**THE HIGH COURT**

**[2023] IEHC 58**

**Record No. 2021/271JR**

**BETWEEN**

**GARY SOLAN**

**APPLICANT**

**- and -**

**AN BORD PLEANÁLA**

**RESPONDENT**

**- and –**

**CUISLE PROPERTIES LIMITED**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Niamh Hyland delivered on 03 February 2023**

**Summary of Decision**

1. This is an application for judicial review of a decision of An Bord Pleanála (the "Board") of 10 February 2021 granting planning permission for a proposed development at numbers 23 to 24 Rutland Place North, Dublin 1. I have decided to quash the decision of the Board for one very net reason i.e. the Board's Inspector failed to take into account a relevant consideration when considering the planning status of the applicant's kitchen extension in the context of adjudicating upon the applicant's objection to the development.

2. The applicant lodged an objection to the construction of a development beside his house at 22 Rutland Place North and, *inter alia*, objected to the fact that the development would entirely block his kitchen door, with consequences for light and access. The Inspector, who recommended the grant of permission, rejected that aspect of the applicant's objection on the basis that the extension housing the kitchen door did not have planning permission and had been refused retention permission. It was entirely appropriate for the Inspector to consider the lack of permission and refusal of retention permission. However, given that he considered the planning status of the extension to be relevant to the determination of the applicant's objection, he was obliged to consider all matters relevant to its planning status, including the enforcement file. This was materially relevant to the question of the status of the extension and by implication, the door. Failure to take a material consideration into account when making a decision is a well-established basis for quashing an administrative decision.
3. In those circumstances, and for that reason alone, I have granted the relief sought by the applicant.

**Facts**

4. The permission the subject of challenge is for the demolition of a storage building and the construction of 5 one-bedroom apartments at Rutland Place North. The application came before Dublin City Council. The applicant lodged an objection on 12 April 2019, the grounds of which are dealt with later in this judgment. Permission was granted on 13 August 2020 after the Council had requested and received further information. An appeal was lodged to the Board by a Mr. O'Hanrahan. The applicant objected by way of submission of 28 September 2020. The Inspector provided his report on the application on 2 February 2021 recommending grant of permission. The Board in

substance adopted the Inspector's reasoning, accepted his recommendation and granted permission for the development on 10 February 2021.

5. An *ex parte* motion docket comprising an application for leave for judicial review was filed by the applicant on 7 April 2021 grounded on his affidavit of 1 April 2021. The Statement of Grounds was similarly filed by the applicant on 1 April 2021. On 12 May 2021 the applicant was directed to apply for leave on notice to the respondent. On 9 July 2021 a Notice of Change of Solicitor was filed, and Morrisey Solicitors were appointed to act for the applicant. On 2 November 2021 Mr. Justice Meenan granted leave.
6. The Notice of Motion was filed on 15 November 2021 returnable to 14 December 2021. An affidavit of Pierce Dillon of the Board was sworn on 14 March 2022 and a Statement of Opposition was filed on 14 March 2022.

**Arguments of the applicant**

7. The applicant makes three key complaints about the development in the Statement of Grounds, all of which focus upon its impact upon his property at 22 Rutland Place North, which abuts the development site.
8. First, he says that the development will entirely block his kitchen door, and this will impact upon his access to the development site which he enjoys at present as his door leads onto the development site. He also says it will block his light and his ventilation to the kitchen.
9. Second, he asserts that the drainage at his property will be adversely affected. He points out that he has had significant problems with drainage since 2015 and that the way in which he resolves them is to go onto the development site to access the manhole and to clear it out using rods. He argues that he will no longer be able to do so and that the Board have failed to take into account the impact this will have upon the drainage to

his property. He says this is not a private law right but rather a public health issue. He argues that contrary to the conclusions of the Inspector, it cannot be considered to be a matter coming under s.34(13) of the Planning and Development Act 2000 (the "2000 Act").

10. Finally, he argues that because the development will be higher than his chimney, the smoke from his chimney will be pushed back down the chimney thus creating another public health hazard and that again this is not a matter that can be disposed of, as the Inspector asserted, by reliance upon s.34(13) i.e. as a private law dispute between himself and the developer.

11. In his Statement of Grounds, he identifies two other arguments i.e. that the decision is inconsistent with previous planning decisions where permission was refused for a development at the same site and that the applicant for permission failed to lodge a valid set of drawings. However, at the hearing, it became clear that the drawings argument had fallen away in circumstances where revised drawings had been submitted to the planning authority. Accordingly, this argument was not proceeded with. Nor was the argument in relation to the inconsistency with previous decisions advanced at the hearing of the matter.

12. The complaint about the impact upon his door has been a long standing one. In the applicant's submission to the planning authority of 12 April 2019 he asserted:

> *"There is absolutely no way this can be permitted and if the applicant insists on this design style then any building will have to remain at least 2.4m away from my boundary to preserve my pre-existing rights to light, and ventilation and access from my glazed kitchen door for my bin storage and drain clearance when needed."*

13. In his submission to the Board of 28 September 2020, he points out that the development would place a solid wall within millimetres of his kitchen door, blocking his access and light, noting that on the ground floor of his property he has no other side or rear walls, and this is the only source of light and ventilation.

14. At the hearing, counsel for the applicant sought to introduce a new argument not made in the Statement of Grounds or indeed even in the legal submissions. He argued that the applicant's right to be heard was breached in circumstances where the Inspector failed to revert to the applicant in relation to the planning status of the door. He argued that the Inspector should have looked at the full planning history of the extension including the enforcement file and that, had he indicated to the applicant his concerns about the planning status, the applicant would have been in a position to inform him of the position in that respect.

**Arguments of the Board**

15. In relation to drainage, the Board identifies in the Statement of Opposition that its Inspector addressed this issue following its inclusion in the grounds of appeal before the Board and the observations submitted by the applicant. The Board sets out that the Inspector noted that a new dual drainage system had been installed and that there were no objections to the drainage arrangements raised either by the Council or by Irish Water. In the circumstances the Inspector considered that the proposed site services were satisfactory subject to the appropriate conditions. The Board then identify that condition 7 of the permission required that the water supply and drainage facilities comply with the Council's requirements. It is submitted in conclusion that the drainage issue is denied where the assessment of drainage is within the jurisdiction of the Board and where its Inspector assessed the evidence and deemed the arrangement satisfactory.

16. In relation to the chimney, the Board pleads in the Statement of Opposition that the impact on residential amenities was considered in the Inspector's report and the Inspector was satisfied that the application should not be refused on the basis that it interfered with such amenities. It is submitted that in granting planning permission the Board concluded that the proposed development would not seriously injure the amenities of properties in the vicinity.
17. In respect of the planning status of the door, counsel for the Board argues that the planning status of a development or feature that is relied upon by an objector or applicant is always a relevant consideration in any application for planning. Where the applicant argued that he was entitled to use the door and that permission should be refused, *inter alia,* for that reason, the Board was entitled to look at the planning status of that door. Moreover, counsel notes that it is not clear whether the applicant is arguing that there may have been a grant of planning permission, but it was not on the file, or whether the development was exempt, or planning was not required.
18. If the applicant is arguing that it is relying on an exemption, counsel argues he must put evidence before the Board in this respect. He failed to do so. As an objector he had an opportunity to put relevant evidence before the Board in relation to the planning status of the door. The mere reference to the door by him without reference to its planning status could not oblige the Board to look for more information.
19. Counsel also notes that the Board was not determining the planning status of the door but rather deciding whether the development was entitled to permission. The absence of planning permission was a relevant factor that could lawfully be considered by the Inspector. She also identified that under s.131 of the 2000 Act, the Board has information gathering powers, but it is very much for the Board to decide in any given circumstance if it is necessary to obtain information. In relation to the principle of *audi*

*alteram partem* invoked by the applicant, she argues that this principle is not directly applicable given that the applicant is not the recipient of the decision by the Board.

20. In response to those arguments, the applicant argues that the mere fact of a refusal of retention is not determinative of the planning situation of the extension because the extension might be exempt, even if retention is refused. He also exhibits the enforcement file in relation to the property and relies upon an enforcement officer report of 31 March 2017. That file identifies an inspection was carried out on the property where the applicant indicated that the ground floor extension had been *in situ* for over 40 years. The report identifies that the desktop analysis showed that there had been a ground floor extension at the property for longer than 7 years and there was no open space at the rear of the property. The report concludes that the works that were being undertaken at the property at the time of inspection did not require the benefit of planning permission and the enforcement officer therefore recommended that no further enforcement action was warranted, and the file was closed.

21. Counsel for the applicant argues that, had the Inspector indicated to him that the planning status of the door was a relevant consideration in determining the issues in the appeal, the applicant would have been able to identify that the property was compliant. He submitted that if the Inspector is going to consider the planning status of the door, then he must do so in full and not simply confine himself to the decision refusing retention.

**Applicant's Door**

22. The applicant's house has a kitchen extension to the rear. That extension has a door in the gable wall that opens onto the development site. The extension was the subject of an application for retention permission along with an application to add a first-floor extension. Dublin City Council granted permission on 7 July 2016. An appeal was

lodged against this decision and the Board refused permission for the proposed development on 5 December 2016. The Board considered that the proposed development would comprise substandard accommodation by failing to provide any private open space at ground level and failed to ensure basic amenities such as natural light and ventilation would be available within parts of the development. It concluded that the proposed development and the development proposed for retention would be contrary to the proper planning and sustainable development of the area.

**Inspector's Report**

23. In relation to the applicant's complaint about the construction of the development immediately proximate to his kitchen door, thus preventing access to the development site and blocking his light, the Inspector observed as follows. Under the heading "*7.4. Impacts on Residential Amenities*", he notes that properties with the greatest potential to be affected as a result of overbearing impacts would include the houses within Rutland Place North, noting:

> *"7.4.4… it is proposed to construct a two-storey element directly onto the boundary with no.22 Rutland Place North, extending to rear of the first-floor to this house by over 9m. The house at no.22 is not served by rear-facing ground-floor windows and the only rear first-floor window serves a landing area and bedroom that is also served by a window to the front. I address the issue with respect to a side door serving this property onto the appeal site further below."*

24. He concludes under that heading that the proposed building would not be excessively overbearing where visible from number 22 and would not result in excessive overshadowing or overlooking of neighbouring properties. Accordingly, he decides the proposed development should not be refused for reasons relating to impacts on neighbouring residential amenities.

25. That paragraph appears to demonstrate that he is not considering the question of overshadowing/overbearing/overlooking in relation to the side door under this heading as he reserves that question to later in the report.

26. Under the heading "*Boundaries and Regulatory Compliance*", he identifies as follows;

> *"7.5.4. According to the details submitted, the proposed development would be wholly within the site boundaries and while I recognise that a doorway exists directly from no.22 into the site, there is no record of planning permission for this doorway. The primary access serving no.22 is off Rutland Place North and the previous decision of the Board (ABP ref. PL29N.247010) did not provide permission for retaining the extension that this doorway serves. The implications of developing on the shared boundary with this property, or any other properties, including those with vents and other services onto the appeal site, is a civil matter to be resolved between the parties, having regard to the provisions of section 34(13) of the Planning and Development Act 2000, as amended."*

27. Under the heading "*Site Services*" the Inspector further identified the following:

> *"7.5.2. Objections to drainage and water supply proposals have not been raised by the planning authority or Irish Water. The planning authority stated that the Engineering Department have not objected to the proposals and specific conditions regarding clarifications and agreements on matters of surface water management were attached to the planning authority decision. Standard connection agreements with Irish Water would be required prior to the commencement of the development. In conclusion, I consider the proposed site services, including surface water proposals and continued facilitation of*

*services traversing the site to be satisfactory, subject to appropriate conditions."*

**Reasons for decision of Board**

28. It is clear from the Board direction that it decided to grant permission generally in accordance with the Inspector's recommendation. The reasoning given by the Board in its Order is in the most general terms and does not address the issues raised by the applicant in respect of his property. Rather the Board simply notes that the proposed development would not seriously injure the amenities of the area for property in the vicinity and that the development is in accordance with the proper planning and sustainable development of the area. Therefore, I am treating the detailed reasons for the decision of the Board as being located in in the Inspector's report.

**Decision**

***Applicant's Pleadings***

29. The applicant's pleadings in this case may charitably described as minimal in nature. The Statement of Grounds does not contain any argument that the applicant's right to be heard was not observed or that there was an obligation on the Board to hear the applicant. Although some of the arguments made in oral submission by counsel for the applicant veered into that territory and were responded to by counsel for the Board on her feet, it is quite clear from the Statement of Grounds that this argument is not pleaded at all. Therefore, the Board therefore did not respond to it in its Statement of Opposition. Similarly, the written legal submissions lodged on behalf of the applicant do not address this point at all. In the circumstances, as per the decision in *AA v Medical Council* [2003] IESC 70, I am not willing to entertain this argument.

30. On the other hand, the argument that the Board failed to take into account matters relevant to the planning status of the kitchen extension was in my view just about made out on the pleadings. It is true that the Statement of Grounds merely identifies at paragraph 6 that the Board wrongly took into account the fact that there was no record of planning permission for a kitchen extension at 22 Rutland Place North and that an application to regularise same by way of retention had been refused by the Board. However, at paragraph 7, it is pleaded that the extension including the door was built in the 1970's and that it was below the limit above which planning was required under the regulations applicable at the time. In response to a complaint that unauthorised works were being carried out, it is pleaded that an investigation was carried out by an Inspector appointed by Dublin City Council and the Inspector concluded the works being carried out were exempt development.

31. The Board in its Statement of Opposition at paragraph 20 pleads that the pleas at paragraph 6 and 7 relate to the planning status of the door which exits onto the site of the proposed development and identifies that the absence of a grant of planning permission in respect of the door is a factor to which the Board were entitled to have regard to in taking a decision as to whether to grant permission for the development.

32. In the applicant's written legal submissions, reference is made to *White v Dublin City Council* [2004] 1 IR 545 and to *Dietacaron Ltd v An Bord Pleanála* [2005] 2 ILRM 32 in support of the proposition that the Court may intervene where it is clear that the planning authority has failed to take relevant considerations into account. As developed at the hearing, the applicant identified that the Inspector ought to have considered the enforcement history of the property, its age and the fact that it was exempted development.

33. In those circumstances I am prepared to accept that, although pleaded with a distinct lack of clarity, the applicant had identified as a key argument that the Board had erred in failing to take account of the enforcement history of the extension and in those circumstances was not entitled to look only at the 2016 decision and at no other material when considering the applicant's objection on the grounds of interference with his door. I am reinforced in that conclusion by the fact that the applicant exhibited the enforcement documents to his grounding affidavit and described the planning history in the body of his affidavit. The Board were therefore on notice that the failure of the Inspector to take into account this material was a central issue in the case.

***Failure to take into account material consideration***

34. As identified above, the Board has made the point that an applicant cannot be surprised that the Board will take into account the planning status of any relevant development in determining an objection and that it is fully entitled to do so. I fully accept that the planning status of a structure, whether it is a building relevant to an objection or relevant to the decision in some other way, will always potentially be a material fact and one that the Board and their inspectors are entitled to look at and must be expected to look at. No applicant or objector can be surprised by that. There is no merit in the bare contention that the Board was not entitled to look at the lack of planning permission or its own decision refusing retention in 2016. But if an inspector and/or the Board decides that the planning status of a structure is relevant to his or her recommendation or decision and decides on the planning status based on incomplete information, then there is likely to be a failure to consider all relevant matters.
35. Here, I find that the correct interpretation of the Inspector's report is that he concluded the invocation of interference with the door by the applicant did not warrant consideration because there was no planning permission for the extension, and a refusal

of retention permission for the extension served by the doorway. It is accepted by counsel for the Board that even where a retention application is refused, a development may not be unauthorised as it is exempted. The refusal of retention does not alter that position. The Inspector was arriving at a negative view of the planning status of the door without having considered the enforcement file and the question of exemption. Had he done so, he might well have concluded that the extension was not unauthorised, and this may have had implications for his decision on the relevance of the objection made by the applicant in this respect.

36. In my view, the Inspector should have considered the full planning history of the site before concluding that the arguments in relation to the door did not merit weight because of its planning status. He could have done that by seeking submissions from the applicant or by obtaining the enforcement file. I cannot accept the Board's argument that it was exclusively for the applicant to identify whether an exemption applied. Once the inspector himself decided to make the planning status of the extension a relevant consideration (without this issue having been raised by the applicant in his objection), the inspector was obliged to consider all material relevant to that planning status.

37. In summary, I disagree that the Board was not entitled to take into account the lack of planning permission and the application for retention, those being matters that the Board was entirely and appropriately entitled to consider. On the other hand, I consider the Board, through its Inspector, erred in not taking account of all relevant matters in relation to the planning status of the development in circumstances where the Inspector had decided to make the planning status a determining factor in relation to the complaint concerning the impact on the door.

**Conclusion**

38. Accordingly, I will grant an Order of *certiorari* quashing the decision of the Board of 10 February 2021 the subject matter of these proceedings and remit the matter back to the Board. In the circumstances I do not propose to address the remaining grounds i.e. that the applicant's arguments in relation to the impact on his chimney and his drainage were not adequately addressed by the Inspector.

39. I propose 9 February at **10.00am** for a **remote hearing** on costs and final orders. The parties have liberty to apply for a different date but if they wish to do so, they should agree a date and propose same in writing to the Registrar. The parties are not required to provide written submissions in advance of the hearing.