THE HIGH COURT

[2019 No. 560 CA]

BETWEEN

SIMON REVILL

APPELLANT/APPLICANT

– AND –

PHILIP FARRELLY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 30th June 2021.

SUMMARY

This is an unsuccessful application for: (i) a joinder of a County Council to the within s.160 proceedings; (ii) leave to submit fresh evidence on appeal that was not before the Circuit Court; (iii) an order that the proceedings be subject to case management, fixing a date for case management, and fixing a date for the hearing of these proceedings. This summary is part of the court's judgment.

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1. This is an appeal brought in the context of s.160 proceedings commenced under the Planning and Development Act 2000, as amended. By notice of motion dated 9th April 2021, three principal reliefs have been sought in the present application, *viz*. (i) an order pursuant to O.15(13) Rules of the Superior Court and/or the inherent jurisdiction of the court joining Fingal

County Council to the within proceedings as a notice party, (ii) an order pursuant to O.61(8) RSC entitling the applicant to adduce evidence of ongoing works carried out to the premises the subject matter of these proceedings which was not before the Circuit Court, (iii) an order that the proceedings be subject to case management, fixing a date for the case management of the case, and fixing a date for the hearing of the proceedings.

2. As regards relief (i), O.15(13) RSC provides, *inter alia*, as follows:

> "*No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added*."

3. It is fair to note that relief (i) is an unusual relief to seek, albeit that unusualness is not the determinant of what is appropriate. Why unusual? Because s.160 empowers individuals to bring actions before the courts, they routinely do so, and they do not routinely seek to join in local/planning authorities. In truth, unless a Council brings a case itself it is not typically a party to s.160 cases. That said a power of joinder does exist under O.15(13); however, in this case the within application does not meet the thresholds set out in O.15 because there is, with respect, nothing to be gained in joining in the Council as a notice party. The Council, both sides are agreed, has had opposing views internally on Mr Farrelly's development, initially, it seems, not unfavourable, latterly less favourable. There can be cases in which the views of the Council would be appropriate as, for example, in material change of use cases such as *Mahon v. Butler* [1997] 3 I.R. 369 and *Grimes v. Punchestown Developments Co Ltd and Anor.* [2002] 1 ILRM 409 (though the court notes that in neither of those cases was the local authority joined as a notice) where the council may have a particular knowledge of certain concerns of planning

relevance (such as noise, traffic, *etc*.) that may arise from the proposed material change of use. Such issues do not present here and the court sees no reason to depart from the usual practice whereby such views as the council has evinced will be exhibited in the ordinary course of the proceedings.

4. Fundamentally, this is a straightforward s.160 matter: one or other of Mr Revill and Mr Farrelly is right that the development in issue is not/is exempted. That is a matter for the court to decide and the Council's shifting view of matters is not going to be determinative of the issues in a s.160 proceeding. The court does not see any particular matters to present on which the especial input of the Council need be sought. But even if the trial judge were to take a different view of matters it is an easy matter to adjourn the trial proceedings and have affidavit evidence sought of the Council so as to assist the court. That is not a process which requires the Council to be formally joined into the proceedings. Nor does the Council need to be a notice party to the proceedings to become informed of any aspects of the judgment that may be of interest/use to the Council as regards the proceedings. Additionally, though a lesser consideration (at least for the court; it will obviously be a significant issue for whoever loses in these proceedings), the court cannot but note that joining the Council as a notice party will almost certainly lead to an additional costs burden for whoever ends up paying costs at the end of these proceedings. Having regard to all of the foregoing, the court does not see that a decision now in effect to 'run up' those additional costs for whoever ends up paying them is justified.

5. Relief (i) will therefore respectfully be refused.

6. As regards the adducing of additional evidence under O.61(8) RSC, that Order provides as follows:

> "*Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court. Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be*

necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court."

7. This step just has not been taken here. The affidavit sworn in support of the motion does not give any substantial indication as to what the evidence is, and no indication at all as to why it is required, what it will comprise, and why it was not before the Circuit Court. There may be good reasons presenting for the submission of fresh evidence but they are simply not before the court. The court respectfully does not accept the proposition that if the affidavit grounding the within motion is read in tandem with other affidavit evidence in the within proceedings, it is clear what fresh evidence it is sought to submit. The court does not see that this is clear; it can guess at what the evidence may be but that is no basis on which to make the order sought. Moreover O.61(8) is clearly drafted as the process by which leave should be sought, with the person seeking leave required (to use a colloquialism) to 'set out his stall' as to what evidence he seeks to submit and why it was not before the Circuit Court, with his opponent then given the opportunity to take an informed view as to what suits him best in terms of how he will proceed in light of the leave sought. Mr Revill has not sworn the requisite affidavit, and Mr Farrelly has not therefore been given the opportunity to proceed in the informed manner that O.61(8) clearly contemplates. It would therefore be unfair to grant relief (ii) to Mr Revill.

8. Relief (ii) will therefore respectfully be refused.

9. As regards case management (relief (iii)), the court understands that one of the reasons for resisting the previous interlocutory application in this matter was that it was considered more desirable by Mr Farrelly that the full appeal come on for hearing. That appeal has not been advanced. It is Mr Revill's appeal and is for him to advance at whatever pace he considers necessary. Barr J., at the interlocutory stage, gave leave to take any steps required in this regard. The court does not see any need for case management of the type contemplated. Setting a trial date is a matter for the listing judge.

10. Relief (iii) will therefore respectfully be refused.

11. As this judgment is being delivered remotely, the court should perhaps also indicate that it proposes to order costs against Mr Revill, who has failed on each limb of this application. If either party objects to the court so ordering, they should let the registrar or the court's judicial assistant know within 14 days of the date of this judgment and the court will schedule a brief costs hearing.