THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 140
[2020 No. 74 JR]

BETWEEN
BRIAN FLANNERY, JIM NOLAN AND PATSY KEARNS AS TRUSTEES OF KEVIN'S GAA
APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
TEMPLOGUE SYNGE STREET GAA, DUBLIN CITY COUNCIL AND BARRY CARROLL
NOTICE PARTIES

Judgment of Humphreys J. delivered on Friday the 12th day of March, 2021

1. Planning permission was granted for a development on the site to which these proceedings relate in 2006. That permission expired and the board did not permit it to be renewed.

2. The present application was made on 10th April, 2019 and was refused by Dublin City Council on 4th June, 2019. The developer appealed to the board on 28th June, 2019.

3. At a board meeting on 22nd November, 2019 the board gave a direction to grant permission and the formal decision was made on 26th November, 2019 permitting the developer to build apartments and a new GAA clubhouse on a portion of the developer's playing fields including a crèche and an ESB substation.

4. Sometime thereafter an error in the decision was noticed (reference to the wrong Special Area of Conservation (SAC)) and a memorandum from an official of the board was prepared on 2nd December, 2019 pointing out the error.

5. At a board meeting on 3rd December, 2019 a direction was issued to correct what was described as a "clerical error".

6. On 4th December, 2019 the board made a formal decision under s. 146A of the Planning and Development Act 2000 amending the prior order, although the amending decision did not refer to it being a "clerical error".

7. A statement of grounds in the present proceedings was filed on 29th January, 2020, the primary relief sought being *certiorari* of the board's decision. Leave was granted on 6th February, 2020 and the matter entered into the Commercial List on 8th September, 2020. It was then transferred to the Commercial Planning and Strategic Infrastructure Development List.

8. A statement of opposition of the board was filed on 2nd October, 2020 verified by an affidavit of Mr. Pierce Dillon, Senior Executive Officer of the board. The applicants then unsuccessfully sought agreement to interrogatories, and issued a motion seeking leave to deliver such interrogatories. They then changed tack and decided that they did not need leave to serve interrogatories by virtue of O. 63A RSC, but the parties agreed to treat the

motion as being a motion to compel replies to those interrogatories. Insofar as the motion related to striking out averments on behalf of the first notice party or alternatively discovery it was adjourned for separate consideration by consent (and for completeness I can record that it was eventually disposed of by noting that (by consent) the impugned averments were to be construed as statements of the notice party's position before the board and not as statements of independent fact, with no other order and (following a contest on that issue) no order as to costs).

9. The notice parties did not get involved in the present application.

Substance *versus* procedure in terms of disclosure

10. There has been inordinate emphasis in some of the jurisprudence on the particular method chosen to obtain information in litigation. One might even say that a dubious practice has developed of "sending the fool further", whereby, whatever method is chosen, the other side will argue that some other method is more appropriate. One can ask for discovery, disclosure, particulars, interrogatories, cross-examination or directions from the court, but one can almost guarantee that in the majority of contested cases the court will be urged to refuse such an order on the basis that the wrong method has been chosen. To their immense credit counsel for the board did not try such arguments here.

11. A prominent example of this approach is *Armstrong v. Moffatt* [2013] IEHC 148, [2013] 1 I.R. 417, to which I will return. A far more productive methodology is to deal with the substance of whether a particular piece of information should be provided having regard to all the circumstances, and then turn to the wide jurisdiction to fashion the appropriate remedy. The relevant circumstances include:

    (i). possible saving of time and costs (certainly not enhanced by demanding new motions be brought, with no guarantee they will turn out to be the right ones either);

    (ii). the doing of justice (part of which is providing a clear path to a remedy for the party seeking the information); and

    (iii). avoiding an undue burden on the party providing the information.

12. If the answer to the primary question is that the information should be provided, then the precise mechanism for doing so can be addressed as a secondary question. Indeed, an order may not in fact be necessary. The court can just encourage that to be done and that may be enough: see *Griffin v. Irish Aviation Authority* [2020] IEHC 113, [2020] 2 JIC 2603 (Unreported, High Court, 26th February, 2020). If the answer to the primary question is no, then the mechanism does not arise. Perhaps it might even be better if rules of court could expressly provide for more explicit flexibility in the actual remedy in the event of finding that some particular piece of information should be disclosed, albeit not in the manner claimed. But the absence of express rules shouldn't stop the court from fashioning the just and appropriate remedy in the individual case.

13. Maybe the reason *Armstrong v. Moffatt* has become so widely quoted despite, if I may say with great respect, being clearly problematic, is presumably because it suits certain parties to rely on it. I set out a number of the problems with that decision in *Griffin v. Irish Aviation Authority* and in *Somers v. Cosgrave Developments (Dublin) Ltd*. [2020] IEHC 255, [2020] 5 JIC 1801 (Unreported, High Court, 18th May, 2020). But in summary those problems include the following:

    (i). *Armstrong* encourages setting parties off on wild goose chases; in that instance by responding to a request for particulars by suggesting that the defendant was actually looking for interrogatories.

    (ii). The characterisation of the defendant's request in that case for narrative information (as opposed to a yes or no answer) as being properly one for interrogatories was, with great respect, manifestly incorrect.

    (iii). The basis for saying that the information sought was not required was unfortunately fundamentally misconceived. Hogan J. held that because the plaintiff had not made an issue as to what time the incident had occurred it followed that "[t]he actual time of the incident is, therefore, irrelevant to this claim". That is, respectfully, a fundamental misconception, because the time of the incident, or any other information, could be of considerable relevance to the defendant even if the plaintiff doesn't see it as such, or *vice versa*.

    (iv). Similarly, the weight given to the plaintiff's intention to provide certain information later such as special damages or details of medical treatment is, in my respectful view, erroneous because it focuses on one party's position and allows it to dictate what is relevant or necessary without any real or adequate regard to points that could be legitimately made by the other side.

14. The other real problem is that by delaying the furnishing of information that is probably going to have to come out anyway, approaches such as those in *Armstrong v. Moffatt* will delay the progression and settlement of the case and could create surprise at the hearing. Of course, as in many things, there is a balance; but it seems to me that the flaws in the *Armstrong v. Moffatt* approach are such that it does not provide a coherent theoretical framework for approaching questions regarding provision of information.

15. A much more holistic approach is required whereby the court should ask itself the real question which is - what is most just and most likely to save time and costs overall? That normally means that if something is definitely going to come out, it should be brought out at the earliest opportunity so that the case can be, if necessary, settled or at least narrowed at the earliest opportunity.

Does the applicant actually need the information sought?

16. Essentially the information sought in the extensive interrogatories here amounts to asking whether the board's deponent is speaking from his personal knowledge or whether he is speaking from a reading of the board's file. Such information should be provided if it

actually helps advance a point that properly arises in the proceedings as they currently stand or as they could relevantly be amended following such disclosure. The question then is, does this relevantly arise here, whether from the statement of grounds, the affidavit itself, the statement of opposition or the more general duty of disclosure by respondents in judicial review proceedings?

Does this arise from the statement of grounds?

17. Reliance was placed on grounds E31 to E35 where it is argued that the decision referred to the wrong SAC, and while an attempt was made to correct this, that attempt is challenged. That claim can be evaluated on the papers. Some argument is made that the decision amending the board's decision does not recite the fact that it was a clerical error. But that again is an argument for the papers and does not require further evidential elaboration.

18. Grounds E38 to E46 were also relied on where it is argued that it is not clear what matters were considered in the decision. That apparently postulates a highly implausible distinction between considering something and having regard to it. Assuming *arguendo* that I would be wrong in viewing that point as frivolous, and that an argument can be raised about an alleged discrepancy between the decision and the direction, that is a matter of interpretation of the paperwork and does not require evidential clarification.

Does the information sought arise from the affidavit evidence?

19. Reliance is placed on para. 1 of Mr. Dillon's affidavit where he says that the affidavit is made from his own knowledge or the records of the board save where otherwise appearing. Admittedly, that is not a hugely helpful formula where the affidavit does not go on to clarify the means of knowledge of specific averments. But that is a totally academic issue unless some specific point has been identified where this would make any difference.

20. Paragraph 3 verifies the statement of opposition, but again that does not hugely matter unless there is a disputable fact in the statement of opposition where a question could arise as the capacity of the verifier to verify it.

21. Paragraph 11 says that the error in the board decision was a clerical error. However, in context that is not an evidential matter. It is merely a recitation of a statement in the board's direction. Anyway, even if there was an evidential dimension to it, it is only a statement of the obvious because it could not reasonably be in dispute that the reference to an irrelevant SAC was itself an error. Mr. Dillon's affidavit on this point would be of equal evidential value if he just exhibited the documents. Paraphrasing or summarising them is not really adding anything of evidential value. The present case is well removed from *B.C. (Zimbabwe) v. International Protection Appeals Tribunal* [2019] IEHC 488, [2019] 7 JIC 0207 (Unreported, High Court, 2nd July, 2019), where the person swearing the verifying affidavit purported to go beyond the file to say what was actually considered by the decision-maker, when in fact he was not in a position to do so. The present affidavit was drafted in a much more cautious manner (again, due credit to counsel for the board); and no such problem arises.

Does the information sought arise from the statement of opposition?

22. Paragraphs 12 and 13 of the statement of opposition assert that the decision involved "a clerical error". Counsel for the applicants states that this is being put forward "as a fact". Even assuming that that is so, it is only an obvious fact. But in any event, those pleas do not actually respond to the point made by the applicants at para. 36 of the statement of grounds, which is a complaint as to the form of the decision.

23. Paragraph 16 of the statement of opposition is also pointed to which says that the direction and decision say the board had regard to relevant matters. Counsel for the applicants interprets verification of this as being of evidential value. It is not. It is just a comment as to what is clear on the face of a document. Counsel for the applicants also said that perhaps he should apply to strike out para. 16, although he was not pressing that and perhaps in a strict sense that is a legally viable option, but in fact it makes no difference given that para. 16 is of no real evidential value.

24. He also complained about paras. 17 to 18, but those are also fairly argumentative and there is nothing of evidential value there warranting further exploration. One could alternatively strike them out but it wouldn't make any difference to anything.

25. Objection is taken to the verification of the plea at para. 19 of the statement of opposition which says that "it is patently clear" that the board "had regard to the appeal or the application". This was an appeal decision, so inherently it was taken by reference to the appeal and the original application - it would be nonsense to suggest otherwise. Insofar as there is a point, it seems to be that the board did not expressly say that it considered the application and the appeal. Again, assuming *arguendo* that I would be wrong in considering that to be an implausible if not frivolous ground to challenge the validity of the outcome, it is a point as to the form of the decision, not one warranting evidential clarification.

26. Finally, there seems to be a separate point being made that a listing in the decision of matters considered does not constitute evidence that such matters were considered; and proof of such consideration would require an affidavit to that effect. That submission seems to be a point of law and not one that requires evidential clarification by interrogatories or otherwise.

Does the information sought arise from the duty of disclosure by respondents?

27. Respondents have a duty of candour in judicial review to give a true and comprehensive account of the decision-making process (see *Secretary of State for Foreign and Commonwealth Affairs v. Quark Fishing Ltd.* [2002] EWCA Civ. 1409) and "to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide", *per* Singh L.J. (at para. 106) in *R (Citizens UK) v. Secretary of State for the Home Department* [2018] EWCA 1812, [2018] 4 WLR 123 citing *R (Hoareau) v. Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) (at para. 20). This duty extends not just to points relevant on the pleadings as they stand, but also to points that could be pleaded if the applicant knew about them. However, it

does not go to points that are not even potentially relevant. The applicants here have not established that the information sought falls into any relevant category.

Order

28. Accordingly, as no basis has been made out to furnish the information sought whether by interrogatories or, for what it's worth, otherwise, the order will be as follows:

    (i). the relief sought in para. 1 of the applicant's notice of motion filed on 21st January, 2021 (as treated by the parties as being a motion to compel replies to interrogatories) is dismissed;

    (ii). the parties should contact the List Registrar to have the matter listed on the next convenient Monday for any consequential matters or directions.