[2023] IEHC 136

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 58 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, AS AMENDED

BETWEEN

BARRY O'LONE

APPLICANT

AND

AN BORD PLEANÁLA

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BARTRA PROPERTY (CASTLEKNOCK) LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 21st day of March, 2023

1. On 5th October, 2017, the board granted permission for the demolition of a public house on a site on the Old Navan Road, Blanchardstown, Dublin 15 and for the construction of apartments. The notice party acquired the land on 27th July, 2018.

2. On 6th January, 2020, the board granted a second permission for the demolition of the public house and the construction of co-living bedspaces. The applicant brought a first set of judicial review proceedings [2020 No. 175 JR] challenging the validity of the second permission on 2nd March, 2020. On 20th June, 2020, the board conceded those proceedings and on 25th June, 2020, an order was made on consent quashing the second permission without remittal.

3. On 3rd December, 2020, the board granted a third permission for demolition of the public house and construction of co-living spaces. The applicant then brought the present proceedings challenging that permission on 1st February, 2021.

Procedural history

4. On 27th January, 2022, the board filed a statement of opposition. The notice party developer did likewise on 24th February, 2022.

5. On 22nd April, 2022, an article was published on *The Ditch* website (ontheditch.com) entitled "An Bord Pleanála deputy chairperson failed to recuse himself from votes on six developments involving brother's fire safety firm" (https://www.ontheditch.com/abp-deputy-chair-voted-six-developments-involving-brothers-firm/). The article stated: "An Bord Pleanála's (ABP) under-fire deputy chairperson didn't recuse himself from at least a further six development[s] applications on which his brother's company worked. ABP board members must recuse themselves from cases where their 'involvement could give rise to an appearance of objective bias,' according to the organisation's code of conduct. Last week *The Ditch* reported that Paul Hyde voted on a controversial build-to-rent development in Ranelagh, Dublin 6 that included a report prepared by his brother Stefan's engineering firm, Maurice Johnson & Partners Ltd. Stefan Hyde is a founding partner and 50 per cent shareholder of the firm, which was established in 2009 and specialises in fire safety and access engineering services. It has now emerged that Paul Hyde from 2019 to 2020 voted on a minimum of six proposed developments that included submissions from the same company."

6. The present proceedings are referenced further down the article, where the authors state: "In December 2020, Paul Hyde also voted to approve a 210-unit build-to-rent development in Castleknock, Dublin 15. Property developer Bartra submitted a fire safety report conducted by Maurice Johnson & Partners as part of its application. The decision to approve is the subject of a High Court challenge from local student Barry O'Lone, who claims the development contravenes the Fingal County Development Plan. In June 2020 O'Lone successfully challenged a previous ABP decision approving the same development." The article concludes: "Paul and Stefan Hyde and ABP declined to comment".

7. On 26th May, 2022, an RTÉ Prime Time programme broadcast further information about perceived bias and conflict of interest at the board. An article was published on the RTÉ website the following day outlining some of this information.

8. The article by Oonagh Smyth is headed "Concerns over 'system failure' at An Bord Pleanála" (https://www.rte.ie/news/primetime/2022/0526/1301450-key-procedure-an-bord-pleanala/), and begins: "A key procedure designed to avoid the perception of bias and conflicts of interest at An Bord Pleanála does not appear to have been followed in a number of recent cases involving its Deputy Chairman, Paul Hyde, Prime Time has learned. As a result, it appears that Mr Hyde, who has currently stepped aside from his role, made a number of decisions on planning files that he was

restricted from handling. Upon being appointed to the board, Mr Hyde listed fire safety engineering firm Maurice Johnston and Partners as a business in respect of which he was restricted from making decisions on. This is because his brother Stefan is a partner of the company. But Mr Hyde was involved in 11 decisions where Maurice Johnston and Partners submitted a report on behalf of a planning applicant, or where the fire safety consultancy company was acting as a board inspector. According to An Bord Pleanála records, no conflicts of interest were declared".

9. The article goes on to quote Catherine Murphy T.D. as saying that this suggested that there was a "governance and a systemic issue" at the board, and that this "suggests to me that this is not an issue around an individual". The article stated that "The allocation of these cases to Mr Hyde also appears to be a failure of internal procedures restricting file allocation".

10. On 8th June, 2022, judicial review proceedings entitled *Residents of Vincent's Park & Ors v. An Bord Pleanála & Ors* [2022 No. 480 JR] were issued containing an allegation of perception of bias on a very similar ground to that sought to be made by the applicant here. One of the applicant's lawyers in the present proceedings appears to have drafted that statement of grounds.

11. On 25th July, 2022, the present proceedings were certified as ready for hearing and on 29th July, 2022, the proceedings were listed for hearing on 13th December, 2022. On 17th August, 2022, the applicant says he became aware of the article on *The Ditch*. On 5th October, 2022, the first planning permission expired. On 11th October, 2022, the applicant requested a copy of the minutes of the board meeting at which the decision to grant the permission was made and also sought consent of the parties to a proposed amendment to the statement of grounds to deal with the objective bias point.

12. The amendment is essentially encapsulated by a new core ground 1A which reads as follows: "The Decision is invalid insofar the grant of permission was made by a division of the Board comprising a member who was not duly authorised to determine the application contrary to section 111(6)(a) of the 2000 Act as amended and/or who acted in breach of the Board's Code of Conduct and in breach of Section 150 of the Act and the terms of his appointment including the terms as inserted by Section 150(3) and/or (4) of the Act and/or where the application came within the Board member's declarations of interests under section 147 of the 2000 Act and/or which involved an interest on the part of such member that was required to have been on the register of interests under section 147 and where same gave rise to objective bias and/or such decision is vitiated by conflict of interest amounting to a reasonable apprehension of bias and contrary to law".

13. The applicant confirmed the request for an amendment to the court when the matter was next listed, which seems to have been 14th November, 2022.

14. The full grounds of the claim of objective bias are set out at the proposed sub-grounds 11 to 17 which read as follows (underlining omitted):

> "11. Mr Paul Hyde was a deciding member of the Board, and was deputy chairperson of the Board, in respect of the impugned decision. He is the brother of Stefan Hyde a founding Partner and 50% owner of Maurice Johnson & Partners who were the Fire Safety Engineering and Access Consultants acting for the notice party in relation to the proposed development when same came before the Board. Stefan Hyde had a fiduciary interest in the application being successful as his firm would also act at the development stage if successful before the Board. The planning application cover letter lodged on the 19th August 2020 by Thornton O'Conor Town Planning specifically identifies of the reports submitted with the application, a 'Preliminary access & Use Strategy' prepared by Maurice Johnson & Partners.
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> 12. Maurice Johnson & Partners and in particular Stefan Hyde, were at all material times during the consideration of the application for the development herein by the Board, a connected person with the said Paul Hyde ('Mr. Hyde').
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> 13. Notwithstanding Mr Hyde having a clear conflict of interest and the connected person to him having a pecuniary and/or beneficial interest in the application herein, the decision on the application herein was dealt with by Mr. Hyde and Mr. Hyde voted to grant the proposed development permission despite the fact that his doing so gave rise to a reasonable apprehension that the division of the Board including Mr. Hyde or the process leading to the decision might have been biased or that a reasonable observer would apprehend that there had not been an impartial decision making process
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> 14. Mr Hyde acted without lawful authority in acting as a member of the Board which determined such application and granted permission. The involvement of Mr Hyde was in breach of section 15.7 of the Board's Code of Conduct dated June 2011, adopted by the Board pursuant to Section 150 of the Act, which states:
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>> 'A Board member or employee shall not deal with or participate in the decision making process in any case where he/she considers such involvement could give rise to an appearance of objective bias i.e. that such involvement could give rise to a reasonable apprehension that the decision maker or the process leading to the

decision might have been biased or that a reasonable observer would apprehend that there had not been an impartial decision making process'.

15. The appointment of Mr. Hyde included a term pursuant to Section 150(4)(a) of the Act that he would comply with the Code of Conduct and Mr. Hyde was subject to the requirement to comply with the Code of Conduct pursuant to Section 150(3)(a) of the Act. In circumstances where the involvement of Mr. Hyde on the decision making division of the Board was in breach of the Board's Code of Conduct, Mr. Hyde's appointment to that division was not in order and was not duly carried out. Section 111(6)(a) of the 2000 Act states: '(6) (a) Subject to paragraph (b) and (c), the Board may perform any of its functions through or by any member of the Board or other person *who has been duly authorised by the Board in that behalf*'.

16. Mr Hyde was not therefore "*duly authorised*" to carry out the function of determining the application on behalf of the Board. As far as the Applicant is aware Mr Hyde did not identify a conflict of interest at the meeting of the Board at which it was decided to grant permission to the proposed development.

17. The decision of the Board, insofar as it relied upon the affirmative vote of Mr Hyde, is in breach of section 111(6)(a), Section 150(3) and/or (4) of the Act, the Board's Code of Conduct and the contract of appointment of Mr. Hyde as a member of the Board (which term was intended for the benefit of members of the public interested in planning matters including the Applicant herein) and is vitiated by an apprehension of objective bias in favour of granting permission. An ordinary reasonable member of society would form the view that Mr Hyde had a conflict of interest (a conflict he himself identified) in the decision the subject matter of the proceedings herein."

Does a party seeking an amendment in planning judicial review have to comply with s. 50(8) of the 2000 Act?

15. In *Habte v. The Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405, (Unreported, High Court, 4th February 2019), *Habte v. The Minister for Justice and Equality (No. 2)* [2019] IEHC 93, [2019] 2 JIC 1110, (Unreported, High Court, 11th February 2019), I attempted to survey the law on amendment of proceedings and extract a number of principles deriving from an overview of the case law on amendment in judicial review. That exercise was further summarised in a table in *Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701, (Unreported, High Court, 27th January 2023) at para. 40:

Situation	Appropriate approach where amendment sought after expiry of time for instituting proceedings
Amendment challenges a totally separate decision from that challenged in the original (or previous) statement of grounds.	Requires good and sufficient reason for an extension of time.
Amendment challenges an interim decision in the same process, in circumstances where for some reason it is thought necessary to add express reference to such an interim decision to a challenge that has already been brought to the final decision.	Such an amendment is normally not necessary because a challenge to the final decision inherently allows the court to review the interim steps in the process as well. Where such an amendment is sought for the avoidance of doubt or otherwise, it does not require the level of good and sufficient reason that would be necessary for an extension of time; the amendment is to be assessed on a balance of justice basis, having regard to arguability, explanation (which will normally be simply the avoidance of doubt) and lack of irremediable prejudice (which is inherent in the fact that a challenge to the final decision encompasses an interim decision anyway). In such circumstances a court can lean towards allowing such an essentially clarificatory amendment.
Amendment challenges the same decision in substance, but reliefs are re-worded or added to, *e.g.* declaratory relief rather than just *certiorari* or *vice versa*.	Does not require the level of good and sufficient reason that would be necessary for an extension of time; amendment is to be assessed on a balance of justice basis having regard to arguability, explanation and lack of irremediable prejudice.
Reliefs the same, but grounds amended to re-word or elaborate a point that was	Does not require the level of good and sufficient reason that would be necessary for an extension of time; amendment is to be assessed on a balance of justice

there already in some form or to correct technical or other errors.	basis having regard to arguability, explanation and lack of irremediable prejudice.
Reliefs the same, but grounds amended to add a new ground but one that is reasonably related to pre-existing grounds.	Does not require the level of good and sufficient reason that would be necessary for an extension of time; amendment is to be assessed on a balance of justice basis having regard to arguability, explanation and lack of irremediable prejudice.
Reliefs the same, but grounds amended to add an entirely new case, completely separate from any pre-existing grounds.	If the interests of justice are such as to permit the amendment on the basis of mere explanation (together with arguability and lack of irremediable prejudice) then this may be done. If the interests of justice do not so permit, then a higher level of "good and sufficient reason" would be required.

16. The upshot is that s. 50(8) of the 2000 Act applies to the initiation of the proceedings in the first place, not to an application to amend: see Collins J. for the Court of Appeal in *North Westmeath Turbine Action Group v. An Bord Pleanála, Ireland and The Attorney General* [2022] IECA 126, (Unreported, Court of Appeal, 1st June, 2022) para. 54. An application to amend should be assessed under the umbrella of the interests of justice by reference to the test in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56: arguability, explanation and lack of irremediable prejudice.

17. Again, at the risk of repetition every time the question of an amendment arises, the public policy rationale for the commencement of proceedings within time is of course very strong but is satisfied once those proceedings are commenced and the status of the impugned decision becomes provisional and under challenge. Whether specific grounds are added or subtracted, or even specific reliefs refined, does not particularly undermine or even engage most of the public policy considerations that demand a strict time limit for the initiation of the proceedings overall. Thus, it makes complete logical sense for the test for an amendment to be somewhat less demanding than

the test for late commencement of the proceedings at all. To impose an equally restrictive test for amendment would be unfairly disproportionate and would allow opposing parties a windfall benefit from applicant's errors that did not in themselves engage the policy against late changing of the status of decisions from unchallenged to challenged. The same applies in reverse to amendments of statements of opposition by opposing parties.

Does an application for an amendment that is an "entirely" or "substantially" new case have to satisfy O. 84 r. 23(2) RSC?

18. Collins J. in *North Westmeath Turbine Action Group v. An Bord Pleanála* [2022] IECA 126, (Unreported, Court of Appeal, 1st June 2022) at para. 54 said: "... I am not persuaded that it was appropriate to approach the amendment application here as though it involved a late application for leave to seek judicial review and thus was subject to the extension of time provisions in section 50(8) PDA. Section 50 does not purport to impose any such general requirement. It does not in fact address the issue of amendment at all. Order 84, Rule 23(2) RSC continues to govern the amendment of judicial proceedings brought pursuant to section 50. Order 84, Rule 23(2) does not require that every amendment application must be approached as if it involved a late application for leave. That is the appropriate approach where a substantially new case is sought to made. The amendment here did not involve the making of a substantially new case or, indeed, any new case at all."

19. Much emphasis at the hearing of the present matter was placed on the one sentence "That is the appropriate approach where a substantially new case is sought to be made." But I think that the notice party's reliance on this sentence is over-determined.

20. First of all, it is clearly *obiter*, and a single *obiter* sentence cannot ever have been intended to deal with, still less qualify, detailed jurisprudence teasing out this issue.

21. Secondly, no authority is referred to in support of that *obiter* sentence, which suggests that a court interpreting such a statement should not lean towards the sort of extremely wide and expansive interpretation urged by the notice party.

22. Thirdly, and most obviously, the Court of Appeal did not define what it meant by "a substantially new case" for the purposes of this *obiter* sentence. I do not think it can be contested that if "substantially new case" means challenging a new and unrelated decision, then an amendment application must be approached as if it were a late application for leave. Indeed, I made that point in *Sherwin*, as reflected in the table above. The situation would be somewhat different if what was intended to be meant by "substantially new case" was merely a new ground for an existing relief.

23. The concept that O. 84 r. 23(2) RSC requires that the test for a late application for leave to be applied to such a new ground does not appear from the text of that provision. Order 84 r. 23(1) and (2) RSC as inserted by the Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011) provides as follows:

> "23. (1) A copy of the statement in support of an application for leave under rule 20, together with a copy of the verifying affidavit must be served with the notice of motion or summons and, subject to sub-rule (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.
>
> (2) The Court may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application."

24. The crucial point is that the test for a late application for leave at all is set out expressly in O. 84 r. 21 RSC, as substituted by the 2011 rules, as follows:

> "21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
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> (2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.
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> (3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
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> > (a) there is good and sufficient reason for doing so, and
> >
> > (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
> >
> > > (i) were outside the control of, or
> > >
> > > (ii) could not reasonably have been anticipated by
> >
> > the applicant for such extension.
>
> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.

(7) The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

25. Collins J. for the Court of Appeal in *North Westmeath Turbine* expressly followed the Supreme Court in *Keegan v. An Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570 and said in effect that the approach majoring on the interests of justice was the appropriate one. At para. 44 he stated: "Ultimately, the touchstone for determining whether to permit an amendment under Rule 23(2) RSC – as it is under Order 28 RSC – is the interests of justice: *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570, per Fennelly J (O' Donnell and McKechnie JJ agreeing), at para 21. Protecting the constitutional right of access to the court is an important consideration in this context: *Keegan*, at para 29. The assessment of whether the interests of justice weigh in favour of amendment or not will depend on the particular facts and circumstances: *Keegan* at para 23. Ultimately, the Court in *Keegan* allowed the amendment, even though the additional grounds *"raised an entirely new ground in law"* and, to that extent, substantially enlarged the original grounds (para 38). A factor favouring the amendment was that, if not permitted, the appellant would be *"deprived of a serious argument"*.

26. The Court of Appeal did not seek to distinguish *Keegan* in any way. On the contrary, it clearly stated that the *Keegan* approach was correct and controlling.

27. However, if an application to amend in relation to a substantial new case, where the "new case" is merely a new ground (albeit one raising a substantial new point), not a new relief, has to be approached as if it were a late application for judicial review at all, then such an amendment could not be allowed by reason of the factors within the control of a party and its legal advisers, such as mere lawyers' oversight, as in *Keegan.* It respectfully seems to me therefore that you can have *Keegan,* or you can have a rule that a substantially new ground has to satisfy the test for a

late application in the first place, but logically you cannot have both. I prefer to read *North Westmeath Turbine* in the former sense. Indeed in *Keegan* the Supreme Court relied on the fact that the applicant was making a new "very significant point of law" as a reason to *allow* the amendment, not to disallow it (para. 46).

28. I am conscious of course, as is everybody, of the need to follow precedent. It is easy to oversimplify that process, because when the pre-existing authorities are in tension, any current decision can be superficially presented as not following at least one of them. So the subsequent court is set up to fail, and to be damned whether it does or doesn't. In such a situation, the court has to forget the impossible task of reconciling every judicial pronouncement, and aim instead for a holistic overview of the legal landscape; to step back and ask what is the approach that makes the best sense of the law overall. This is the approach championed by Ronald Dworkin, the legal academic who more than any other has achieved the most penetrating insight into the judicial task.

29. Ultimately, I find it is very hard to get away from the basic legal policy point that while there is the strong rationale for a restrictive rule regarding time for commencement of proceedings, most of those considerations if they arise at all are simply nowhere near as strong in relation to a possible refinement of the grounds. The status of the decision is already in question by that point, and we are at the level of detail rather than at the level of principle. Indeed all of the points made in *Keegan* and indorsed in *North Westmeath Turbine* apply in a situation such as we have here. Notwithstanding that the applicant possibly could have acted sooner, to refuse the amendment would mean that the applicant would be deprived of a legally arguable point and the interests of justice would be adversely affected.

30. It is of course child's play to come up with authorities where amendments have been refused. For example, written submissions mention the decision of Twomey J. in *O'Brien v. an Bord Pleanála, Ireland and The Attorney General* [2022] IEHC 18, (Unreported, High Court, 18th January 2022), which on one view appears to lend itself to the same sort of analysis as resulted in the reversal by the Court of Appeal (in the judgment to which we have referred) of Twomey J.'s similar judgment in *North Westmeath Turbine* v. *An Bord Pleanála* [2019] IEHC 924, (Unreported, High Court 19th December 2019). There are inevitably other isolated examples where a narrow approach was taken to an amendment. But the preponderance of authorities is very much in keeping with the spirit of the point made by the Supreme Court in *Croke v. Waterford Crystal Ltd* [2004] IESC 97, [2005] I.R. 383, [2005] 1 I.L.R.M. 321 that the jurisdiction to amend was intended to be liberal. It's easy to find a couple of authorities to support any given outcome. The more worthwhile task is to extract

the best sense from all of the authorities combined. In attempting to do so, the interests of justice loom large.

Is the test for amendment in the interests of justice satisfied?

31. Those interests of justice in the light of the tests of arguability, lack of irremediable prejudice, and explanation, favour allowing the amendment here.

32. The applicant's point is clearly arguable to the substantial grounds threshold. There is no irremediable prejudice in granting the amendment. There are no reliance interests on the decision because the permission has been under challenge at all material times. Having to answer potentially winning points is not legally cognisable prejudice. The applicant has proffered an explanation for not having included the point originally.

33. In fairness to the notice party, it is true that the applicant could have mobilised himself more quickly and I bear in mind all of the valid points made by the notice party on that front, including the possibility that one of the applicant's current lawyers appears to have had knowledge of the point since June, 2022. However the weight to be attached to that suggestion is limited because the notice party floated that point in by way of submissions, rather than as an evidential matter to which the applicant could be called on to respond. I don't think that that is a sufficiently formal way of requiring a defence of actions or inactions to be compelled, and I think that the applicant's response, to the effect that he could not be expected to deal with a point raised in that way, is a legally correct one. It would not have been a problem for the notice party to put the relevant facts on affidavit and argue for the need for an evidential response. Maybe there is some simple explanation or maybe this is just more of the human error that frequently lurks behind the need for amendment applications. But even if *arguendo* the applicant's lawyers or any of them were in some way inattentive to the point, which I am not for a moment suggesting, that wouldn't outweigh the other elements of the situation that favour the balance of justice being resolved in favour of allowing the amendment. A slippage in expedition would be weightier as a factor if we were dealing with the late initiation of a challenge at all, rather than refinement of the grounds of a challenge already in being.

34. In coming to the conclusion as to where the balance of justice lies, I have considered all of the circumstances, but two factors particularly stand out; the board's lack of objection, and the overriding importance of integrity in public life. I will expand further on these issues below. There is a third possible element, the lack of evidence on behalf of the notice party regarding how the

alleged conflict of interest arose and who knew what when, but for reasons which I explain further below I don't propose to place reliance on it for today's purposes.

The board's lack of objection

35. Of significant importance here is the absence of any objection from the board to the amendment. On the particular facts, the amendment is very personal to the board. It alleges that the deputy chairperson of the board acted in direct conflict of interest by making a decision in a case where a close relative was a partner in a firm that was a professional adviser to the developer. The vital interests of the board in the integrity of its own processes are directly engaged by these matters. The fact that the board itself has not seen fit to object to the amendment must be a significant factor. Without taking from a notice party's right in law to oppose an application of this kind, it would be a complete distortion of the process not to attach great significance and weight to the lack of objection from the body whose internal ethical requirements and external integrity obligations were said to have been disregarded or violated.

Integrity in public life

36. The second important factor is the public interest in upholding integrity in public life. The applicant here seeks to add a plea of objective bias, which on one view sounds legalistic and even technical. But why is objective bias a potential problem? In a situation such as where it is alleged that decisions carrying financial rewards have been handed out by a statutory decision maker, under the stewardship of its deputy chairperson, to developers who are being advised by the deputy chairperson's brother's firm, the rule against objective bias is vital because it ensures that the integrity of the process is not distorted. If unchecked by appropriate scrutiny such as through legal proceedings, the appearance of departure from integrity, or any other form of distortion of the process, is corrosive of confidence in public institutions and generates cynicism and disengagement. Such issues could potentially undermine elements of the rule of law and of the equality between citizens on which the social contract is founded.

37. That said, not all governance issues are equally concerning. In certain circumstances a failure to declare an interest, or even ending up in a conflict of interest, may be a relatively forgivable oversight or misjudgement, may be an issue of an essentially technical nature of no practical import, or may involve fine judgement-calls in a fluid situation, with which the ultimate decision-maker, enjoying the leisure of hindsight, may disagree. But on the other hand, where those holding office, employment or contractual position within the public service are involved in awarding financial favours, even minor ones, to their relatives or to firms or persons associated with them, or in making

decisions in favour of relatives or persons associated with them that confer financial benefit, serious issues can arise with potentially significant consequences and sanctions.

38. There is a public interest in the investigation of such matters, including conflict of interest or objective bias in the public service generally and statutory decision-making in particular, and a consequent interest in public disclosure and accountability. One major way in which this is achieved is through invoking the jurisdiction of the courts. I am not of course assuming that the applicant's allegations here will be substantiated, or that even if they are substantiated that any massively blameworthy subjective element of wrongdoing will come to light. But nonetheless the public interest is clearly engaged by the present application and weighs strongly in favour of allowing the applicant to ventilate this point, and indeed, all other things being equal, in favour of allowing any given applicant to raise a point regarding alleged apparent or real lapses in the integrity of public decision-making.

39. A policy along these lines has motivated the courts to allow proceedings to be maintained, continued, or amended in circumstances where more pedestrian allegations might not have been permitted. For example, in *Comcast International Holdings Incorporated & Others v. Minister for Public Enterprise & Others* [2012] IESC 50, (Unreported, Supreme Court, 17th October 2012), the Supreme Court rejected the State defendants' application to have proceedings dismissed for delay, and had significant regard to the claims being made regarding alleged corruption in public procurement.

40. Similarly in *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2019] IECA 360, (Unreported, Court of Appeal, 16th December 2019), Donnelly J. permitted certain amendments to proceedings, on the basis of the allegations being "firmly anchored in corruption".

41. In *Goode Concrete v. CRH Plc* [2015] IESC 70, [2015] 3 I.R. 493, [2015] 2 I.L.R.M. 289, 2015 WJSC-SC 11827, the Supreme Court strongly emphasised that decisions effected by a financial conflict of interest had to be set aside. MacMenamin J. said at para. 3: "It is fortunate that there is a high degree of public trust in the judiciary (see E.U. Justice Scoreboard 2014, 17th March, 2014, Figure 7). However, it is the task of judges to maintain public confidence, even in a case where there may be doubts about the *bona fides* of an application to set aside a judgment. Maintaining public trust and confidence is a fundamental value. It comes before other considerations. For justice to be seen to be done, the orders made should be set aside".

42. That sentiment is applicable by analogy here. Maintaining trust and confidence in the processes, including but not limited to judicial and quasi-judicial processes, of Irish public

administration and ensuring that those processes are not distorted, is of central importance and "comes before other considerations".

43. Thus, it is for the greater good that allegations of the type sought to be made by the applicant here are allowed to be pursued by amendment, given that integrity in public life is at issue.

Lack of evidence from the notice party

44. There is a potential third factor which is the lack of evidence from the notice party, but in fairness to the parties, that was not particularly developed at the hearing, so I decided to park it unless it became crucial, in which case there would have been further argument. Having regard to the foregoing I don't think it is crucial, so I don't need to decide its relevance.

45. The point arose because the applicant drew attention to the lack of an affidavit from the notice party. One was then left wondering what was the relevance of that. The possible line of thought, which I only note for the purposes of transparency and not because I am making any decision on it, is that one could see an argument from the case made by the applicant that the notice party who is objecting to this application is the very entity that is said to have engaged Stefan Hyde's firm, thereby setting in motion the conflict of interest. One then might ask who knew what when, what steps were taken to mitigate the problem, and whether it is relevant that this hasn't been clarified as far as the notice party is concerned.

46. The situation also potentially raises the question as to the obligation in judicial review for opposing parties to place their cards face up on the table, see *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941, and the extent to which a notice party has to assist the court on relevant facts if it wishes to step into, or share, the shoes of the respondent in opposing relief (see Michael Fordham, *Judicial Review Handbook* 7th ed. (London, Bloomsbury, 2020), para. 10.4.12 which envisages duties on all opposing parties). Again I am noting that for transparency to identify a point I don't have to address, but if it had been crucial I would have invited further submissions.

47. Insofar as the notice party bridled somewhat at my even asking the question, I emphasise that this arose from a point made by the applicant, albeit that the implications weren't teased out. I don't think a court is precluded from following such a train of thought. It is small potatoes compared to for example *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, [2014] 4 I.R. 277, 2015 WJSC-SC 5994, where the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2), that Hogan J. in the High Court had of his own motion taken a point as to the *validity* of legislation in terms of EU law, legislation that hadn't been

challenged by the applicant. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473, (Unreported, High Court, 13th December, 2011), Hogan J. took an important point of his own motion, not raised by any of the parties, after having reserved judgment and reconvened the hearing to invite submissions on it. Anyway, none of that matters because I am not placing any reliance on the issue for the reasons stated.

Order

48. Accordingly, the order will be as follows:

(i). I will give the applicant liberty to file the proposed amended statement of grounds in the terms sought;

(ii). the amended statement should be filed within two weeks of the date of this judgment together with a verifying affidavit;

(iii). the board will have three weeks to file an amended statement of opposition, and the notice party will have one further week to file its amended statement of opposition;

(iv). the matter will be listed for mention thereafter on a date to be notified by the List Registrar;

(v). if no submissions to the contrary regarding costs are received by the List Registrar within 7 days of the date of this judgment, the foregoing order will be perfected at that point with costs being reserved; and

(vi). if such submissions are so received, the other parties will have 7 days for a replying submission and the matter will be listed thereafter on a date to be notified by the List Registrar for determination.