Neutral Citation: [2015] IEHC 705

THE HIGH COURT

Record No: 2014/331 JR

Between:

JOHN BRADY
– and –
GAYLE BRADY

Applicants

– and –
WICKLOW COUNTY COUNCIL

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 13th November, 2015

Part 1: Background

1. Mr Brady is a successful Sinn Féin politician. He has been a councillor since 2004. He narrowly missed out on election to the Dáil in 2011. He has recently been re-elected a Wicklow county councillor, 'topping' the poll in Bray. During the course of his political career, he has sometimes made criticisms of local government. In May 2013, he supported a 'sit-down' protest by a number of homeless women at Bray Town Council (since subsumed into Wicklow County Council). In August 2013, the Town Council sought to bill him for certain security costs arising from that dispute. The previous month, Mr Brady's Council-owned house was selected – he says 'targeted'; the Council denies this – for a random Council inspection. Thereafter, Mr and Mrs Brady received a letter from the Council advising that their attic conversion posed a fire risk. Mr and Mrs Brady were more than mildly surprised by this letter. They claim some of their neighbours have done the same conversion. They claim too that the houses in their estate were effectively pre-designed to allow for precisely the extension they undertook. A protracted dispute ensued between the Council and the Bradys. This led, in March 2014, to Mr and Mrs Brady being served with a 'Notice to Quit' the home where they had lived, with their family, for almost 13 years. Thereafter Mr and Mrs Brady commenced the within proceedings in which they seek a variety of administrative law and other reliefs. The Council, for its part, denies any wrongdoing. It appears from the documentation before the court that the Council and certain of its staff are particularly irked by certain allegations of bad faith and misfeasance in public office made by Mr and Mrs Brady.

Part 2: Discovery in Judicial Review Proceedings

2. In *Carlow Kilkenny Radio Limited v. Broadcasting Commission of Ireland* [2003] 3 I.R. 528, the applicants were unsuccessful applicants in a competition held by the Broadcasting Commission to award franchises to radio broadcasters in Counties Carlow, Kilkenny and Kildare. Having been granted leave to seek relief by way of judicial review by the High Court, the applicants brought a motion on notice seeking discovery of various categories of documents. The High Court refused the motion for discovery in respect of eleven of thirteen categories sought. The applicants appealed unsuccessfully to the Supreme Court In his judgment, Geoghegan J. considered the law applicable to discovery in judicial proceedings, observing at 537:

> *"The established English and Northern Irish jurisprudence, which would seem to be in conformity with our own principles of discovery, is to the effect that discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery. Likewise, if the application for judicial review is on the basis that the decision being impugned was a wholly unreasonable one in the Wednesbury sense, discovery will again not normally be necessary because if the decision is clearly wrong, it is not necessary to ascertain how it was arrived at. 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 not 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."*

3. In *Fitzwilton Limited v. Judge Alan Mahon and Others* [2006] IEHC 48, Laffoy J. was confronted with an application for discovery in the context of judicial review proceedings where, *inter alia*, a declaration was sought that the Mahon Tribunal on planning and payments had failed to comply with its own terms of reference in electing for a public hearing into a particular payment, which public hearing was contended to be *ultra vires* the respondents and in breach of the applicants' constitutional rights. In the course of dismissing the application for discovery, Laffoy J. indicated, at p.12 of her judgment, her view that the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings, albeit that *"the practical application of those principles may result in discovery being less frequently ordered in judicial review proceedings than in other civil proceedings."* After considering the then recent authorities, Laffoy J. concludes, as follows, at 16:

> *"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 an application is founded or the state of the evidence."*

4. In *Evans v. UCC* [2010] IEHC 420, the question before the court was the ambit of discovery in judicial review proceedings which, in that case, sprang from a recommendation by the Head of the School of Medicine at University College Cork, that had the potential to impact on a particular lecturer's future livelihood, and on his constitutional right to a good name. At paras. 5–6 of his judgment, Hogan J. succinctly identifies the principles applicable to discovery generally and to discovery in the context of judicial review proceedings. Per Hogan J:

> *"5. Before considering the merits of this application, it is scarcely necessary to recall that discovery will only be ordered where the tests of both relevance and necessity are satisfied: see, e.g. PJ Carroll & Co. Ltd. v. Minister for Health and Children (No. 2) [2006] IESC 36….In this context, relevance is determined by the pleadings, see e.g., the comments of Murray J. in Framus….The scope of discovery must thus accommodate itself to the parameters of the case as pleaded rather than the other way around. In this regard, I cannot accept…the argument advanced…for the applicant that the decision of the House of Lords in Tweed v. Parades Commission for Northern Ireland [2007] 1 A.C. 650 is of any material assistance to his case. Prior to that decision, the various courts in the UK had been reluctant to order discovery in judicial review save by reference to what Lord Carswell described in Tweed as the 'restrictive rule' that effectively precluded any orders for discovery in judicial proceedings save where there was a clear contradiction or inconsistency in the affidavits sworn by the respondent public body. That has never been the situation in this jurisdiction, either in theory or (just as importantly) in practice. It is equally clear that Tweed is now authority in the United Kingdom for the proposition that discovery can be more extensive in cases involving a challenge to the proportionality of any administrative decision. But that is equally an unexceptionable proposition so far as this jurisdiction is concerned.*
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> *6. A further consideration is that, in the words of …Bingham MR for the English Court of Appeal in R. v. Health Secretary,*

ex p. Hackney LBC (July 29, 1994) it is not open to an applicant…'to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertion that the applicant, or the plaintiff, is otherwise unable to substantiate.' Added to this is the factor that while…[the Rules of the Superior Courts make clear] that the ordinary discovery rules apply in judicial review applications, this is tempered by the consideration that the essential facts are generally not in substantial dispute in judicial review applications. In addition, it should be noted that as judicial review is normally concerned with procedural matters rather than substance, this will inevitably limit the range of documents which are both relevant and necessary in judicial review matters: cf. the reasoning of Geoghegan J. in Carlow Kilkenny Radio".

5. In the recent case of *McEvoy v An Garda Síochána Ombudsman Commission* [2015] IEHC 203, McDermott J. was presented with an application for discovery in the context of proceedings in which Garda McEvoy had been granted leave to seek judicial review of a decision of the Ombudsman Commission deeming a particular complaint to be admissible. After referring briefly to some applicable case-law, McDermott J. indicates, at pp.18–19, that the issue of discovery in judicial review proceedings falls to be approached on the following basis:

"(1). An order for discovery should only be granted where the applicant seeking discovery establishes that it is relevant and necessary for the fair disposal of the issues in the case in the sense indicated by Brett L.J. in the Peruvian Guano case.

(2). The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings.

(3). A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient.

(4). Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.

(5). Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery.

(6). If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached.

(7). Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is prima facie evidence to the effect that a document that ought to have been considered before a decision was made was not or a document which not to have been seen before a decision was made, was considered.

(8). The court must consider whether discovery is necessary having regard to the grounds upon which the application was founded or the state of the evidence….But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker.

(9). An applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate. It is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit."

6. Both parties to the within application appear to accept that the above principles represent a good statement of the present law.

Part 3: 'Fishing Expeditions'

7. As will be seen hereafter, in a number of instances the Council has thus far declined to volunteer certain requested categories of documentation to Mr and Mrs Brady on the basis that in seeking those documents the Bradys are engaged in a so-called 'fishing expedition'. This is a metaphor often deployed in discovery proceedings. It has been used by the court on occasion. There is even a hint of it in the principles cited above. Yet when greeted with metaphors of this type, this Court cannot but recall the observation of the American judge, Cardozo J., in the so-called 'veil piercing' case of *Berkey v. Third Avenue Railway Co* 244 N.Y. 84 (1926), 94, that *"[M]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."* What the Council seems to be claiming when it refers to Mr and Mrs Brady engaging in a 'fishing expedition' is that the documentation to which this metaphor is applied is irrelevant and/or unnecessary and that, while all discovery is to some extent a voyage into the unknown, some line of proportionality and/or reasonableness has been crossed. If irrelevance and/or lack of necessity, coupled with some element of disproportionality and/or unreasonableness is what is meant, then it seems best that this be said expressly. Issues of relevance, necessity, proportionality and reasonableness are issues that a court of law can grapple with and adjudicate upon. The rather opaque term 'fishing expedition', though often encountered in discovery applications, in truth seems best left to the columns of *Irish Angler's Digest.*

Part 4: Documentation Sought, Responses Received, Conclusions Reached

8. Six categories of documentation have been sought. The court identifies these categories below, the response received from the Council, and the court's conclusion.

9. **Category 1: All documents, notes memoranda and records, whether paper, electronic, digital or otherwise in its power, possession or procurement relating to the Council's decision to inspect and/or select for inspection the Applicants' home, the inspection of their home on 29th June, 2013, by the Councils' servants or agents, and the contents, writing and approval of a letter of 31st July 2013 (the initial letter concerning the attic extension) from the Council to the Applicants.**

10. Council response to request for voluntary discovery. The Council contends that this request is a 'fishing expedition' whereby documentation is being sought to 'shore up' allegations of bad faith and misfeasance in public office made by Mr and Mrs Brady.

11. Court's decision. To borrow from the wording of Geoghegan J. in Carlow Kilkenny, it appears to the court that "there is a clear

factual dispute on the affidavits that would have to be resolved in order properly to adjudicate". Here that dispute concerns the rationale for the inspection of Mr and Mrs Brady's home in July 2013, which inspection was the starting-point of a process that ended with the issuance of the Notice to Quit. The court will **order** production of this relevant and necessary category of documents.

12. **Category 2: All documents, notes, memoranda and records, whether paper, electronic, digital or otherwise, in its power, possession or procurement relating to further inspections carried out by the Respondent between 31st July, 2013 and 1st June, 2014; the decision to issue the Notice to Quit dated 12th March, 2014; and the demand for possession made at the Applicants' premises on 23rd April, 2014.**

13. Council response to request for voluntary discovery. Same response as to Category 1, save that some of the documents have been included in the affidavit evidence before the court.

14. Court's decision. The court's decision is the same as regards Category 1. Thus the court will **order** production of this relevant and necessary category of documents, save to the extent that the relevant documents have already been furnished to Mr and Mrs Brady as part of the affidavit evidence before the court, in which case the relevant documentation is merely to be identified by the Council.

15. **Category 3: All documents, notes, memoranda and records, whether paper, electronic, digital or otherwise, in its power, possession or procurement relating to letters of 22nd April 2014, 23rd April, 2014, 21st May, 2014 and 30th May, 2014 (to which letters there was no response).**

16. Council response to request for voluntary discovery. The Council has declined to make voluntary discovery of such documentation, it seems on the basis that it is not relevant and also on the basis that it is privileged.

17. Court's decision. To borrow again from the wording of Geoghegan J. in *Carlow Kilkenny*, it seems to the court that *"there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate".* Here, the dispute arising is an assertion by (a) the Council, on the one hand, that matters evolved as they did because Mr and Mrs Brady did not engage properly with the Council, and (b) Mr and Mrs Brady that they sought to engage with the Council but correspondence to the Council repeatedly went unaltered. The court will order production of this relevant and necessary category of documents, save that if the Council considers that any or all of the documentation sought is privileged, it can proceed in the usual manner by listing the relevant documents individually, providing a general description of each such document and indicating the type of privilege claimed in the affidavit of discovery.

18. Category 4: All documents, notes, memoranda and records, whether paper, electronic, digital or otherwise, in its power, possession or procurement relating to plans or drawings concerning the Applicants' house.

19. Council response to request for voluntary discovery. The Council declines to make voluntary discovery of such documentation because it maintains Mr and Mrs Brady should have this documentation.

20. Court's decision. Mr and Mrs Brady do not have this documentation. They rent a house from the Council and the court rather doubts it is general practice for local authorities to provide plans and drawings of rented accommodation to tenants of local authority housing. This documentation is patently relevant and necessary as regards the claims made by the Council in respect of the structure of Mr and Mrs Brady's home, the *imbroglio* that has ensued, and the issuance of the Notice to Quit. In each regard, to borrow again from the wording of Geoghegan J. in Carlow Kilkenny, it seems to the court that *"there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate".* The court will order production of this relevant and necessary category of documents.

21. **Category 5: All documents, notes, memoranda and records, whether paper, electronic, digital or otherwise, in its power, possession or procurement relating to standard letters of consent in respect of attic conversions issued to tenants between 2004 and June 2013 by Bray Town Council, and all documents consenting to the attic conversions at the house next door to the Applicants.**

22. Council response to request for voluntary discovery. The Council contends that this request is a 'fishing expedition' whereby documentation is being sought to 'shore up' allegations of bad faith and misfeasance in public office made by Mr and Mrs Brady.

23. Court's decision. To borrow from the wording of Geoghegan J. in Carlow Kilkenny, it seems to the court that *"there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate".* Here that dispute concerns the rationale for the inspection of Mr and Mrs Brady's home in July 2013, which inspection was the starting-point of a process that ended with the issuance of the Notice to Quit. The court will **order** production of this necessary category of documents, save that, to satisfy the requirement of relevance, the court will limit the required discovery to such documents, etc., that were issued between the dates indicated and which concern houses on the estate where Mr and Mrs Brady live.

24. **Category 6: All documents, notes, memoranda and records, whether paper, electronic, digital, or otherwise, in its power, possession or procurement relating to rental records in respect of the Applicants.**

25. Council response to request for voluntary discovery. The Council, as part of the proceedings, has claimed that Mr and Mrs Brady failed to pay adequate rent at certain times. Mr and Mrs Brady claim there was an agreement between them and the Council in this regard. The Council contends that as Mr and Mrs Brady are able to answer the claim, they do not need the documentation sought.

26. Court's decision. To borrow from the wording of Geoghegan J. in Carlow Kilkenny, it seems to the court that "there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate". The court will order production of this relevant and necessary category of documents.

Part 5: Conclusion

27. The court is advised that there is a fairly discrete number of documents that will fall to be released pursuant to this application. Certainly, all of the documents sought seem of a fairly innocuous nature, and convincing and reasonable rationales have been offered by Mr and Mrs Brady from the outset for seeking them. The court has slightly modified one of the six categories of documentation sought, though only slightly. The Council had every legal right to object as it did to production of the various documents sought of it by Mr and Mrs Brady; but just because one is entitled to do something does not always mean that one ought to do that something