

THE HIGH COURT  
JUDICIAL REVIEW

[2022 NO. 437 JR]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND  
DEVELOPMENT ACT 2000  
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND  
RESIDENTIAL TENANCIES ACT 2016

BETWEEN

PAUL LEECH AND FRANK MCDONALD

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

HPREF HSQ INVESTMENTS LIMITED

NOTICE PARTY

**JUDGMENT of Humphreys J. delivered on the 25th day of May, 2023**

1. While this ruling addresses the modest issue of the applicants' request for an adjournment of cross-examination, it has some procedural relevance both for this action and similar proceedings. I gave an *ex tempore* ruling on the issue on 17th May, 2023 and now take the opportunity to give a written statement of reasons.

2. The applicants have had the benefit of a number of statements of grounds. After the original statement, I allowed amendments on 30th May, 2022, 2nd June, 2022, 15th June, 2022 and 11th July, 2022.

3. The primary relief sought in the fourth amended statement of grounds is an order of *certiorari* quashing the decision of the board to grant planning permission for a development comprising 399 build-to-rent residential units, the partial demolition of existing structures and the provision of 18 parking spaces and a retail unit at the Heuston South Quarter, St. John's Road West/ Military Road, Kilmainham, Dublin 8. That permission was granted by the board on 31st March, 2022.

4. The applicants have indicated a possible intention to consider narrowing the grounds of challenge in some unspecified way. I should note at this stage that most of the grounds, on their face anyway, can be dealt with without new evidence and can be addressed by legal submissions on the basis of what was before the board.

5. That would appear to apply to core ground 1, relating to environmental impact assessment (EIA) and possibly core ground 2.

6. In relation to core ground 3, the applicants have raised an issue regarding the "cone of vision" on which they are seeking to introduce new evidence.

7. Core grounds 4 and 5, relating to the development plan, seem on the face of things primarily to be capable of being dealt with on the basis of evidence before the board and legal submissions.

8. Core ground 6, regarding impacts on the Royal Hospital Kilmainham, again raises the cone of vision issue in relation to which the applicants have sought to introduce new evidence.

9. Core ground 7 complains about the lack of provision for EIA in relation to submission of revised proposals pursuant to various identified conditions, and that seems primarily, as drafted anyway, to be a matter of legal submissions in the context of the evidence before the board, although there may be an overlap with the condition 3 issue.

10. Insofar as condition 3 in particular is raised in core grounds 8 and, more particularly, 9, the applicants are endeavouring to introduce new evidence on that point.

11. As regards the grounds relating to the masterplan, which are core grounds 10 and 11, and in relation to the habitats directive, which is core ground 12, those seem to be primarily a matter of legal submission and consideration of evidence before the board.

12. Core ground 13, in relation to the board's code of conduct, could be a matter of new evidence; likewise core ground 14 on information provided by the board.

13. Core ground 15, as regards the validity of the application, is a matter primarily of legal submission and evidence before the board, as are the transposition grounds against the State, core grounds 16 and 17.

**The order for cross-examination.**

14. What gave rise to the hearing before the court on 17th May, 2023 was the applicants' request to cross-examine Mr Reddy, an expert on behalf of the notice party. That was agreed to by the notice party on the basis that there would also be cross-examination of the first named applicant, together with some additional terms.

15. That resulted in a consent order of Holland J. on 21st March, 2023 for cross-examination of Mr Leech and Mr Reddy. The parties were to agree a document stipulating the scope of

cross-examination, and it was also ordered that paras. 22 to 27 and 32 to 35 of Mr Leech's affidavit of 13th February, 2023 would be disregarded for the purposes of cross-examination and trial.

**16.** The crucial provision of the order on which the parties have disagreed is the requirement that: "The parties prepare and upload by the morning of the 17th day of May 2023 a dossier of the documents insofar as it is possible to predict said documents that they propose to put to the witnesses in cross-examination said dossier to be available on ShareFile in a searchable pdf format."

**17.** Before turning to that disagreement, I should note that the parties also disagreed as to the document stipulating the scope of cross-examination as envisaged by the order of Holland J. That conflict was then resolved by Holland J. by order of 17th April, 2023 which permitted cross-examination as follows.

**18.** First of all in relation to the issue (particularly relevant to core ground 9) regarding condition 3, the identified issues were:

- (a) the extent of the revisions to the proposed development required by condition 3 to be submitted to the planning authority for agreement;
- (b) whether condition 3 requires a radical or fundamental re-design of the proposed development; and
- (c) whether condition 3 specifies the revised details that are required to be submitted to the planning authority for agreement.

**19.** Secondly, in relation to the issue that arises in core grounds 3 and 6, and sub-grounds 29, 31 and 51 regarding the cone of vision, the cross-examination would include, in particular:

- (a) the extent of the cone of vision identified in p. 278 of the Dublin City Development Plan 2016 to 2022;
- (b) whether and, if so, to what extent the permitted development as required to be amended by condition 3 will be within the cone of vision; and
- (c) whether the permitted development as required to be amended by condition 3 will affect the cone of vision and, if so, the nature and extent of any effects.

**20.** The third issue (also related to core ground 9) was whether and to what extent the issues left over to be submitted to, and agreed with, the planning authority in compliance with condition 3 comprise points of detail.

**21.** Cross-examination was then fixed for 17th May, 2023.

#### **The new material**

**22.** As noted above, a dossier of materials to be put to the witnesses was to be delivered by the morning of 17th May, 2023.

**23.** The applicants uploaded three PDFs:

- (i) a booklet of affidavits running to 53 pages which were already in the case;
- (ii) an architectural design statement of 73 pages which was already exhibited at tab 3 of exhibit CC1 to the affidavit of Chris Clarke; and
- (iii) a booklet of submissions made to the board of 92 pages which was exhibited at tab 2 of exhibit PL1 to the affidavit of the first named applicant.

**24.** That clearly complies with the order of Holland J.

**25.** By contrast, on the evening of 16th May, 2023, the notice party uploaded to ShareFile a total of ten documents:

- (i) a second affidavit of Mr Reddy which ran to five pages and was new;
- (ii) exhibit TR1 of 42 pages, the large majority of which is new to some extent or has new annotations or labels;
- (iii) a bundle of papers for cross-examination of 89 pages: that material is already in the case;
- (iv) a list of RIAI grade 1 conservation architects of 6 pages – that is new;
- (v) a list of RIAI grade 2 conservation architects of 5 pages – that is also new;
- (vi) a list of RIAI grade 3 conservation architects of 40 pages – again that is also new;
- (vii) a statement of consistency of 77 pages already exhibited at tab 5 of exhibit CC1;
- (viii) an architectural heritage and visual impact assessment of 78 pages already exhibited at tab 4 of exhibit CC1;
- (ix) the EIA report, volume 1 of 472 pages which is at tab 7 to exhibit CC1; and
- (x) the appendices to volume 2 of the EIA report – there are 21 appendices numbered 1A to 14A running to 1,185 pages of which the notice party only pointed to appendix 14A of 121 pages as having already been exhibited at tab 21 to exhibit CC1.

**26.** In terms of the 42-page document, that involves a total of 33 separate identifiable documents or extracts from documents, of which all but the first are either completely new or involve new annotations to existing documents. The following table outlines the position:

Page	Document [and whether new]
2	1) SORA 7 Heuston and Environs, Dublin City Development Plan 2016-2022 (Page 277). [Already exhibited within tab 4]
3-4	2) RAU drawing representing full extents of relevant 'Cone of Vision', described in the Dublin City Development Plan (p. 278) [New]
6	3) Drawing Number RAU-ZZ-ZZ-DR-A-SEC-06302 - Proposed Section 02 as submitted for planning permission (Reg. Ref ABP-311591-21). [New]
7	4) Proposed Section 02 highlighting Block E L03 and L04 in green for omission. [New]
8	5) Section 02, as granted per ABP Board Order, showing omitted L03 and L04 floors in dashed green outline. [New]
9	6) Drawing Number RAU-ZZ-ZZ-DR-A-ELE-06202 -ELE Proposed Elevations 02 as submitted for planning permission (Reg. Ref ABP-311591-21 ). [New]
10	7) Proposed Elevation DD, highlighting L03 and L04 of Blocks D&E in green for omission [New]
11	8) Elevation DD, as granted per ABP Board Order, showing omitted L03 and L04 floors in dashed green outline. [New]
12	9) Existing Verified View 04 (Summer) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 18). [New annotations added to what was exhibited in tab 21]
13	10) Proposed Verified View 04 (Summer) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 19). [New annotations added to what was exhibited in tab 21]
14	11) Verified View 04 (Summer) as granted per ABP Board Order. [New]
15	12) Existing Verified View 04 (Winter) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 21). [New annotations added to what was exhibited in tab 21]
16	13) Proposed Verified View 04 (Winter) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 22). [New annotations added to what was exhibited in tab 21]
17	14) Verified View 04 (Winter) as granted per ABP Board Order. [New]
18	15) Existing Verified View 05 (Summer) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ - Photomontages' report (page 24). [New annotations added to what was exhibited in tab 21]

19	16) Proposed Verified View 05 (Summer) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 25). [New annotations added to what was exhibited in tab 21]
20	17) Verified View.05 (Summer) as granted per ABP Board Order. [New]
21	18) Existing Verified View 05 (Winter) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 27). [New annotations added to what was exhibited in tab 21]
22	19) Proposed Verified View 05 (Winter) as submitted for planning permission (Reg. Ref ABP-311591-21) in 'HSQ Photomontages' report (page 28). [New annotations added to what was exhibited in tab 21]
23	20) Verified View 05 (Summer) as granted per ABP Board Order. [New]
24	21) Percentage Of Footprint Within Cov as per SHD application [New albeit possibly not in conflict with Mr Leech's affidavit]
25	22) Percentage Of Footprint Within Cov as ABP granted including Block D&E Cores [New]
27	23) Drawing Number RAU-ZZ-ZZ-DR-A-ELE-06202 ELE Proposed Elevations 02 as submitted for planning permission (Reg. Ref ABP-311591-21). [New]
28	24) Proposed Elevation CC, highlighting arch between Blocks A and C in green for omission. [New]
29	25) Elevation CC, as granted per ABP Board Order, showing omitted arch between Blocks A and C in dashed green outline. [New]
31	26) Drawing Number RAU-ZZ-00-DR-A-GAP-06098 Proposed Lower Ground level as submitted for planning permission (Reg. Ref ABP-311591-21). [Appears new]
32	27) Proposed Lower Ground level highlighting apartment unit E-1-01 in green. [Appears new]
33	28) Lower Ground level highlighting apartment amenity use in lieu of apartment unit as per ABP condition 3.(c). [New]
35	29) Drawing Number RAU-ZZ-00-DR-A-GAP-06098 Proposed Lower Ground level as submitted for planning permission (Reg. Ref ABP-311591-21). [Appears new]
36	30) Proposed Lower Ground level highlighting apartment unit E-1-01 in green. [New]
38	31) Site plan [New]
40	32) Reddy Architecture +- Urbanism Example: CGI of Artwork at Entrance of Glencar, Ballsbridge. [New]

42	33) Example of Bat Friendly Artificial Lighting [New]
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**27.** The notice party stated that the purpose of the materials was to cross-examine Mr Leech but accepted that such new documents could be dealt with in re-examination of Mr Reddy.

**Was the additional material put in by the notice party permitted by the order of the court?**

**28.** One immediate and clear point is that the notice party went beyond the order of the court by not just delivering a dossier, but by delivering an affidavit when no liberty to file an additional affidavit had been given by the court.

**29.** The notice party makes the point, which would be valid in the context of a normal, non-case-managed plenary action, that a party doesn't have to give advance notice to the other side's witness when it is intended to put material in cross-examination. But this isn't a non-case-managed plenary action.

**30.** Unfortunately, that principle doesn't have a read-across to case-managed commercial proceedings, such as those in the Commercial Planning and Environmental List. That approach is reinforced by the point made by the learned authors of *Delaney and McGrath on Civil Procedure*, 4th ed. (Dublin, Round Hall, 2018) at para. 30-89 regarding cross-examination in commercial proceedings – not an exact analogy but nonetheless helpfully illuminating the general approach:

“Cross-examination of a witness proceeds in the normal manner except that the requirement to put matters to a witness on cross-examination is somewhat attenuated because the witness will have had the opportunity of considering (and in the case of a witness called by the defendant, commenting upon) the evidence to be given by opposing witnesses because of the exchange of witness statements.”

**31.** Again, I agree that isn't precisely what we have here but it does illustrate the point that surprise and ambush are very much to be avoided in the commercial and case-managed context.

**32.** The order of Holland J. could not have been intended to allow unexhibited new material to be delivered on the morning of cross-examination. It is notable that that was the applicants' understanding of the order from the outset; that the applicants confined themselves to the existing exhibited material and were emphatic in submissions that the order was not to be understood as allowing fresh material but was designed to relate to material that was already there; and that the most the notice party could say was that the order was silent as to allowing new material.

**33.** I should mention in passing that the notice party objected to my consulting Holland J. on that point (not necessarily an *indicium* of over-confidence in one's position, you might think) so I have had to interpret the order myself, but in my view the meaning is clear.

**34.** This is not a question of *de minimis* material, or of putting something that is capable of being dealt with there and then without difficulty. There is a very large amount of new complex material as I hope I have made clear. On any view, it is unhelpful to deliver that quantity of new paperwork at the last minute, even if it were permissible, which it isn't. I certainly agree with the applicants that it would be beyond the ability of anybody in counsel's position to absorb that amount of material literally minutes before the start of cross-examination (even acknowledging in fairness to the notice party that the material was first available the previous evening, although it didn't in fact reach counsel at that time).

**35.** The notice party's interpretation of the order of Holland J. would allow the experts to be cross-examined on material they had only just received. That would be totally inconsistent with the case-managed nature of proceedings in the List. It would contradict the clear procedure for notice of relevant material in case-managed commercial proceedings. It would permit trial by ambush and would deprive the expert witnesses and counsel of the opportunity to consider the points and to address them in a structured manner.

**36.** Had the order envisaged that there could be new material, then there would have had to have been *some* advance notice, because otherwise an application to adjourn the matter on the morning would be not only highly predictable but virtually inevitable. Of course that is exactly what happened.

**37.** It would be utterly chaotic to set a deadline of the morning of the cross-examination for the delivery of large volumes of highly complex new technical material on which the cross-examination was then to take place immediately. The irresistible inference is that there was no intention on the part of the court to allow any new material to be introduced. As noted above, it is unquestionable that there was no provision for liberty to file any new affidavit.

**38.** Finally, to get a date the matter would have had to be certified as ready. That is inconsistent with an intention to introduce new material, even accepting that such material was primarily for cross-examination purposes.

**39.** Reinforcing all of that is the fact that the notice party envisaged that it could have relied on the new material in re-examination of their own witness, hence making it evidence in the case.

**40.** Even if I am wrong in all of that, and even if any individual new document was not problematic, an accumulation of documents becomes problematic beyond a certain point. The volume and nature of the material provided certainly presents a daunting prospect to the court (a prospect that has not been in any way diminished by the attempt to put together this written version of the judgment) and I don't know how counsel for the applicants could seriously attempt to embark unperturbed on a cross-examination that has been prepared in advance, when handed this welter of highly technical material just before the hearing.

**41.** The clear and obvious conclusion is that the notice party did not comply with the order of Holland J. That order did not permit new affidavit evidence and did not envisage that the "dossier" of material for cross-examination would include new documentation that had never been exhibited to the affidavits that had been permitted up to the date of that order.

**Order**

**42.** The obvious net effect of the foregoing is that by reason of its misinterpretation of, and non-compliance with, the order of Holland J., the notice party has caused the cross-examination hearing to be derailed, so the matter had to be adjourned in fairness to the applicants.

**43.** There did not seem to be any fundamental objection in principle to the introduction of new materials, subject to an opportunity to consider them.

**44.** As regards the court diary between the date of the order and the putative hearing date of 4th July, 2023, there wasn't a convenient time for a separate period of cross-examination and given that there were only two days available on 4th July, as previously indicated, there wasn't time to accommodate both the cross-examination and the legal submissions. In any event, I don't consider it appropriate in general to sever cross-examination from a substantive hearing. It consequently followed that the hearing date of 4th July, 2023 had to be vacated.

**45.** The primary order made on 17th May, 2023 was therefore as follows:

- (i) cross-examination was adjourned to the trial;
- (ii) the applicants were to be allowed a reasonable opportunity to consider the new material and either agree to its inclusion, disagree if they so wish, or if necessary reply;
- (iii) the hearing date of 4th July, 2023 was vacated;
- (iv) the matter was listed on 12th June, 2023 in the list to fix dates;
- (v) subject to being re-certified as ready, the parties should aim for a three- to four-day hearing to include one day of cross-examination followed immediately by two days of legal submissions, with a possible one-day overflow in case of necessity but not to be availed of without a specific order of the court.

**Supplementary orders**

**46.** There were a number of supplementary applications as follows:

- (i) The notice party asked for the hearing date to be maintained, but I had already explained the reasons why that was not viable.
- (ii) As regards taking Mr Leech alone by way of cross-examination on 17th May, 2023, the parties did not pursue that. As noted, it is a sub-optimal procedure anyway.
- (iii) The notice party asked for a new date to be fixed immediately, but of course it defeats the purpose of a list to fix dates to give out dates in advance of the term to which that list relates. Practice Direction HC119 envisages that a date will be given on, rather than in advance of, the date of a list to fix dates, subject to certification.
- (iv) The applicants sought the costs of the hearing of 17th May, 2023, which was not strenuously opposed, so those costs were granted.
- (v) The notice party asked for a stay on adjudication of those costs, which is unnecessary and excessive. It is appropriate to stay the enforcement of any costs order until the final determination of the proceedings, but there wasn't any sufficiently compelling reason to restrain the applicants from having the costs adjudicated if that's what they want to do.
- (vi) The notice party asked for a priority hearing in the list to fix dates, which I will consider in due course. The purpose of a list to fix dates, obviously, is to assess the list of cases in the round and assess the competing levels of priority as of that date. But the parties certainly have some special factors in their favour, so I will bear those in mind.
- (vii) As regards directions in respect of the new affidavit, the applicants should clarify their position by 31st May, 2023 as to whether they are objecting to the notice party's new material or accepting that it can be introduced with or without being subject to a replying affidavit, and if they are replying, should file an affidavit by 7th June, 2023.
- (viii) If the applicants are objecting, they should inform the notice party by 31st May, 2023 so that the notice party can decide on their position and can reply by 7th June,

2023 as to whether they will be seeking to rely on the affidavit in full or not. Any residual disagreement can be dealt with by the court on 12th June, 2023.

**47.** Finally, in case there is any doubt about the matter, I should now emphasise that it follows from the foregoing that any material of evidential relevance uploaded to ShareFile in the Commercial Planning & Environmental List must be exhibited, even if introduced purely because it is intended to be put to a witness in cross-examination, unless leave of the court is obtained. So the notice party should remove from ShareFile anything not already exhibited. That also includes their new affidavit and exhibits, filed without leave, unless the applicants consent. That is without prejudice to the notice party properly applying to the court to introduce further evidence (including the new affidavit or any already-uploaded material to be duly exhibited) but the onus will be on them to apply, otherwise that affidavit will be struck out and any unexhibited material disregarded.