THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 593 J.R.]

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

BETWEEN

CORK HARBOUR ALLIANCE FOR A SAFE ENVIRONMENT

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INDAVER IRELAND LIMITED,

FIRST NAMED NOTICE PARTY

INDAVER NV IRELAND T/A INDAVER IRELAND

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 15th day of February, 2019

Introduction

1. This is my judgment on an application by the applicant, Cork Harbour Alliance for a Safe Environment, for:-

> (i) Orders for discovery in these judicial review proceedings against the respondent, An Bord Pleanála ("the "Board"), and against the notice parties, Indaver Ireland Limited and Indaver NV trading as Indaver Ireland (the "notice parties")(paras 1 and 2 of the notice of motion); and
>
> (ii) An order against the Board that it identify on oath all documents relied upon by it and considered by each of its members in making the Board's decision dated 29th May, 2018, to grant planning permission for the development of a waste incinerator and groundworks at Ringaskiddy, Co. Cork, which is challenged in the proceedings and in making various other decisions in the course of the process (para. 3 of the notice of motion).

2. The applicant's application for discovery against the Board and the notice parties referred to at (i) above is made pursuant to the provisions of O. 84, r. 26 RSC and O. 31, r.12 RSC. Its application for the relief summarised at (ii) above invokes the inherent jurisdiction of the court in order to enforce the duty of candour owed by the Board, as a public body which is a respondent to judicial review proceedings.

Background to the Application

3. The applicant's application for these reliefs is made in proceedings in which the applicant obtained leave to challenge the Board's decision of 29th May, 2018, by way of judicial review on several grounds by order made by me on 24th July, 2018. The proceedings are listed for hearing before me for eight days commencing on 19th March, 2019.

4. In accordance with directions made by the court on 23rd November, 2018, opposition papers were delivered by the Board and by the notice parties. Voluntary discovery was sought by the applicant from the Board and from the notice parties by letter dated 7th January, 2019. The applicant sought discovery of three categories of documents from the Board and of two categories from the notice parties. There followed an exchange of correspondence between the applicants and the Board and the notice parties in relation to the discovery sought. The upshot of that correspondence is that a substantial measure of agreement was reached in relation to one of the categories of documents sought by way of discovery from the Board and from the notice parties. That category concerns documents relating to the ground of challenge made by the applicant on the basis of alleged objective bias by reason of the involvement of one of the members of the Board in the decision. There were, however, some issues remaining to be resolved in relation to those categories. There was no agreement between the parties in relation to two of the categories of discovery sought from the Board and in relation to one of the categories sought from the notice parties.

5. It is necessary, therefore, for me to resolve the dispute between the parties in relation to the two outstanding categories of discovery sought by the applicant as against the Board and in relation to the one outstanding category of documents sought from the notice parties. It is also necessary for me briefly to address the outstanding issues in relation to the category directed to the alleged objective bias issue. Finally, I must determine the applicant's application for the additional relief sought against the Board at para. 3 of the notice of motion pursuant to the duty of candour.

6. Extensive correspondence was exchanged between the parties on the question of discovery. In the absence of agreement in full to the discovery sought by the applicant, the applicant issued a motion for discovery and for the additional relief sought pursuant to the duty of candour. That motion was returnable before me on 24th January, 2019. It was grounded on a very detailed affidavit sworn by Joe Noonan, the applicant's solicitor, on 18th January, 2019. That affidavit exhibited the relevant correspondence between the parties up to that date. There was additional correspondence between the parties following that affidavit. I was provided with a updated book containing all the correspondence. The parties exchanged written submissions on the applications for discovery and for the further relief sought by the applicant. I heard the application over the course of two partial days on 1st February and 8th February, 2019. I reserved my judgment. In light of the impending hearing date for the proceedings, it has been necessary for me to rule urgently on the applications and I do so in as brief and succinct a manner as possible in light of the time constraints involved.

Structure of Judgment

7. I will first identify the grounds of challenge advanced by the applicant to the Board's decision which are relevant to the discovery application and to the other relief sought by the applicant. I will then briefly refer to the legal principles applicable to discovery in judicial review proceedings. I will then address each of the disputed categories of discovery sought as against the Board and the

notice parties. I will refer to the extent of the agreement between the parties in relation to one of the categories of discovery sought and address any outstanding issues of disagreement in relation to that category. Finally, I will consider the applicant's application for the relief sought arising from the duty of candour.

The Proceedings: Grounds of Challenge Relevant to Discovery
8. The applicant seeks to challenge the Board's decision in these proceedings on several grounds. The proceedings are being fully defended by the Board and by the notice parties. There are three grounds of challenge relevant to the discovery and the other relief sought by the applicant in this application.

(a) Ground No. 3

9. The first relevant ground of challenge is ground No. 3. Under this ground of challenge, the applicant alleges that the Board unlawfully and in breach of its duties under the Planning and Development Act, 2000 (the "2000 Act") permitted the notice parties to split the incinerator project into two planning applications for the purposes of avoiding the provisions of the Seveso III Directive and/or the Domestic Seveso Regulations with the result that it failed to carry out an Environmental Impact Assessment (EIA) of the entire project at the earliest opportunity and/or gave rise to the prospect of "*incremental development*". In the alternative, under this ground, the applicant alleges that the Board failed to have any or any proper regard to the issue of project splitting.

10. This ground of challenge is elaborated upon at paragraphs E(38) – (42) of the statement of grounds. Of considerable significance to this ground of challenge is the construction of a "*raised plateau*" on a portion of the development lands (referred to as the "*Western Fields"* portion) as part of the development. At para. E(42) of the statement of grounds, it is alleged that the construction of that "*raised plateau*" is "*manifestly for the sole purpose of facilitating the development*" of a waste transfer station in the future. It is alleged that the proposal for the development initially put forward by the notice parties included a waste transfer station but that this was removed in the course of the pre-application planning procedure. It is contended by the applicant that the waste transfer station was removed in order to avoid the application of the Seveso requirements, that there was a failure to perform an EIA of the entire project and that this amounted to project splitting or, alternatively, that the Board failed to have any or any proper regard to that issue.

11. The Board dealt with this ground at paras. 25 – 31 of its statement of opposition. At para. 30, it responded to the plea at para. E(42) of the statement of grounds. It denied that the "*only possible purpose*" of the "*raised plateau*" is to accommodate a waste transfer station. It then pleaded:-

> *"The construction of a level site on the western side…may simply prepare the site for a range of potential applications, which need not necessarily involve a waste transfer station and which may or may not require to be the subject of an EIA. Further, as pleaded above, where on a future application for permission for a proposed development on the western side, the relevant decision-maker determines that EIA is required, such EIA will include an assessment of cumulative effects when considered with the previously permitted Waste to Energy Facility the subject matter of these proceedings."*

12. In their statement of opposition, the notice parties addressed this issue at paragraphs 16 – 20. At para. 18 of the statement of opposition, they plead:-

> *"There is no proposal to develop a waste transfer station at the Waste to Energy Facility in Ringaskiddy and no waste transfer station is required for the operation of the Waste to Energy Facility. In that regard, it is denied that the construction of a raised plateau on the western portion of the site on which the Waste to Energy Facility is to be developed is manifestly for the sole purpose of facilitating the development of a waste transfer station as alleged at paragraph 42 of the Statement of Grounds or at all."*

(b) Ground No.4

13. Under ground No. 4, the applicant alleges that the Board's decision was tainted by objective bias and that the Board breached the principles of natural and constitutional justice and fair procedures by reason of the involvement of the (former) Deputy Chairperson of the Board, Cathal Boland, in the decision due to an alleged conflict of interest arising from his role with RPS-MCOS Consulting Engineers ("RPS") in the preparation of a consultancy report on behalf of "*Indaver Ireland*" in 2004, and by reason of other work done by Mr. Boland person in 2006.

14. The Board deals with the allegations in relation to ground No. 4 and in particular the alleged objective bias issue at paras. 32 – 34 of its statements of opposition. In addition, affidavits have been sworn on behalf of the Board by Dr. Mary Kelly, the former Chairperson of the Board, and by Mr. Boland, who was Deputy Chairperson of the Board at the time he swore his affidavit but who has ceased to be a member of the Board since then. The Board's statement of opposition and the affidavits of Dr. Kelly and Mr. Boland refer to Mr. Boland's prior role with RPS, the disclosure of his role and the involvement which Mr. Boland had in the Board's decision. The applicant is very critical of the extent of the information contained, in particular, in Mr. Boland's affidavit. The applicant's dissatisfaction with the manner in which this issue is dealt with on affidavit by the Board is the main factor which has led to the applicant seeking the additional relief at para. 3 of the notice of motion against the Board. I will deal with that issue below. Clearly since I will be hearing the proceedings themselves in a matter of weeks, I must be cautious about how I address the applicant's criticisms of the Board in general, and of Mr. Boland, in particular, on this interlocutory application. I should also note that the notice parties have denied the allegations made under ground No. 4 and, in particular, have denied that there was objective bias or any reasonable apprehension of bias. They do so at paras. 21 to 23 of their statement of opposition.

(c) Ground No. 11

15. The third relevant ground is ground No. 11 in which it is alleged that the inspector failed to provide the Board with a fair or complete or sufficient report for the various reasons set out at paras. E(97)-(98) of the statement of grounds.

16. The Board denies the allegations made in respect of ground No. 11 at paras. 60 – 63 of its statement of opposition. It pleads in that context that the "*full file*" in respect of the application including all submissions made was "*before the Board*" when it made its decision on the application (paragraph 62). The notice parties also deny that there was an alleged failure by the inspector to provide the Board with a fair or complete report at paras. 50 and 51 of their statement of opposition.

Discovery

Discovery in Judicial Review Proceedings: Legal Principles
17. There was no real disagreement between the parties as to the relevant principles to be applied to the question of discovery in judicial review proceedings. They were recently reviewed and considered by the High Court (Noonan J.) in *Barry v. The Governor of the Midlands Prison* [2018] IEHC 713 ("*Barry*"). The leading decision in this jurisdiction is the decision of the Supreme Court in *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 3 I.R. 528 ("*Carlow Kilkenny*"). In *Carlow Kilkenny*, Geoghegan J. who delivered the judgment of the Supreme Court in that case, endorsed the statement of principle made by Sir Thomas Bingham M.R. in R. *v. Secretary of State for Health ex parte Hackney London Borough* (Unreported, English Court of Appeal, 24th July, 1994) ("*Hackney*"). Essentially, discovery will be ordered in judicial review proceedings where the documents in question are "*necessary for disposing fairly of the application but not otherwise*" (per Bingham M.R. at p. 82, quoted by Geoghegan J. in Carlow Kilkenny at p. 534 and by Noonan J. in Barry at para. 10, p. 5).

18. In *Fitzwilton Limited & Ors v. Judge Alan Mahon & Ors* [2006] IEHC 48 ("*Fitzwilton*"), Laffoy J. in the High Court observed that:-

> *"In my view, the recent Irish authorities clearly establish that the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings, although, primarily by reason of the nature of the process, the relief afforded and the issues which arise in judicial review proceedings, the practical application of the principles may result in discovery being less frequently ordered in judicial review proceedings than in other civil proceedings."* (per Laffoy J. at p.12)

19. It follows, therefore, that the twin requirements of relevance and necessity in O. 31 RSC must, therefore, be satisfied. However, it is generally more difficult to establish the test of necessity in judicial review proceedings than in ordinary proceedings for the reasons summarised by Laffoy J. in the passage from *Fitzwilton* quoted above. On the issue of necessity, Geoghegan J. described the test *Carlow Kilkenny* as follows:-

> *"Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application or where there is prima facie evidence to the effect either that a document which ought to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it*." (per Geoghegan J. at 537)

20. In *Fitzwilton*, Laffoy J. observed:-

> *"What clearly emerges from a review of the recent Irish cases is that, where discovery is sought in judicial review proceedings, the determinant as to whether discovery will be ordered in many cases is whether it is necessary having regard to the ground on which the application is founded or the state of the evidence."* (per Laffoy J. at p.16)

21. In the same vein, in *Kerins v. McGuinness* [2015] IECA 267, Finlay Geoghegan J. in the Court of Appeal stated (having cited with approval, the dicta of Bingham M.R. in *Hackney*) that while the same rules on discovery apply in judicial review proceedings as in other civil proceedings, having regard to the nature of judicial review, it is more difficult to establish the tests of relevance and, in particular, necessity.

22. I conclude this very brief review of the legal principles by referring to Hogan & Morgan *Administrative Law in Ireland* (4th ed., 2010) where, having reviewed the authorities, the distinguished authors stated (at para. 16-69) that "*discovery in judicial review applications is thus generally confined to cases where information is improperly withheld or where there is a relevant and material conflict of fact in the affidavits*" (para. 16-69, p. 846).

23. I adopt these principles in considering whether the applicant is entitled to the discovery sought against the Board.

24. As regard the applicant's application for discovery against the notice parties, the position of the notice parties on the question as to whether discovery can be sought against a notice party in judicial review proceedings is reserved. I am proceeding on the basis that it is possible to obtain discovery against notice parties in judicial review proceedings. However, having regard to the nature of judicial review proceedings and the types of issues which generally arise in such proceedings, the circumstances in which discovery will be ordered against notice parties to such proceedings are likely to be rare. In my view, if discovery is to be sought against notice parties in judicial review proceedings, it will generally be necessary to establish the existence of some special or exceptional circumstance. The fact that it is in principle open to seek discovery from a notice party in judicial review proceedings can be seen from the decision of the High Court (McGovern J.) in *Callaghan v. An Bord Pleanála* [2015] IEHC 235 ("*Callaghan*"). In that case, discovery was sought by the applicant against the Board and against notice parties to judicial review proceedings. The court considered the discovery sought against the notice parties and refused that discovery. However, it did not do so on the basis that there was no entitlement in principle to seek discovery against a notice party in judicial review proceedings. In my view, it is possible in principle to seek such discovery, and I will proceed to deal with this application for discovery against the notice parties on that basis.

Decision on the Categories of Discovery Sought

Category 1: Discovery re Ground No. 3: *Raised Plateau*
25. In category 1, the applicant seeks discovery of documents from the Board and from the notice parties which it says are relevant and necessary for the purposes of ground No. 3 of its grounds of challenge in respect of the Board's decision. This is the ground which concerns the "*raised plateau*" on the Western Fields portion of the development lands which raises the issue of project splitting. The category of discovery sought as against the Board in respect of this issue is described in almost exactly the same terms as that sought against the notice parties.

26. The documents sought in this category are as follows:-

> *"All documents tending to disclose, record or assess the purpose of the development of the 'raised plateau' on the Western Fields including, all planning documents, instructions to technical and design team, and all technical and design documents and/or contracts for the full works required for the development of the said 'raised plateau' on the Western Fields."*

(a) Discovery for the Board

27. I will deal first with the applicant's application for discovery of this category of documents as against the Board. I have carefully considered the written and oral submissions made by the parties in relation to this category. In very brief (and no doubt imperfect)

summary, the applicant states that, on the basis of the pleadings, there is a factual dispute between the parties as to the purpose of the "*raised plateau*" on the Western Fields. The applicant maintains that it will be necessary to resolve that factual dispute in order to deal with the issues raised in ground No. 3 concerning the avoidance of the Seveso provisions and project splitting. The applicant contends that because of that dispute, it is necessary for it to obtain discovery from the Board of the documents referred to in this category.

28. The Board contends that there is no requirement for discovery of the documents sought in this category. The Board relies on the fact that s. 146(5) of the 2000 Act requires the Board to make available for public inspection, the documents relating to the application and that such documents are required to be placed on the public planning file and made available for inspection. It submits that the only documents which it has in relation to the intention of the notice parties with regard to the "*raised plateau*" are those contained on the public planning file. The Board did acknowledge, however, in oral submissions that the Board's minutes, while available for public inspection, are kept separately as a book of minutes rather than detached and placed on the individual public planning file in respect of the particular application. In addition, it is said that the Board publishes electronically certain documents such as Board directions, Board orders and inspectors' reports.

29. I am not satisfied that the applicant has established that it is necessary for it to obtain discovery from the Board of the documents covered by this category, at least in the form sought. I do not believe that discovery of the documents falling in this category is required for disposing fairly of the proceedings. The applicant was in a position to plead, at para. E(42) of the statement of grounds, that the "*raised plateau*" is "*manifestly for the sole purpose of facilitating the development of the waste transfer station in the future".* The applicant was in a position to advance that plea on the basis of the information which it already has and which it has obtained from the public planning file (including the record of the meeting on 16th July, 2015 during the pre-application consultation process in which reference is made to the removal of the waste transfer station from the intended planning application). I do not accept that the pleas contained at para. 30 of the Board's statement of opposition are such as to give rise to a fundamental factual dispute as between the applicant and the Board in relation to the purpose of the "*raised plateau*". The applicant having pleaded that the "*raised plateau*" is "*manifestly for the sole purpose of facilitating the development of the waste transfer station in the future*", the Board pleaded in response, at para. 30 of the statement of opposition, that it denied that this was the "*only possible purpose*". The Board then expanded on that plea and stated that the construction of a level site on the western side of the lands "*may simply prepare the site for a range of potential applications, which need not necessarily involve waste transfer station and which may or may not require to be the subject of an EIA*". I do not accept that these pleas give rise to a factual dispute requiring discovery of the categories sought. However, the principal reason that I have concluded that discovery of these documents is not necessary is that I accept the submission of the Board that discovery of these documents is not required having regard to the statutory requirement on the Board under s. 146(5) of the 2000 Act to make available all documents relating to the application and that it does so in the form of the public planning file to which the applicant has had access.

30. In this regard, I take a similar approach of that taken by McGovern J. in *Callaghan*. I am not persuaded that it is necessary for fairly disposing of this aspect of the applicant's claim that the applicant obtains discovery of this category of documents.

31. However, there is no doubt that the documents sought from the Board in this category are relevant to an issue in the proceedings. Insofar as all of the documents relevant to this issue are on the public planning file (as submitted by the Board), I would not be prepared to make an order for discovery of the documents sought as I would not be satisfied that it is necessary for the fair disposal of the claim. However, it was indicated that some documents (Board minutes were mentioned) are not placed on the public planning file but are made available to the public by a different means. It was also the case in *Callaghan* that the Board provided some documents (internal administrative emails) which were not placed on the public planning file in that case (*Callaghan*, para. 19, page 8). Counsel for the Board stated in oral submissions that "*everything the Board knows about the raised plateau is on the public file*" (Transcript 8th February, 2019, p. 29). I have no reason at all to doubt that that is the case. However, it has not been put on affidavit by the Board in response to the applicant's discovery application as there was no replying affidavit from the Board to the applicant's application for discovery. There was a replying affidavit on behalf of the Board in *Callaghan.* I make no criticism of the fact that there is no replying affidavit in this case and I entirely accept that it may well be as a result of the fact that the application has had to be dealt with very expeditiously in light of the impending trial date. In the circumstances, while I am not satisfied that it is necessary for the applicant to obtain discovery of the documents sought in category 1, I believe that it is appropriate to and I will direct that the Board swear an affidavit confirming (assuming that to be the case) that it did not have in its possession at the time of the decision, any documents falling within this category which are not on the public planning file required to be made available under s. 146(5) of the 2000 Act. In the event that the Board did have in its possession at the time of the decision any documents falling within this category which are not on that file, the Board should identify those documents and where they are to be found, in the affidavit I have directed to be sworn. I will hear counsel as to the time period within which that affidavit must be provided.

(b) Discovery from the Notice Parties

32. Turning now to the applicant's application for discovery of the documents in this category as against the notice parties, I am not satisfied that the applicant is entitled to an order for discovery of these documents from the notice parties. I accept the submissions advanced by the notice parties that discovery of documents which may be held by it but not by the Board is not necessary for fairly disposing of the issues raised in ground No. 3 of the applicant's statement of grounds. The court will have to assess the Board's decision as of the date in which the decision was made and on the basis of the documents which were before the Board when that decision was made.

33. I do not accept that as part of that exercise, the court should look at documents in the possession of the notice parties which were not before the Board whether in the sense of those documents being on the public planning file or otherwise in the possession of the Board. As I indicated earlier, while I accept that discovery in principle can be sought against notice parties to judicial review proceedings, such discovery will generally be ordered only in exceptional circumstances. Having regard to the terms of the ground of challenge at issue here (the Seveso/project splitting ground), the nature of the exercise which the court will be required to undertake in reviewing the decision of the Board and the material available on the public planning file, I do not believe that this is an exceptional case in which discovery should be ordered against the notice parties.

34. Therefore, I refuse the applicant's application for discovery against the notice parties in respect of the documents sought in Category 1.

Category 3: Material "*before the Board*"
35. In Category 3, the applicant seeks discovery from the Board of:-

> *"All documents constituting and/or referring to and/or recording information and/or material 'before the Board' (i.e. information actually considered by each Board member individually) during the Board meetings of 10th March, 2017, 3rd*

May, 2018, 9th May, 2018, 15th May, 2018, 17th May, 2018 and 23rd May, 2018."

36. In its letter seeking voluntary discovery dated 7th January, 2019, in Mr. Noonan's affidavit of 18th January, 2019 and in written and oral submissions to the court, the applicant relied in support of its application for discovery of this category of documents on the fact that the Board pleaded in its statement of opposition that the "*full file*", including all submissions made, was "*before*" the Board when it made its decision on the application for planning permission for the proposed development. The applicant further relies on the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, ("*O'Keeffe*"). The applicant contends that what the Board is effectively saying is that while the entire file (consisting of five bankers boxes) was in the Board's possession, the applicant is not entitled to know whether those boxes were even opened at Board meetings, still less whether Board members considered its contents. It submits that O'Keeffe drew a distinction between documents in the Board's possession and those on which the Board relied in making its decision.

37. In response, the Board contends (in correspondence and in submissions) that the documents which were "*before*" the Board for the purposes of its consideration and determination of the relevant planning application are *"the documents relating to the matter"* which are on the public planning file required to be made available under s. 146(5) of the 2000 Act. The Board also relies on the affidavit sworn by Chris Clarke, the Secretary of the Board, on 23rd November, 2018, for the purpose of verifying the Board's statement of opposition and, in particular, on the averment by Mr. Clarke (at para. 11 of his affidavit) that the Board considered the "*file*" at various meetings. The Board's response to the request for discovery of this category of documents is set out in detail in the letter from its solicitors, McDowell Purcell, dated 24th January, 2019. The Board further submits that there is no factual dispute in the proceedings as to the extent of any individual Board member's consideration of particular documents on the file. The Board relies on the fact that the Board is a body corporate under s. 103 of the 2000 Act and its decisions are made by that body corporate. It is further pointed out in correspondence and in submissions that the Board does not generate or keep records as to what precise documents were considered by individual Board members and that, consequently, what is being sought in this paragraph is for the Board to create documents which do not exist. Finally, the Board rejects the contention that the discovery sought by the applicant is supported by *O'Keeffe*. It further notes that *O'Keeffe* was decided prior to s. 146 of 2000 Act and the earlier provisions which imposed an obligation on the Board to keep a public file.

38. I have carefully considered all of the correspondence, pleadings and affidavits and submissions on this issue (including those which I have not summarised in the preceding paragraphs). I have concluded that the applicant has not established that it is necessary for it to obtain discovery of the documents sought in this category. The principal reason why I do not believe that discovery is necessary is because of the fact that the Board is required by virtue of s. 146(5) of the 2000 Act to make all documents relating to the application available for inspection by the public. I accept the submission of the Board that the Board is a statutory body corporate (pursuant to s. 103 of the 2000 Act) and that it takes decisions on applications before it on a corporate basis. The Board's statement of opposition pleads that the "*full file*" including all submissions made was before the Board when it made its decision. The Board's statement of opposition is verified by an affidavit sworn by Mr. Clarke (the Secretary of the Board), by Dr. Kelly (the Board's former Chairperson) and by Mr. Boland (the Board's former Deputy Chairperson). Mr. Clarke expressly states (at para. 11 of his affidavit) that the Board considered the file at meetings of the Board which are referred to in that paragraph. The Board's solicitors' letter dated 24th January, 2019 in response to the discovery request asserted, in respect of this category documents that:

> *"The extent of any individual member's consideration of the file is not a relevant issue for a judicial review. It is the corporate consideration and decision that is important."*

39. I accept that contention for the purposes of this discovery application. The Board's solicitors' letter went on to state that the Board does not generate or keep records as to what precise items were considered by particular members. The letter furthered stated as follows:

> *"The law requires that the Board consider all relevant material. All material held by the Board and relating to the case is relevant. All material relating to the case is required by the Act to be placed on the file, and is available there for inspection."*

40. I accept, for the purposes of the discovery application, that this is a correct statement of the position and that (a) the Board is required to consider all relevant material relating to an application; (b) all material held by the Board relating to the application is relevant; (c) all material relating to the application is required under s. 146(5) of the 2000 Act to be placed on the file and to be available for public inspection; (d) the "*full file*" containing all such relevant material was before the Board and was considered by the Board at the meetings referred to at para. 11 of Mr. Clarke's affidavit. I do not believe that it is necessary for the Board to go further and to make discovery of documents (or information) "*actually considered by each Board member individually*" at those meetings, even if such documentation existed (and the Board's solicitors have stated in correspondence that it does not). I am not aware of any precedent for an order such as this. The applicant was not in the position to point to any such precedent.

41. Insofar as the applicant seeks to rely on the duty of candour on the part of the Board as a statutory body whose decisions are subject to judicial review, I fully agree that the Board has a duty of candour (and this issue is addressed in more detail below when dealing with the further relief sought by the applicant at para. 3 of the notice of motion). The Board has a duty to be up front in the manner in which it defends judicial review proceedings. It is not suggested by the Board that it is not subject to that duty. It disputes that it has been in breach of the duty.

42. The Supreme Court very recently commented on this issue in *RAS Medical Limited trading as Parkwest Clinic v. Royal College of Surgeons in Ireland* [2019] IESC 4 ("RAS*").* At para. 6.9 of his judgment, Clarke C.J. stated:

> *"As was noted by Lord Donaldson M.R. in R. v. Lancashire County Council Ex p. Huddleston [1986] 2 All E.R. 941, such parties* [i.e. public authorities] *should conduct public law litigation 'with all cards face upwards on the table'."*

43. There is no example of a case dealing with the duty of candour in which an order for discovery of the type sought in this category has been made.

44. Nor, in my view, does the decision of the Supreme Court in *O'Keeffe* support the making of such an order. That case dealt with a different type of situation and, in any event, pre-dated the statutory requirement in s. 146(5) of the 2000 Act and the preceding statutory requirements on the Board to maintain a public planning file.

45. The Supreme Court in *O'Keeffe* was dealing with the situation where one of the grounds of challenge to a decision of the Board was that the decision was invalid for want of the keeping of a minute of the deliberations of the Board and a list of the material before it. In his judgment (with which all of the other members of the court agreed), Finlay C.J. noted that no request had been made

by the plaintiff in the case to the defendants to establish by affidavit or by other means the material which was "*before*" the Board before it reached its decision. The plaintiff had obtained an order for discovery in general terms. Nowhere in the judgment of Finlay C.J. is there a distinction drawn between documents which were "*before*" the Board when it made its decision and documents "*actually considered*" or "*relied on*" by it in making the decision (to use the words used in the applicant's submissions in this case, at para. 47). On the contrary, Finlay C.J. referred on several occasions to the documents or material "*before*" the Board when it made its decision (see the several references made by Finlay C.J. to documents and material "*before*" the Board at the time it reached its decision on pp. 77-78 of the *judgment*). The decision of the Supreme Court in *Carlow Kilkenny* supports my conclusion that O'Keeffe does not provide a basis for distinguishing between material "*before*" a decision-maker such as the Board and material "*actually considered*" and "*relied upon by*" the decision-maker. In his judgment for the Supreme Court, Geoghegan J. commented on *O'Keeffe* and explained that the judgments of the court in *O'Keeffe* were given in the context of the circumstances of that case where documents from discovery were produced in court without making them evidence in the appropriate way and without any clarification as to whether they were documents which were *"properly before the Board when it made its decision or not"* (per Geoghegan J. at p. 537). Geoghegan J. further stated:

> *"What Finlay C.J. and indeed McCarthy J. were saying was that a decision of An Bord Pleanala could not be impugned on the basis of irrationality without the court knowing what exactly was before the Board and being able to assess whether in the documentation before the Board there was evidence or information to support the decision of the Board."* (per Geoghegan J. at p. 537).

46. In conclusion, I am not satisfied that the applicant has established a basis for obtaining discovery of the documents sought in this category. An order in the terms sought would be very unusual and no precedent for such an order has been provided to me. Nor am I satisfied that the decision of the Supreme Court in *O'Keeffe* provides any support for the making of an order in the terms sought. In my view, having regard to the provisions in s. 146 (5) of the 2000 Act and the matters stated by the Board in its solicitors letter of 24th January, 2019 and in submissions, the applicant has not established that it is necessary for disposing fairly of the judicial review proceedings that it obtains discovery of the documents sought in this category.

Category 2: alleged objective bias documents
47. The applicant sought discovery of documents concerning the alleged objective bias ground advanced by it. The documents sought by it from the Board are contained in category 2 of the discovery sought from the Board. The documents sought from the notice parties are contained in category 2 of the discovery sought from them. A considerable measure of agreement has been reached between the parties in respect of this category.

(a) Discovery from the Board

48. In relation to the discovery sought from the Board, the Board has agreed to make discovery subject to doing so on the basis of an identified methodology designed to ensure that the document searches to be conducted by the Board are "*targeted, reasonable and practicable*" and do not place an unrealistic administrative burden on the Board. In their letter of 24th January, 2019, the Board's solicitors set out in a schedule the methodology of proposed searches which the Board proposed carrying out. The applicant has reasonably and responsibly agreed to that methodology in order to minimise disputes between the parties. However, the applicant has requested that Mr. Boland swear the affidavit of discovery on behalf of the Board in respect of the documents sought in this category, having regard to the allegations of objective bias arising from Mr. Boland's involvement in the decision by reason of an alleged conflict of interest. The applicant submits that where a corporation makes discovery, the order for discovery can require specific officers or members of the corporation to make that discovery. It relies in that regard on *Harrington v. North London Polytechnic* [1984] 1WLR 1293 and *Dummer v. Chippenham Corporation* (1807) 14 Ves. Jun. 245. However, it emerged during the course of the Board's oral submissions that Mr. Boland ceased to be Deputy Chairperson and a member of the Board in December 2018. On the first day of the hearing of the application, counsel for the Board confirmed that the Board would make enquiries as to whether Mr. Boland would be prepared to swear an affidavit notwithstanding that he is no longer a member of the Board. On the second day of the hearing of the application, the Board's counsel confirmed that the Board had been in contact with Mr. Boland and was awaiting a response. She confirmed that while the Board was happy to make the request, it was dealing with the situation where Mr. Boland is no longer a member of the Board and is not an officer of the Board in any capacity.

49. I accept that the retirement of Mr. Boland creates a difficulty for the Board in terms of any order or direction that Mr. Boland should swear the affidavit of discovery in respect of the documents to be discovered under this category. In those circumstances, I will note that the Board has agreed to make discovery of the documents sought in category 2 of the documents sought in Schedule A of the schedule of categories of discovery sought in the notice of motion on the basis of the methodology set out under the heading "Schedule of Proposed Searches" in the letter from McDowell Purcell Solicitors to Noonan Linehan Carroll Coffey Solicitors dated 24th January, 2019. As regards the period within which such discovery should be made, I will consider this further with counsel on the delivery of this judgment. As regards the position of Mr. Boland as deponent, having regard to the fact that he is no longer a member of the Board, I will not direct that Mr. Boland swear the affidavit of discovery in respect of the documents to be discovered under this category unless it is confirmed that Mr. Boland is agreeable to doing so. If Mr. Boland is not agreeable to doing so, then the affidavit should be sworn by another member of the Board. I will give liberty to apply in relation to any issue which arises in relation to this.

(b) Discovery from Notice Party

50. As regards the discovery sought from the notice parties in respect of documents under this category, I was informed on the second day of the hearing that the notice parties have provided an affidavit to the applicant confirming that they have made relevant searches and have found no documents over and above those which they have already exhibited which might fall under category 2. The applicant was satisfied to accept that affidavit in lieu of an order for discovery in respect of the documents in this category. Therefore, no order is required as against the notice parties.

Paragraph 3 of Notice of Motion: Relief re Duty of Candour
51. I now turn to the final relief sought by the applicant as against the Board at para. 3 of the notice of motion.

52. The applicant seeks an order against the Board in accordance with a request made by it in the applicant's solicitors' letter dated 7th January, 2019 and "*in accordance with the [Board's] duties of full disclosure to and full cooperation with*" the court, requiring that the Board *"identify to the court, on oath, all documents relied upon by the Board, and considered by each of its members, in making:*

> *(i) The impugned decision*
>
> *(ii) All and any decisions as to whether or not Conall Boland should participate in making a decision relating to any*

reiteration of the Ringaskiddy Incinerator – in that respect also stating

(1) The precise degree of the decision-maker's knowledge of such documents from time to time and

(2) The full nature and extent of Conall Boland's work, qua RPS employee, for the notice parties and have his disclosure in that regard to the Board and/or Mary Kelly from time to time

(iii) All and any decisions as to whether or not Board members other than Conall Boland should participate in making any decision relating to the Ringaskiddy incinerator".

53. The basis on which the applicant seeks this relief is set out in paras. 97 to 101 and earlier paragraphs of Mr. Noonan's affidavit. The applicant relies on the duty of candour imposed on public bodies in judicial review proceedings. In particular, the applicant relies in support of its application for this relief on:

(i) An alleged lack of clarity as to the precise documents "*actually considered*" by the Board members and "*relied upon them*" in making the decision challenged in these proceedings;

(ii) The alleged vagueness or lack of clarity in Dr. Kelly's affidavit as to the true nature and extent of her knowledge of the full content of a May 2004 RPS report and earlier RPS reports from February 2004 and March 2004;

(iii) The alleged vagueness and inaccuracy in Mr. Boland's affidavit as to the true nature and extent of his work as an employee of RPS insofar and as it related to the notice parties' Ringaskiddy incinerator having regard to the February 2004 and March 2004 reports which the applicant alleges were not disclosed by Mr. Boland to Dr. Kelly; and

(iv) The fact that certain other Board members, but not Mr. Boland, were excluded from participation in the decision challenged in these proceedings.

54. In written and oral submissions to the court, the applicant relies on a number of authorities. They include the decision of Lord Donaldson M.R. in *Huddleston*, in which he memorably stated that public authorities whose decisions are challenged by way of judicial review must conduct those proceedings "*with all cards face upwards on the table" and that "the vast majority of the cards will start in the authority's hands*" (*Huddleston*, per Lord Donaldson M.R. at p. 945). The applicant also relies on the recent observation by Morris J. in the English decision of *R (on the application of Jet2.com Limited) v. Civil Aviation Authorities* [2018] EWC 3364 (Admin) where, in summarising the established principles of the English courts concerning disclosure in judicial review claims, where the duty of candour is well established, the court stated that public authorities must be "*open and honest in giving disclosure and in their affidavits or witness statements"* and that they must identify "*the good, the bad and ugly"* (per Morris J. at para. 48). The applicant places considerable reliance on the statements of the law in England and Wales in a document entitled "*Guidance on discharging the duty of candour and disclosure in judicial review proceedings*" issued by the Treasury Solicitor's Department in England and Wales in January, 2010 (the "*Treasury Solicitor's Guidance*"). In addition to these English authorities, the applicant also relies on some Irish cases, namely *O'Neill v. Governor of Castlerea Prison* [2004] 1 IR 298 ("*O'Neill*"), *Murtagh v. Judge Kilraine* [2017] IEHC 384 (Barrett J.)("*Murtagh*") and the very recent judgment of the Supreme Court in *RAS* (also referred earlier).

55. In response, the Board does not dispute that, as a statutory body defending judicial review proceedings, it is subject to a duty of candour. However, it completely rejects any suggestion of a breach of candour on its part in these proceedings. It observes that unusually affidavits have been sworn in these proceedings on behalf of the Board by Dr. Kelly (its former Chairperson) and by Mr. Boland (its former Deputy Chairperson), as well as by Mr. Clarke, the Secretary of the Board. It further relies on the fact that the planning file is required to be made public and has been made public under s. 146(5) of the 2000 Act. It draws attention to the fact that it has agreed to make discovery of documents in relation to the objective bias issue. The Board further submits that it has been up front about Mr. Boland's prior involvement with RPS and draws attention to para E(48) of the applicant's statement of grounds and para. 33 of the Board's statement of opposition, as well as the affidavits sworn on its behalf. The Board further submits that there is no factual dispute in existence in relation to Mr. Boland's involvement. The Board also disputes the existence of a jurisdiction to make an order in the terms sought by the applicant.

56. I have again carefully considered the submissions of the parties on this issue and have concluded that it would not be appropriate for me to make the order sought by the applicant. I fully accept that public bodies such as the Board, in defending judicial review proceedings, are subject to a duty of candour. This is clear from several Irish cases. It is only necessary briefly to touch on a small number. In *O'Neill*, Keane C.J., in the Supreme Court, described as "*well-founded*" an argument made on behalf of the applicants that "*in judicial review proceedings a respondent should disclose to the court all the materials in its possession which were relevant to the decision sought to be impugned"*, although he stated that respondents would not be required to disclose privileged material (see para. 49 of the judgment of Keane J. in *O'Neill*, at p. 316). In *Carlow Kilkenny*, Geoghegan J. described the respondent in the proceedings as being "*entirely up front in disclosing both its procedures and the documentation which was before it"* (at p. 538).

57. The Irish and English authorities were very helpfully recently reviewed, and the applicable principles in relation to the duty of candour summarised, by the High Court (Barrett J.) in *Murtagh*. I agree with and adopt the principles summarised by Barrett J. at para. 25 of his judgment. It is unnecessary for me to repeat them here. Finally, as pointed out by the applicant, Clarke C.J. in delivering the very recent judgment of the Supreme Court in *RAS* expressly endorsed the card playing metaphor suggested by Lord Donaldson M.R. in *Huddleston* (see para. 6.9 of the judgment of Clarke C.J.).

58. On the question as to whether the court has a jurisdiction to make an order of the type sought by the applicant, I accept that, in principle, if the court were satisfied that there was a clear breach of the duty of candour on the part of a respondent, the court could fashion the necessary remedy to address that breach. However, the sort of remedies which one might expect might be granted in such a situation would include an order for costs, a formal order for discovery in respect of any documents not disclosed, an order precluding the respondent from relying on documents not disclosed and even, in a very serious case, a fine or other penalty for contempt of court. Indeed, I note that these are the sort of orders which are referred to in the Treasury Solicitor's Guidance relied upon by the applicant (see para. 1.6 on p. 8 of that document). I am not aware of any case in which an order of the type sought by the applicant has been made and the applicant has not been in the position to point to any such case. It is not given as one of the examples of the possible orders which could be made in the Treasury Solicitor's Guidance. However, notwithstanding that, I am prepared to proceed on the basis that the court may have a jurisdiction to make an order such as is sought by the applicant in an appropriate case. However, it seems to me that the court could only exercise that jurisdiction in a most exceptional situation, where there was a clear and obvious breach of the duty of candour. I am not satisfied that the circumstances of this case come anywhere

near meeting that test, at least on the basis of the material before me on this interlocutory application.

59. It is unusual, in my experience, for affidavits to be sworn on behalf of the Board, in defending judicial review proceedings, by members of the Board themselves. In this case both the former Chairperson and the former Deputy Chairperson have sworn affidavits as well as the Secretary of the Board. In addition, the planning file has been made available to the public (and the applicant has obtained the file) pursuant to s. 146(5) of the 2000 Act. As well as that, the Board has agreed to make discovery of documents in relation to the issue of alleged objective bias by reason of Mr. Boland's prior involvement with RPS. While the applicant has submitted that Mr. Boland has not fully or accurately described his prior involvement with RPS (and does so in trenchant terms), that contention is disputed by the Board. It may well be open to the court to express a view on that issue following the full trial of the proceedings. However, I do not believe that it would be appropriate for me to do so on an interlocutory application such as this on the basis of the material before me. That is particularly so where I will be hearing the case in a few weeks' time.

60. I am not satisfied that the applicant has established, at this stage of the proceedings, at least, any breach of the duty of candour by the Board in the circumstances alleged by the applicant. If the applicant wishes to challenge Mr. Boland's credibility and the veracity of the averments made by him, it is open to the applicant to seek to cross-examine Mr. Boland. It is well established that where a party wishes to challenge the evidence of another party on affidavit, cross-examination is necessary. This was expressly stated in very forceful terms by Hardiman J. in the Supreme Court in *Boliden Tara Mines Limited v. Cosgrove* [2010] IESC 62 ("*Boliden*"). In that case, Hardiman J. stated:

> "*It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence, an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."* (per Hardiman J. at pp. 17-18).

61. While those observations were not made in judicial review proceedings, very similar comments were made by Clarke C.J. in the recent *RAS* case in the context of judicial review proceedings. At para. 7.2 of his judgment in that case, Clarke C.J. stated:

> *"Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question."*

62. I entirely accept that in order for cross-examination to be effective it is necessary for the cross-examining party to have access to the relevant documents (this was made clear in very vivid terms by Hardiman J. in the judgments he delivered in *O'Callaghan v. Mahon* [2006] 2 I.R. 32 and [2008] 2 I.R. 514 (dissenting in the latter case)).

63. I would merely observe that in the present case the applicant has obtained access to the public planning file and may also obtain further documents on foot of the agreement by the Board to make discovery of documents in relation to the alleged objective bias issue. It is, ultimately, of course, a matter for the applicant as to whether, in light of the reliefs which it seeks in the proceedings and the grounds which it advances for those reliefs, whether it seeks to cross-examine any of the Board's deponents. There is at present no application by the applicant for leave to cross-examine any of the Board's deponents. If such an application is made, it will have to be properly considered on its merits.

64. In conclusion, therefore, for these reasons, I refuse the applicant's application for the relief sought at para. 3 of the notice of motion.

Conclusions

65. I set out my conclusions on the applicant's application below.

(a) Discovery from the Board

66. In relation to the discovery sought by the applicant against the Board, I have reached the following conclusions. With regard to the discovery sought at category 1, I refuse the applicant's application for discovery. However, I direct that the Board swear an affidavit confirming that it did not have in its possession at the time of the decision challenged in the proceedings, any documents falling within this category which are not on the public planning file required to be made available under s. 146(5) of the 2000 Act. In the event that there are documents falling within this category which are not on the public planning file, I direct that the Board identify those documents and where they are to be found, in the affidavit I have directed to be sworn. I will hear counsel as to the time period within which that affidavit must be provided.

67. As regards the discovery sought in category 2, I note that the Board is agreeable to make discovery of the documents sought in this category on the basis of the methodology set out in the Board's solicitors' letter to the applicant's solicitors dated 24th January, 2019. I note that Mr. Boland is no longer a member of the Board but that the Board has made enquiries as to whether he would be prepared to swear the affidavit in respect of the documents to be discovered under this category. The outcome of those enquiries is awaited. In the circumstances, I will not direct that Mr. Boland swear the affidavit unless it is confirmed that he is agreeable to do so. If Mr. Boland is not agreeable to swear the affidavit, I direct that the affidavit be sworn by another member of the Board. I will give liberty to apply in relation to this.

68. As regards the documents sought in category 3 I refuse to direct the Board to make discovery of the documents sought in this category.

(b) Discovery from the Notice Parties

69. As regards the discovery sought by the applicant against the notice parties, I refuse to make an order for discovery against the notice parties of the documents sought in category 1. I note that in relation to category 2, the notice parties have provided an affidavit in terms which are acceptable to the applicant. Therefore, no order arises in respect of category 2.

(c) Para. 3 of Notice of Motion

70. Finally, as regards the reliefs sought at para. 3 of the notice of motion in respect of the duty of candour, I refuse to grant the relief sought by the applicant for the reasons which I have set out earlier in this judgment.

71. While it is not an issue which directly arises in the applications before the court which have given rise to this judgment, the very recent decision of the Supreme Court in RAS was drawn to my attention. I would urge the parties to consider what the Supreme Court has said in relation to the evidential status of discovered and other documents and to take a pragmatic approach which conforms with the principles discussed by the Chief Justice in his judgment in that case.

72. I will hear counsel in relation to the precise terms of the order or orders to be made to give effect to my judgment. I will give liberty to apply.