THE HIGH COURT
JUDICIAL REVIEW

2017 No. 440 J.R

IN THE MATTER OF SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

MAIRE OLIVE PIERSE
EILIN ENRIGHT

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

KERRY COUNTY COUNCIL
DERMOT GODSELL

NOTICE PARTIES

JUDGMENT of Mr Justice Garrett Simons delivered on 30 November 2018

INTRODUCTION

1. The within proceedings seek to challenge a declaration made by An Bord Pleanála pursuant to the provisions of Section 5 of the Planning and Development Act 2000 (as amended) ("PDA 2000"). In brief, An Bord Pleanála determined that work consisting of the forming of two entrances at lands near Listowel, County Kerry constituted "development", and did not qualify as "exempted development". The impugned determination is dated 5 April 2017.

2. Leave to apply for judicial review was granted ex parte by the High Court (Noonan J.) on 29 May 2017. The proceedings are grounded on an amended statement of grounds which was filed on 2 June 2017. The statement of grounds—as is all too often the position—pleads the case at great length. No less than 59 grounds are set out at part (E) of the statement of grounds.

3. An Bord Pleanála has filed a detailed statement of opposition in response, which clearly sets out the basis upon which the Board proposes to defend the proceedings. The Board's statement of opposition is verified by an affidavit sworn on its behalf by Pierce Dillon dated 27 September 2017.

4. The application, the subject-matter of this judgment, is an application for leave to cross-examine An Bord Pleanála's deponent, Mr Dillon, on his affidavit. The application is brought pursuant to the provisions of Order 40, rule 1 of the Rules of the Superior Courts.

5. The parties are in broad agreement as to the legal test governing an application for leave to cross-examine. There is, however, a significant dispute between the parties as to whether this legal test has been met in the particular circumstances of this case. As discussed presently, this dispute arises largely because of the nature of the averments included in Mr Dillon's affidavit. Much of the latter part of the affidavit consists of comment and submission on the legal issues raised in the proceedings. Such material has no place in an affidavit. It is also inconsistent with the *pro forma* affidavit introduced as part of the amendments introduced in 2011 to the judicial review procedure under Order 84 of the Rules of Superior Courts. Whereas I have no doubt that the filing of such a lengthy and detailed affidavit was done with the best of intentions, and was intended to expedite the hearing of the substantive application for judicial review, it has had the unintended consequence of exposing the deponent to the possibility of cross-examination.

6. The application for leave to cross-examine Mr Dillon came on for hearing before me on the morning of Wednesday 28 November 2018.

Procedural Background

7. In order to put the dispute between the parties in context, it is necessary to rehearse briefly the procedural background against which the application for leave to cross-examine is made.

8. As noted earlier, the proceedings seek to challenge a determination by An Bord Pleanála made pursuant to the provisions of Section 5 of the PDA 2000. This section allows An Bord Pleanála to make a declaration as to whether certain acts are "exempted development", i.e. a form of minor development which is exempt from the usual requirement to obtain planning permission. The legal consequences of such a declaration are explained in detail in the judgment of the Court of Appeal in *Killross Properties Ltd. v. Electricity Supply Board* [2016] 1 I.R. 541.

9. Various classes of exempted development are set out *inter alia* in Schedule 2 of the Planning and Development Regulations 2001 (as amended). Even if a proposed development *prima facie* falls within one of the classes, the benefit of exempted development may nevertheless be unavailable. This is because the benefit of exempted development is subject to certain limitations and conditions. Relevantly for the present proceedings, the benefit of exempted development is not available if the proposed development "endangers public safety by reason of traffic hazard or obstruction of road users". See Article 9(1)(a)(iii) of the Planning and Development Regulations 2001 (as amended). This Article was cited by An Bord Pleanála in its determination.

10. One of the grounds relied upon by the Applicants in their amended statement of grounds is to the effect that An Bord Pleanála erred in law in concluding that the proposed development would endanger public safety by reason of traffic hazard and would obstruct road users. This argument is pleaded, in particular, at paragraphs E. 14 to 21 of the amended statement of grounds.

11. An Bord Pleanála has responded to this issue in detail at paragraphs 17 to 21 of its statement of opposition, as follows.

> "17. Without prejudice to the generality of the foregoing, the Board considered the nature and purpose of the entrances formed and the uses of the land on either side of the entrances, namely the agricultural use of the Applicants' lands and the residential nature of the housing estate over which access to and egress from the said agricultural lands would occur. The Board was not required to treat each entrance separately either in the Inspector's report or in the terms of its decision in circumstances where the nature and purpose of each entrance, and the use of the lands on either side thereof, were identical.
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> 18. Further, in this context, the Board relies, in particular, on the contents of paragraph 7.7.6 of the Board's Inspector's report. In explaining her conclusion that Article 9(1)(a)(iii) applied, the Board's Inspector emphasised the residential

nature of the housing estate and the fact that the housing estate currently comprises two cul-de-sacs wherein the gardens of the houses are open plan to the front with no walls or gates. In this context, she concluded, by reference to the *nature* of the extra traffic generated, that the development would cause a traffic hazard. This analysis was based on the Inspector's own inspection of the site, which took place on or about 1st March 2017.

19. The Board's conclusion that the proposed development would endanger public safety by reason of traffic hazard or obstruction of road users was clearly reasonable, rational and therefore lawful in the context of the residential nature and current layout of the housing estate.

20. Furthermore, there was clearly material before the Board to support its decision, including (but not limited to) the Inspector's description of the current nature and use of the lands on the basis of her site inspection and the submissions of Mr Dermot Godsell."

12. An Bord Pleanála's statement of opposition is verified by an affidavit sworn by Mr Pierce Dillon on 27 September 2017. Mr Dillon describes himself as a senior executive officer with An Bord Pleanála. It is common case that Mr Dillon is not a member of An Bord Pleanála, and was not the inspector who dealt with this particular planning case.

13. Mr Dillon's affidavit runs to some 28 paragraphs, and is not in the form prescribed for a verifying affidavit in Form No. 14 in Appendix T of the Rules of Superior Courts (as amended in 2011). (Rules of the Superior Courts (Judicial Review) 2011, S.I. No. 691 of 2011).

14. The first 10 paragraphs of the affidavit set out the chronology of events in terms of the processing of the Section 5 reference, and exhibit certain documentation.

15. The balance of the affidavit, then, consists largely of commentary and submission as to the legal issues in the case. For example, at paragraph 11, it is asserted that the question of whether a particular development would endanger public safety by reason of traffic hazard or obstruction of road users is a matter of planning judgment, within the particular competence and expertise of An Bord Pleanála, a specialist body established by statute, and is subject only to limited review by the High Court on grounds of unreasonableness or irrationality. At paragraph 13 of the affidavit, the nature of the jurisdiction and legal effect of a determination under Section 5 is set out.

16. These are not matters which should be included in an affidavit. Rather, these are matters which should either be set out in a statement of opposition or, more properly, included as part of the written legal submissions to be filed by An Bord Pleanála in advance of the substantive hearing.

17. As noted above, one of the issues raised in the proceedings is as to whether or not An Bord Pleanála had material before it which would justify its finding that the proposed development would constitute a traffic hazard or obstruct road users. During the course of the hearing before me, Senior Counsel on behalf of the Applicants, Mr James O'Reilly, SC, placed some emphasis on this issue in support of his application for leave to cross-examine. It is appropriate, therefore, to consider how precisely this issue is addressed in Mr Dillon's affidavit.

18. Mr Dillon states as follows at paragraph 12 of his first affidavit.

> 12. "While it is ultimately a matter for legal submission, *I say, believe and am advised* that *there was clearly material before the Board to justify its conclusion that the development would give rise to a traffic hazard or obstruction of road users*. In this regard, I note, in particular, the Inspector's description of the nature of the residential context through which access to the field would occur and the aforementioned submissions of Mr Godsell who was concerned about the nature of the traffic generated."
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> *Emphasis not in original.

19. This averment has to be seen in the context of paragraph 20 of the statement of opposition which, it will be recalled, reads as follows.

> "20. Furthermore, there was clearly material before the Board to support its decision, *including (but not limited to)* the Inspector's description of the current nature and use of the lands on the basis of her site inspection and the submissions of Mr Dermot Godsell."
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> *Emphasis not in original.

20. The statement by an employee of the Board to the effect that he has been "advised" of certain matters by undisclosed persons is ambiguous, and *might* be read as suggesting that he was advised of these matters by someone with direct knowledge of the appeal. For example, the advice *might* have come from the planning inspector, or even a member of the Board who *might* have provided detail of the Board's deliberations on the appeal. This is something which could usefully be clarified by cross-examination. The outcome of the cross-examination might simply be to clarify that Mr Dillon was merely giving his own opinion having read the inspector's report. If this were to be the outcome, the (short) cross-examination would nevertheless have been of benefit in clarifying the factual position. Without the benefit of cross-examination, however, the Applicants can only speculate.

21. Mr Dillon returns to the issue indirectly at paragraphs 19 and 20 of his first affidavit as follows.

> "19. First, this was material which the Applicants could have but did not put before the Board in support of their case that the development was exempted development. The Applicants were clearly on notice of the traffic hazard issue, having been invited to respond to the Council's referral of 14 November 2016 and the submission of Dermot Godsell of 2 February 2017. I say, believe and am advised that the Applicants cannot be permitted to use this application for judicial review as a vehicle to re-run the substantive subject-matter of the referral and, in that context, to introduce evidence that they could have but did not put before the Board in support of their case.
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> 20. Second, the thrust of this new evidence/material clearly invites the Court to revisit the merits of the Board's assessment as to whether the development will give rise to a traffic hazard or obstruction of road users, something which is impermissible in the context of an application for judicial review."

22. A further affidavit was also filed on behalf of the Applicants' consulting engineer (Tony O'Keeffe). This affidavit is dated 12 February 2018. Having set out part of Mr Dillon's affidavit at paragraph 11, Mr O'Keeffe then states follows at paragraph 5 of his own affidavit.

> "[…] This repeats in substance paragraph 11 of the Statement of Opposition. In the most significant matter that is in dispute between the parties, the affidavit of Mr Dillon does not state from whom the senior executive officer received advice to the above effect."

23. Mr Dillon then filed a further affidavit dated 19 April 2018. He states as follows at paragraph 4 and 5 of this second affidavit.

> "4. As regards Mr Fitzpatrick's Affidavit, I note that Mr Fitzpatrick takes issue with my means of knowledge and also suggests that the filing of Mr O'Keeffe's Further Affidavit is necessary 'by way of rebuttal' to my Affidavit as regards the issue of whether the two farm gates in issue amount to a traffic hazard. However, as is clear from my Verifying Affidavit of 27 September 2017, I offered no personal view or evidence on that issue, which is quintessentially a matter of planning expertise and judgement.
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> 5. Rather, my Verifying Affidavit simply sought to summarise for the Court, on the basis of my review of the Board's file, the chronology of this referral and to identify what the Inspector and the Board concluded in respect of the relevant issue therein. This was done entirely on the basis of the relevant documents on the Board's file, which documents have been exhibited in these proceedings."

24. With respect, the latter part of Mr Dillon's first affidavit, and, in particular, his averment at paragraph 12 go somewhat further than this summary might suggest.

25. The notice of motion seeking leave to cross-examine was issued on 21 June 2018, grounded upon an affidavit of Mr Fitzpatrick, the Applicants' solicitor. A replying affidavit was filed on behalf of An Bord Pleanála by its solicitor, Alice Whittaker, a partner in Philip Lee Solicitors. Ms Whittaker avers as follows in respect of the status of paragraph 12 of Mr Dillon's first affidavit.

> "17. At paragraph 26 of his affidavit Mr Fitzpatrick complains that Mr Dillon cannot aver that there was material before the Board to justify the conclusion that the development would give rise to a traffic hazard or obstruction of road users. He claims that only a member of the Board can explain the basis of its conclusion. However, as is clear from the statement of opposition filed herein, in defending the rationality of its conclusions at the hearing of this application for judicial review, the Board intends to rely on the documentation that was before it, the inspectors report on the Board's direction and its decision. In line with established judicial review principles, particularly with regard to challenges to decisions of the Board, the legality and rationality of the Board's decision stands or falls on the basis of the said documentary material and it is not necessary for a Board member to supplement the same with affidavit evidence."

26. This averment is helpful insofar as it goes. However, the Board continues to rely on Mr Dillon's first affidavit and has not sought to withdraw same. Nor has the Board sough to withdraw paragraph 20 of the statement of opposition.

Legal test

27. The notice of motion seeks an order pursuant to Order 40, rule 1 of the Rules of the Superior Courts. This, then, was the basis on which the application before me was made. There was no attempt to rely on the alternative rule which may be relevant, namely Order 39, rule 1 when read in conjunction with Order 84, rule 26.

28. The parties were in broad agreement as to the legal test governing an application for leave to cross-examine under Order 40, rule 1. Both parties cited the judgment of O'Donovan J. in *Director of Corporate Enforcement v Seymour* [2006] IEHC 369, and the more recent judgment of Baker J. in *Somague Engenharia SA v Transport Infrastructure Ireland* [2015] IEHC 723 ("*Somague*").

29. I respectfully adopt the following passage from the judgment of Baker J. in *Somague* as a correct statement of the legal test.

> "16. The leading case in this jurisdiction remains the decision of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369. These were proceedings under s. 160 of the Companies Act 1990 brought by the applicant and the judgment was given in the application by the applicant to cross-examine the respondent on certain affidavits. The following statement of principle remains good law:
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> > *'In my view, it is axiomatic that, when, in the course of applications to the court which are required to be heard and determined on affidavit, as is the situation in this case, it becomes apparent from the affidavits sworn in those proceedings that there are material conflicts of fact between the deponents of those affidavits, the court must, if requested to do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross examined on his or her affidavit. This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits. However, while it seems to me that, where it is debatable as to whether or not the cross examination of a deponent on his or her affidavit is either necessary or desirable, the court should tend towards permitting the cross examination, at the end of the day it is within the discretion of the court as to whether or not such a cross examination should be directed and that discretion should only be exercised in favour of such a cross examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine.'*
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> 17. Certain matters were apparent from the statement of principle by O'Donovan J. and I set these out below:
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> a. Cross-examination will be permitted if there are material conflicts of fact apparent from affidavits.
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> b. Cross-examination may be required in order to allow a judge to resolve that material conflict.
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> c. The court should tend towards permitting cross-examination but
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> d. The discretion must nonetheless be exercised only if cross-examination is necessary for disposing of the issues
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> e. There may be examined not merely facts taken in the narrow sense but also the construction, or interpretation, or conclusions that a person draws from those facts, and cross-examination may be permitted in those circumstances even if there is no real dispute as to those material facts.

f. Thus opinions and conclusions may be tested by cross-examination both as to their reliability or reasonableness as the case may be."

30. Senior Counsel on behalf of An Bord Pleanála, Rory Mulcahy, SC, submits that the legal test involves a two-fold test: (i) there must be a conflict on material facts, and (ii) it must be necessary to resolve that conflict in order to determine the legal issues in the proceedings. Mr Mulcahy argues that there is nothing in the affidavit of Mr Dillon which requires to be resolved in order to determine the issue in the proceedings, namely whether An Bord Pleanála had material before it to justify its finding that the proposed development would endanger public safety by reason of traffic hazard. It is suggested that while Mr Dillon may have expressed an opinion, it is not in any sense evidence by reference to which the legal issues in the case should be resolved and the trial judge should attach no weight to same.

31. Mr Mulcahy also makes the point that the oral submissions made on behalf of the Applicants at the hearing before me tend to suggest that the true purpose of the application is not so much to obtain the right to cross-examine Mr Dillon, but rather to address a concern which the Applicants have that further evidence or argument will emerge at the full hearing in support of the Board's plea that it did have sufficient material before it.

Discussion and Decision

32. The extent to which a decision maker, such as An Bord Pleanála, is entitled to rely on affidavits filed by persons other than those directly involved in the making of the impugned decision is something which occasionally arises in judicial review proceedings. For example, the applicant in *Westwood Club Ltd. v. An Bord Pleanála* [2010] IEHC 16, raised a preliminary point as to the propriety of a senior executive officer, who was not a member of An Bord Pleanála and who did not attend at Board meetings, swearing the verifying affidavit. On the particular facts of that case, Hedigan J. concluded that the affidavit filed in those proceedings was in order.

33. It appears from the oral submissions made before me—and as helpfully highlighted by Senior Counsel for the Board—that at least part of the Applicants' motivation for the bringing of the application seeking leave to cross-examine in the present case is a concern that at the substantive hearing new arguments will be introduced by the Board in order to bolster its plea that it had sufficient material before it to justify the finding in respect of traffic hazard/obstruction of road users.

34. These, however, are matters for the trial judge hearing the substantive application. The only matter before me is an application for leave to cross-examine. I am required to determine that application by reference to the relevant case law and, in particular, the test as set out by O'Donovan J. and Baker J.

35. Whereas the general position is that leave to the cross-examine will only be granted in respect of a conflict in respect of what might be described as *primary facts*, both judgments do suggest that, in at least some circumstances, it will also be appropriate to grant leave to cross-examine in respect of *inferences* to be drawn from primary facts. The point has been summarised by Baker J. in *Somague* as set out earlier to the effect that cross-examination may be appropriate to examine not merely facts taken in the narrow sense, but also the construction, or interpretation, or conclusions that a person draws from those facts, and cross-examination may be permitted in those circumstances even if there is no real dispute as to those material facts.

36. Much of the difficulty in the present case flows from the fact that An Bord Pleanála chose to file a very detailed and lengthy affidavit in support of its statement of opposition. Whereas it can sometimes be useful for parties to file an affidavit which sets out, in neutral terms, the chronology of events and exhibits any documents which may have been omitted by applicants in their affidavits, it is not, in my view, appropriate to use an affidavit as a vehicle for what are really legal submissions.

37. One of the issues for determination at the substantive hearing is whether there was sufficient material before An Bord Pleanála to justify its decision on the traffic hazard / road obstruction issue. The resolution of this issue will necessitate, first, identifying precisely the material which was relied upon by the Board in reaching its decision, and, secondly, determining whether that material was capable of supporting the Board's decision. (The Board will presumably argue that this latter exercise must be carried out by reference to the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39).

38. The averments at paragraph 12 of Mr Dillon's first affidavit are potentially relevant to both of these issues. Indeed, it is to be presumed that the averments were included in the affidavit precisely because same were considered by Mr Dillon, and by the Board's solicitors who filed the affidavit, to be relevant to the issues in the proceedings. It may be, of course, that the judge hearing the substantive action will ultimately rule that the affidavit evidence in this regard is inadmissible as hearsay or as opinion. That possibility is not, however, dispositive of the question of whether leave to cross-examine should be granted. The test is whether cross-examination is necessary for the purpose of disposing of the issues which the court has to determine. The trial judge will have to ascertain what material was before the Board, and for so long as the Board continues to rely on Mr Dillon's first affidavit and paragraph 20 of its statement of opposition, it will be necessary to clarify what he means when he says he has been "advised" that there was clearly material before the Board to justify the conclusion that the development would give rise to a traffic hazard or obstruction of the road users.

39. If a deponent chooses to wade in and to address what are the very issues for determination in legal proceedings, and, further, sets out his view on the basis that he has been advised of same by some undisclosed party, then I think that the other side is entitled to challenge that by way of cross-examination. As I say, it may well be that not much will arise from such a cross-examination, and Mr Dillon will explain that he was merely expressing his own opinion on matters which are for the court to decide. Nevertheless, I think that when a deponent has set out his opinion in such strident terms, the other side must be entitled to at least limited cross-examination. If the cross-examination turns out to be a short one, this does not detract from the entitlement of the other party to have that right of cross-examination.

Proposed Order

40. In the circumstances, I will make an order pursuant to Order 40, rule 1 of the Rules of the Superior Courts directing that Mr Dillon attend the hearing of the substantive application for judicial review for the purposes of cross-examination. I will further direct that, in the event of his non-attendance, the entirety of his affidavit is to be disregarded.

41. Obviously, the cross-examination should not extend to those parts of the affidavit which consist purely of legal submission (such as at paragraphs 13 to 15 of the first affidavit). I have also given some consideration as to whether to attach terms to my order, stating that the cross-examination must be limited in some way. In particular, I considered whether the order directing that the cross-examination be expressly confined to the issue of traffic hazard / obstruction. On balance, however, I think that the precise ambit of the cross-examination is something which should be left to the trial judge. He or she will be in a better position to rein in any attempt by the other side to go beyond what is strictly necessary to establish the weight, if any, to be attached to Mr Dillon's averments.

42. I will hear counsel as to the precise form of order and as to the order, if any, which should be made in respect of the costs of the application for leave to cross-examine.