-disclosure by Poundland, and a lack of candour, in failing to bring to the Court's attention the fact of its retention application and appeal, and Poundland's level of knowledge of PKB's s.5 referral evident from the submissions in that procedure. The relevant paragraph of the statement of opposition grounding this contention stated as follows:

"The statement of grounds filed by the applicant and the affidavit sworn in support of the within application failed to disclose the retention application and the decision of the Board. The fact of the retention application and the decision of the Board on that application is disclosed in the statement of grounds filed by PKB in their proceedings. It is evident from the contents of the retention application that [Poundland] was aware of the PKB application for a declaration pursuant to s. 5 of the 2000 Act and the subsequent referral to the Board. The failure to disclose the retention application and the decision of the Board is a material non-disclosure that justifies this Honourable Court exercising its discretion to refuse all reliefs sought by the applicant."

37. I do not believe that the Board's contention as to material non-disclosure is well founded. It was never averred on behalf of Poundland that they were not aware of the PKB s.5 referral process. Ms. Aedamar O'Loughlin swore an affidavit on behalf of Poundland in which she averred that Poundland was aware of the referral but: - *"was not aware of the reformatted question or the extent to which its use and operation would become the focus of the question. [Poundland] was not aware that such specific findings would be made in relation to the manner of its use of its premises."*
38. The case sought to be made by Poundland was that, irrespective of its knowledge or awareness of the s.5 referral process, the Board had an independent obligation to invite Poundland into the s.5 referral process by exercising its s.131 powers to invite submissions from Poundland and that findings within the process which were findings on matters specific to Poundland (such as the decision to reformulate the question under referral and findings as to the type and character for planning purposes of goods sold by

Poundland) were arrived at without any consultation with, or input from, Poundland. While, as I shall come to, the fact that Poundland was aware of the s.5 referral process is an important factor in the analysis of Poundland's fair procedures case in relation to the s.5 PKB referral process, I do not believe it can be fairly said that Poundland was guilty of material non-disclosure in light of the case which they sought to advance in these proceedings.

39. Returning to the fair procedures case advanced by Poundland, the Board contended that there was a duty on Poundland, a well-advised developer, to take proactive steps to seek to participate in a process which they believed might affect their interests. It was submitted that there was no positive duty on the Board to seek out those people who may be affected or who may otherwise wish to make submissions. Counsel for the Board sought to characterise Poundland's position as that of "tactical non-participation."
40. In my view, Poundland's case goes too far insofar as it is premised on the contention that Poundland could not have written to the Board asking the Board to invite it into the process under s.131 as, if it had done so, the Board would have had no jurisdiction to entertain such a request in light of the terms of s.131.
41. In my view, the issue that arises in light of Poundland's submissions is whether s. 131 must be construed as *precluding* the Board from entertaining an application to it to exercise its discretion to allow a third party such as Poundland to make submissions on the s.5 referral. Pursuant to the principles set out in the seminal case of *East Donegal Co-op Livestock Mart v Attorney General* [1970] IR 317, a statutory provision such as s.131 must be construed on the basis that the procedures and discretions provided for within it will be conducted in accordance with the principles of constitutional justice. In the circumstances, I do not see how the Board's powers under s.131 could be construed so as to preclude the Board from entertaining an application to it from a third party for the Board to exercise its discretion to allow that third party into the process. This seems to me to be all the more so where Poundland had an entitlement under s.130 to make submissions on the s.5 referral in any event if it saw fit.
42. In my view, this analysis of the scope of s.131 is also consistent with the observations of MacMenamin J. in *Treacy v. An Bord Pleanála* [2010] IEHC 13 ("*Treacy*") noted in the paragraph from Simons set out at paragraph 30 above. In *Treacy*, a tenant of a warehouse park (TK Maxx) who was not a party to a s.5 referral, but who was a notice party to a judicial review of the decision of the Board on the s.5 referral, complained that

it was prejudiced by the outcome of the referral process which it had not been notified of and had not participated in. MacMenamin J. held as follows (at paragraphs 96 and 97):

"96.....Once the Council's decision was appealed, TK Maxx was entitled to make submissions or observations pursuant to s. 130 of the Act of 2000. However, it chose not to do so.

97. In other circumstances, one could envisage a hypothetical situation where a procedure of this type, might have the effect of constituting an unwarranted prejudice or detriment to the interests of a party not properly informed or on notice – but not in this case. It was TK Maxx's choice not [to] make submissions before the Board. Consequently, I do not think it can complain of prejudice at this stage."

43. In my view, these observations are equally applicable to the position of Poundland in this matter; it chose not to seek to become involved in the Board's s.5 process, whether under s.130 or s.131.
44. In my view, the proper course of action for a party in the position of Poundland if they wish to participate in the s.5 referral process is for that party to seek to make submissions on the referral pursuant to s.130 or to write to the Board requesting the Board to accept submissions from it in exercise of the Board's powers under s.131. Once such an application is made, the Board is under an obligation to consider the extent to which the interests of that third party are potentially affected, such as to entitle that third party to make representations in the process. If a party claims its vital interests stand to be potentially adversely affected by the outcome of a s.5 referral process of which it is aware and writes to the Board as decision-maker to seek permission to make submissions in relation to that process, it would not be consistent with the Board's obligation to conduct its statutory powers in accordance with the principles of constitutional justice for the Board to not even entertain such an application.
45. Accordingly, I do not accept the submission that Poundland had no legitimate way into the process and that there was a self-standing obligation on the Board to proactively take a decision pursuant to s.131 to invite Poundland into the process in circumstances where Poundland had itself chosen not to participate or seek to become involved in the process.

46. In that regard, I believe Poundland seeks to read too much into the averment of Mr. Clarke, Secretary of the Board, referred to at paragraph 18 above. It seems to me that Mr. Clarke was doing no more than stating the unremarkable proposition that where Poundland was clearly aware of the PKB referral and the basis of it, there was no obligation on the Board to seek to bring Poundland into the process pursuant to s.131 where Poundland had not sought itself to become involved.
47. Poundland sought to rely on *The State (Irish Pharmaceutical Union) v. EAT* [1997] ILRM 36 as authority for the proposition that, in the absence of a procedure being set out in a statute from which proceedings derive, the relevant decision-making body must create and carry out the necessary procedures or supplement the procedures set out in the statute in such a fashion as to ensure compliance with constitutional justice. I do not believe the relevant statutory machinery here is so lacking. S.131, together with s.130, clearly provides for a procedure sufficiently flexible to ensure compliance with fair procedures and constitutional justice.
48. In conclusion on this issue, I do not accept that the Board had a positive obligation to seek out submissions from Poundland where Poundland was aware of the s.5 referral process and chose not to seek to become involved.
49. In the circumstances, Poundland's next contention, namely that the Board's obligation to invite Poundland into the case was necessitated by the adverse and binding legal consequences for Poundland of the s.5 referral decision (given that s.5 provides that "*The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register*") does not require to be determined by me.
50. Poundland invoked a series of authorities in support of the proposition that a person who was not a party to a s.5 referral decision process was nonetheless bound by the outcome of that process, including *Grianán an Aileach v. Donegal County Council* [2004] 2 IR 65; *Killross Properties Ltd v. ESB* [2016] 1 IR 541 and the decisions of the High Court (Simons J.) [2019] IEHC 825 and of the Court of Appeal [2021] IECA 217 (Donnelly J.) in *Krikke v. Barranafaddock Sustainable Electricity Limited* ("*Krikke*"). Importantly, none of those authorities addressed a situation where it was contended that a non-party to a s.5 referral was bound by the outcome of the s.5 referral in a subsequent enforcement action to which it was a party.

51. Those authorities are addressed in the section in *Simons* dealing with the s.5 process. In that section of *Simons*, at para. 2-375, it is stated as follows:-

"There is now a line of case law which suggests that a s. 5 declaration, which has not been challenged in judicial review proceedings, is binding and conclusive in enforcement proceedings involving the same parties as to the reference. In particular, a declaration to the effect that an act is "development" or is "exempted development" cannot normally be revisited in subsequent enforcement proceedings between the same parties or their privies." (citing the High Court decision in *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2019] IEHC 825 at para. 73 (Simons J.)).

52. As can be seen, the foregoing extract from *Simons* was effectively addressing a form of issue estoppel as between the same parties to a s.5 referral in subsequent enforcement proceedings.

53. Since that text in *Simons* was published, the Court of Appeal delivered its judgment in *Krikke*. The Court of Appeal took the view on the facts of that case that the Board had not been entitled under s.5 to make a determination that there had been unauthorised development (as opposed to a finding as to development or exempted development). Donnelly J. held (at paragraphs 55 and 56) as follows:

"55...The only role of An Bord Pleanála was to determine whether there was development or exempted development and in effect that is what it determined. Unlike the situation where the question of whether there has been a material change of use arises (where a material change of use amounts to development), the question of whether the development comes within the scope of the planning permission, i.e. whether it was authorised, is not an issue that the planning bodies have jurisdiction to decide. In those circumstances, the High Court was not bound to follow that particular aspect of the conclusions reached by An Bord Pleanála on its way to determining that this was development and not exempted development.

56. The fact that An Bord Pleanála has reached such a conclusion, is however a matter to which the court in its determination of matters under s. 160 should have regard. This is because it represents the opinion of the expert body given general jurisdiction over planning matters. Ultimately however, it is a matter for the High Court (or Circuit Court) to determine if there has been unauthorised development

based upon its assessment of the factual situation. That factual situation can include the inspector's report upon which the Board reached its conclusion and the reasoning of the Board set out in its determination. The weight to be placed upon the Board's determination will depend on the facts of each particular case."

54. The Court of Appeal's decision was the subject of a determination by the Supreme Court permitting leave to appeal to the Supreme Court. At the date of this judgment, the Supreme Court has not yet handed down its decision on the appeal.

55. In any event, I do not believe it is necessary for me to say anything further on this issue in light of the conclusions I have reached on Poundland's claim that its rights to fair procedures were breached. While potentially difficult questions might arise as to the entitlement of a third party to agitate issues as to development or exempted development in enforcement proceedings when that third party had previously participated in a s.5 referral process which addressed those issues, notwithstanding it was not the direct addressee of a decision in the s.5 referral process, those questions do not arise on the facts of this case and I would prefer to leave over those questions to a case where they are properly engaged on the facts.

56. For completeness, I also do not think it is necessary to consider the Board's contention that Poundland had not, in any event, identified in evidence what case it would have made on appeal if it had participated in the appeal. It was said in reliance on the decision in *Wexele v An Bord Pleanála* [2010] IEHC 21, at paragraph 20, that this was an essential requirement to making out a case in breach of fair procedures. In fairness to Poundland, it pleaded that it would have wished to address the Board on the issue of the reformulation of the question the subject of the s.5 referral, which, in Poundland's view, was not only directly referable to Poundland's business but involved findings as to the nature of that business; Poundland also stated that it would have wished to have addressed the question of the proper scope of the concept of "*bulky goods*". In light of the conclusions I have reached on the other issues, it is not necessary to consider the extent to which Poundland complied with the obligations identified in *Wexele*.

Conclusion

57. In conclusion, if the Board's decision had withstood the challenge of PKB, I would not have granted an order of *certiorari* quashing the decision on the grounds advanced by Poundland in these proceedings.

58. In my view, Poundland has not made out any basis on its case for an order of certiorari of the decision. There was no breach of its rights to fair procedures. Poundland was clearly fully aware of the case being made by PKB in the s.5 referral process. There was nothing to stop Poundland from making submissions on the s.5 referral pursuant to s.130 or requesting the Board to allow it make submissions in the s.5 referral process, in exercise of the Board's power under s.131. It took neither of those steps.

59. In light of the decision I have reached in the PKB proceedings, the s.5 referral is going to be remitted to the Board for fresh consideration which will enable Poundland, should it see fit, to apply to the Board for an opportunity to make submissions in that process (it being a matter thereafter for the Board as to how it deals with any such application).

60. In the circumstances, I refuse the relief sought.