BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2011/0040

JIPFA INVESTMENTS LIMITED

Claimant

-and-

THE MINISTER OF PHYSICAL PLANNING[1]

Defendant

-and-

ALRED FRETT
NATALIE BREWLEY

The Intervenors

Appearances:
Mr. Gerard St. C. Farara QC and Ms. Tamara Cameron of Farara Kerins for the Claimant
Ms. Vareen Vanterpool, Senior Crown Counsel and Ms. Maya Barry, Crown Counsel for the Defendant
Mr. Frank Walwyn and Ms. Astra Penn of Dancia Penn & Co. for the Intervenors

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2011: June 08
2011: July 08, October 31

Judicial Review – affidavit in support of claim for judicial review – application to strike out certain parts of affidavit - whether CPR 30.5 applies to judicial review – whether portions of affidavit contain hearsay or expert opinion or legal opinion -

The claimant company seeks to have the planning permission issued by the defendant to the intervenors declared invalid. The claimant, through one of its directors, submitted a 23-paragraph affidavit in support of its application for judicial review. The defendant filed a Notice of Application pursuant to CPR 30 in which he seeks to strike out certain parts of the affidavit on the grounds that they contain statements which are either hearsay, opinion evidence, legal arguments and conclusions or are wholly irrelevant to these proceedings.

[1]There was an oral application by the defendant to change its name to its correct legal name as "The Premier and the Minister of Finance and Tourism." At the hearing, the court requested the defendant to make a written application. Since then, the court has concluded that it will not prejudice any of the parties if the name of the proceedings is changed forthwith to reflect the correct name of the defendant. Henceforth, the name of the defendant will be "The Premier and the Minister of Finance and Tourism."

HELD:

1. Whilst the requirements of CPR 56 are paramount, CPR 30 is applicable to affidavit evidence in a claim for judicial review: Richard Frederick v Comptroller of Customs St. Lucia HCVAP 2008/0037[Judgment 6 July 2009] considered; NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Ltd Trinidad and Tobago HCA Cv 3181 of 2004 (Stollmeyer J), Ruling 9th May 2005 followed.

2. The Court should not exclude "relevant background information" which is material to resolving the dispute before the court. Paragraphs 7 and 9 contain pertinent background information relevant to the claimant's claim: R v Humberside CC ex p Bogdal (No. 1) [1991] COD 66, R v Humberside CC ex p Bogdal (No. 2) [1992] COD 467; R v Humberside CC ex p Bogdal (No. 1) Court of Appeal, 6 December 1996 followed.

3. Witnesses should not give evidence as to inferences which they believe can be drawn from the facts. Paragraphs 8, 10, and 18 in their entirety, and portions of paragraphs 11, 16, 19, 20 and 21 contain statements which constitute commentary on the facts, unnecessary opinion, or submissions better left for trial. These are not facts which the deponent is able to prove from his own knowledge and are hereby struck out: Director of Corporate Enforcement v Baily and Anor [2007] IEHC 365 followed.

4. In paragraphs 13, 14 and 15, the claimant surpasses what is necessary to set out as the grounds of its challenge. The said paragraphs contain statements which are legal arguments and conclusions that ought to be properly struck out: Sierra Club of Canada v The Minister of Finance of Canada and others Federal Court T-85-97 (Hagrave, John A – Prothonotary) Decision 10 November 1998 considered; National Insurance Corporation v Rochamel Development Company Limited SLUHCV 2006/0638 (Edwards J), Judgment 26 September 2008, Anthony Eugene v Joseph Jn Pierre SLUHCV 2004/0097 (Edwards J), Judgment 21 February 2007 followed.

RULING

Introduction

[1] The defendant, the Premier and Minister of Finance and Tourism ("the Minister") seeks to strike out all or parts of the first affidavit of Dr. Joseph S. Archibald QC ("the deponent") in support of the claim by the claimant, JIPFA Investments Limited ("JIPFA"), for judicial review on the grounds that they contain statements which are either hearsay, opinion evidence, legal arguments and conclusions or are wholly irrelevant to these proceedings.

The Parties

[2] The Minister granted planning permission to the Intervenors, Mrs. Natalie Brewley, Mr. Alred Frett, and their company B & F Medical Complex (collectively "the Developers") to construct a 24-bed medical complex on Parcel 21 of Block 2938 Road Town Registration Section ("Parcel 21").

[3] JIPFA is the proprietor of the adjoining Parcel 22 of Block 2938 Road Town Registration Section ("Parcel 22"). The Developers and JIPFA are thus neighbors. The deponent is a director of JIPFA.

Procedural History

[4] JIPFA's property contains a single-residential/dwelling house. The Developers' land abuts JIPFA's western border and a 12-foot right of way over the Developers' land provides the only access to JIPFA's land. Until recently, the Developers' land also contained a single residential / dwelling house.

[5] The Developers submitted an application dated 14 July 2009 for construction of a medical complex on Parcel 21. Both the Planning Authority and the Planning Appeals Tribunal rejected this application ("the first application"). The Developers submitted an application dated 24 August 2010 for construction of a medical complex on Parcel 21 ("the second application"). This application bypassed the Authority and the Appeals Tribunal and was approved directly by the Premier on 14 January 2011.

[6] Sometime during 2010/2011, the Developers commenced demolition of the dwelling house, excavation and other preparatory works on the site. JIPFA, aggrieved by the impending change of land use on what was previously a single-residential house lot, initiated a claim for judicial review of the Minister's decision to grant planning permission for the development.

[7] On 23 February 2011, JIPFA applied for leave to apply for Judicial Review. The application for leave was supported by an affidavit of the deponent. Leave was granted on 28 February 2011. The substantive application was filed with substantially the same affidavit in support on 1 March 2011.

[8] On 4 April 2011, the Minister applied to the Court pursuant to Part 30 of the Civil Procedure Rules 2000 (the "CPR") to strike out certain parts of the deponent's affidavit in advance of filing his affidavit in reply. It is argued on behalf of the Minister that eleven of the twenty-three paragraphs in the affidavit are so improperly drafted that they fall afoul of the general requirements for affidavits spelled out in CPR 30.3. Thus, the impugned paragraphs should be struck out, either in part or in their entirety on the grounds that they contain statements which (a) the deponent cannot prove from his own knowledge, (b) are statements of information or belief where no sources are identified and are hearsay; (c) are opinion evidence of the deponent which he is unqualified to make; and (d) are legal arguments and conclusions. Alternatively, that the whole or parts of the impugned paragraphs be struck out on the ground that they contain scandalous, irrelevant or otherwise oppressive matter. The Minister also seeks leave to file his affidavit in reply outside of the prescribed stipulated time.

[9] The Developers have made no application of their own but piggybacked on the Minister's application, commenting specifically upon an additional three paragraphs, which were not referred to in the application. The Developers' position also is that, with the exception of paragraphs 1 to 6, the entire affidavit is defective in that nearly every paragraph contains a statement or statements, which offend some principle of pleading or some principle of evidence, and should properly be struck out.

[10] In response, JIPFA contends that CPR 30 does not apply to affidavits in support of applications for judicial review and even if it did, the deponent's affidavit does not fall afoul of CPR 30.

The issues

[11] The two issues that fall for determination are as follows:

1. Whether CPR 30 applies to affidavits filed in support of applications for judicial review?

2. Whether the whole or parts of the impugned paragraphs (7, 8, 9, 10, 11, 13, 14, 15, 16, 18, 19, 20 and 21) should be struck out on the basis that they are (i) irrelevant, (ii) opinion, (iii) legal argument, (iv) hearsay or (v) otherwise contain scandalous, irrelevant or otherwise oppressive matter?

CPR 30 and its applicability (if any) to Judicial Review

[12] CPR 30 governs the content and form of affidavits to be used in civil proceedings generally. CPR 30.3 provides as follows:

> (1) "The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
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> (2) An affidavit may contain statements of information and belief –
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> (a) if any of these Rules so allows; and
> (b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source of any matters of information and belief.
>
> (3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."

[13] Learned Senior Crown Counsel, Ms. Vanterpool and Mr. Walwyn, learned Counsel for the Developers submit that while it has been decided that an application for leave to seek judicial review is an interlocutory proceeding, the actual application

for judicial review is not an interlocutory proceeding.[2] Therefore, even though an affidavit in support of an application for leave to apply for judicial review may contain statements of information or belief, provided that the sources are identified,[3] the actual affidavit in support of the application for judicial review must conform to the ordinary rules of affidavit evidence as prescribed by CPR 30.3.

[14] Learned Queen's Counsel, Mr. Farara QC submits that CPR 30.3 does not apply to an affidavit in support of an application for judicial review. Says, Mr. Farara QC, the only rules that apply are those set out in CPR 56. According to Mr. Farara QC, the pleadings in judicial review matters are somewhat peculiar and different from those which obtain in an ordinary civil claim. For instance, the affidavit in support of a judicial review claim is not affidavit evidence only but, is also, in the nature of pleadings. In support, Mr. Farara QC cites CPR 56.10 which provides that "Any evidence filed in answer to a claim for an administrative order must be by affidavit but the provisions of Part 10 (Defence) apply to such affidavit."

[15] In addition, Mr. Farara QC suggests that CPR 30 does not apply because CPR 56.11(1) specifically incorporates the case management powers given to the court under CPR 25 to 27. This specific incorporation would have been unnecessary if the rules applied generally to judicial review claims as they do to civil claims.

[16] Finally, says Mr. Farara QC, the Court of Appeal in Richard Frederick v Comptroller of Customs[4] has pronounced that judicial review is a peculiar specie of proceedings and the ordinary rules applicable to civil proceedings do not really apply to them.[5]

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[2] R v Sandhutton Parish Council ex. p Todd [1992] COD 409; cited with approval in NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Ltd [HCA Cv 3181of 2004] –unreported

[3] Submissions of the Defendant in support of Application to Strike Out dated June 6, 2011, para. 8.

[4] **Richard Frederick and Lucas Frederick v Comptroller of Customs and Attorney General** St. Lucia HCVAP 2008/0037 (Rawlins CJ, George-Creque JA, Joseph-Olivetti JA [Ag]), Judgment 6 July 2009.

[5] See: Transcript of Chamber Proceedings Wednesday, June 8, 2011 at page 41.

[17] On my reading of Richard Frederick, the case did not go quite so far as the position advanced by Mr. Farara QC. George-Creque JA was concerned with the definition of 'civil proceedings' in the Crown Proceedings Act (the "CPA") of St. Lucia. At paragraph 32, she stated as follows:

> "…there is no doubt that public law proceedings are a peculiar specie of civil proceedings falling outside the ambit of ordinary types of 'civil proceedings' contemplated by the CPA. To my mind, CPR 2000 recognizes this peculiar specie of civil proceedings by providing a regime of rules in Part 56 which are applicable only to proceedings of this kind."

[18] At no time did George-Creque JA suggest that CPR 2000 does not apply to claims for judicial review. In fact, she clearly stated at para. [31] that:"CPR 2000 does not seek to define "civil proceedings". Rule 2.2(2) says in effect that "civil proceedings for the purposes of the rules, include judicial review…"

[19] Ms. Vanterpool has also alluded to CPR 2.2 in her submissions. I agree with Ms. Vanterpool that while CPR 56 does provide for administrative orders including judicial review proceedings, it simply does not create a particular exception to affidavit evidence in particular and no exception to the rule under CPR 30.3. It says nothing about the affidavit not having to conform to the other rules particularly CPR 30.3.[6]

[20] In R v Sandhutton Parish Council ex parte Todd and another[7], Schiemann J said:

> "Solicitors or counsel preparing papers for use in judicial review proceedings should bear the following in mind. Judicial review normally takes place on the basis of facts which are either agreed or cannot be disputed in court. In those circumstances a short affidavit exhibiting documents will usually suffice. Where however a party wishes to put before the court alleged facts which may well be disputed, he will need to consider carefully whether or no [sic] the case is suitable for judicial review. If, on reflection, he comes to the view that it is, then some thought

[6] Transcript of Chamber Proceedings Wednesday, June 8, 2011 at page 22.
[7] Queen's Bench Division (Crown Office List) CO/1183/90, (Schiemann J), Judgment 10 March 1992 (unreported), at page 2: See Tab 1 Defendant's Authorities.

must be given to the drafting of affidavits. At the stage of asking for leave to apply for judicial review, those being interlocutory proceedings, the Rules of the Supreme Court, O.41, r 5(2), permit statements of information and belief with the sources and grounds thereof. However, for the hearing proper O.41, 5(1) will apply. This provides that in principle an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. There may or may not thereafter be an application to cross-examine the deponent. If a party wishes at the hearing to prove facts on the basis of an affidavit containing statements of information or belief, he must ask the court for an order under O. 38, r 3." [Emphasis added]

[21] In NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Ltd, Stollmeyer J. said:

> "I am given no authority to support a contention that the law and rules of evidence are any different in a public law matter – or judicial review – as compared to a matter in private law. Order 41 Rule 5 clearly applies – that is well settled. The evidence must be first hand, otherwise it is hearsay. Nothing has been put before me to demonstrate that any of the disputed paragraphs or exhibits complained of fall within any exception to the hearsay rule. On that basis they are all clearly inadmissible. Further, the formal requirements of Order 38 Rule 3 have not been met, indeed, there has been no attempt to do so."[8]

[22] Accordingly, I hold that the requirements of CPR 56 are paramount. Subject to that, the ordinary rules of affidavit evidence apply. CPR 30 is applicable to the affidavit in this case.

Jurisdiction to strike out affidavits

[23] The jurisdiction to strike out pleadings is draconian and should only be exercised sparingly and in clear cases. In Lindsay Fitz-Patrick Grant v Glen Fitzroy Phillip,[9] I observed:

> "Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. So, the power to strike out pleadings at a preliminary stage will be exercised very sparingly and only in the clearest circumstances. A court will err in favour

[8] **NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Ltd.,** Trinidad and Tobago HCA Cv 3181 of 2004 (Stollmeyer J), Ruling 9th May 2005, at page 13/16: See Tab 2 of the Defendant's Authorities.
[9] SKBHCV 2010/0026 (Hariprashad-Charles J), Judgment 4 November 2010, see paras. 8 – 11.

> of having cases tried on their merits.[10] The Court in deciding whether to strike out … is mindful of the fact that it should be slow to drive persons from the seat of justice except in cases in which the pleaded claim has no prospect of success or is bound to fail: see Drummond-Jackson v British Medical Association [1970] 1 All ER 1094."

[24] The above considerations are also relevant to the exercise the court's power to strike out affidavits. These observations were echoed by Blenman J in Delcine Thomas v Victor Wilkins et al.[11] At paragraph 32, she said:

> "It is the law that the Court acting under its inherent jurisdiction is clothed with the power to strike out part or paragraphs of an affidavit that contains scandalous, frivolous and vexatious information."

[25] She continued: (at paragraph 35)

> "Affidavits should contain evidence that is relevant and necessary. They are not to be used to attack others unnecessarily by giving the opinions of others. It is the law that the Court in determining whether to strike out paragraphs of an affidavit must examine the affidavit in question with care. The Court is enjoined to determine whether any aspect of the affidavit offends the rules of evidence or procedure. Should the Court come to the conclusion, and only in very clear cases, where it is shown that the affidavit offends either of the two sets of rules, the offending paragraphs should be struck out."

[26] In Sierra Club of Canada v The Minister of Finance of Canada and others[12] the Federal Court of Canada noted:

> "[21] Counsel for AECL submits that under the former Federal Court Rules "... the Court routinely struck out affidavits or portions of affidavits containing improper material on preliminary motion". While there are many cases in which affidavits have been struck out, including those to which counsel for AECL has referred, the law on striking out of affidavits is well

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[10] See **Frampton and Others v Pinard and Others** DOMHCV2005/0149, 150, 151, 152 and154 - (Rawlins J) Judgment 28th October 2005 (unreported)**.**

[11] **Delcine Thomas v Victor Wilkins** ANUHCV 2007/0530 (Blenman J), Decision 18 December 2008, para. 32 – and 35.

[12] Federal Court T-85-97 (Hagrave, John A – Prothonotary) Decision 10 November 1998. Available at: http://decisions.fct-cf.gc.ca/en/1998/t-85-97_2773/t-85-97.html (Accessed 18.10.2011).

settled: in general the discretion to strike out affidavits, or portions of them, ought to be exercised sparingly.

[22] To maintain the efficiency of judicial review proceedings and indeed of any proceeding, parties ought not to be, for the most part, permitted to strike out each other's affidavits. There are clearly defined exceptions to this generalization: if an affidavit is abusive or clearly irrelevant, or if a party has obtained leave to admit evidence which proves to be obviously inadmissible, or if the Court is convinced that admissibility should be considered at an early date so that the eventual hearing may proceed in an orderly manner, an affidavit, or portions of it, may be struck out. For this proposition I refer to two cases, Home Juice Co. v. Orange Maison Ltée. [1968], 1 Ex. C.R. 163 at 166, and Unitel Communications Co. et al. v. MCI Communications Corp. et al. (1997), 119 F.T.R. 142, a decision of Mr. Justice Richard, as he then was. In the latter case Mr. Justice Richard observed that the trial judge would be in a better position to assess the weight and admissibility of affidavit material (pp. 143 and 145). Of course, pure conjecture, speculation and legal opinion, which have no redeeming value, have no place in an affidavit and ought to be struck out at an early date so that the hearing of the application may proceed in a reasonable way." [emphasis added]

[23] As to striking out a part of an affidavit, that is appropriate if it is possible to separate the admissible from the non-admissible portions of the affidavit: see for example FoodCorp Ltd. v. Hardee Food Systems Inc. (1982), 61 C.P.R. (2d) 37 at 40 (F.C.A.).

[27] To encapsulate, the jurisdiction to strike out affidavits or portions of them ought to be exercised sparingly. Affidavits should contain evidence that is relevant and necessary. They are not to be used to attack others unnecessarily by giving the opinions of others. While an applicant is required to set out the grounds of his application, and the court may allow a degree of latitude in this regard, the affidavit should not cross the line into the realm of "unacceptable opinion, legal argument, speculation or conjecture."[13]

[13] **Sierra Club of Canada v The Minister of Finance of Canada and others** Federal Court T-85-97 (Hagrave, John A – Prothonotary) Decision 10 November 1998 at para. 30. Available at: http://decisions.fct-cf.gc.ca/en/1998/t-85-97_2773/t-85-97.html (Accessed 18.10.2011).

Irrelevance

[28] Ms. Vanterpool submits that paragraphs 7, 8, 9, 10, 11, 18 and 20 of the deponent's affidavit should be struck out in their entirety on the ground that they contain statements which are wholly irrelevant to the claim for judicial review. She submits that the matters contained in these paragraphs purport to be facts relating to the first development proposal and the first application submitted by the Developers. Further, the paragraphs also purport to be facts relating to the decision of the Planning Authority and the subsequent decision of the Appeals Tribunal in respect to the same first application for development, and altogether, the said paragraphs concern matters which are not the facts relating to the decision of the Minister to grant development permission on the second application.

[29] Ms. Vanterpool further submits that each application must be autonomous and be treated independently. According to her, the second application was a very different application and it is unfair for the Minister to be asked to respond to anything containing or pertaining to the first application. Since the Minister made a decision in the second application alone, the matters contained in the said paragraphs, fall outside the decision made by the Minister, and as such they ought to be struck out as being irrelevant, scandalous and oppressive.[14]

[30] It is the law that where the charge is one of irrelevance, the question for the court is whether the impugned paragraphs are material to resolving the question in dispute before the court.[15] So, for example, in Maudlyn Elaine Bascus v Errol James[16] the Judge refused to strike a paragraph of the affidavit which he determined was "…central to the substantive matter".

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[14] Affidavit in support of application sworn to by Karen Reid on the 4 April 2011.

[15] Where affidavits contain irrelevant matter, the court will direct the Master to ascertain what parts are material to bring the question in dispute before the court, and to allow costs to the parties making the affidavits for such parts only as are material, and to the opposite party the costs occasioned by the irrelevant matter. **Cassen v Bond** 2 Y & J 531, SP, **Belle v Smythe** 2 Man & G 350; 2 Scott (NB) 495.

[16] ANUHCV 2006/0383 (Thomas J), Ruling 30 April 2007, paras. 17 – 18.

[31] JIPFA's challenge raises issues of illegality and irrationality. I accept the submission of learned Queen's Counsel, Mr. Farara that the central proposition in each case is that there were no material changes between the first application and the second application. In the case of illegality, JIPFA's argument is that since the first application had already been adjudicated upon by the Planning Authority and the Appeals Tribunal and rejected, the defendant had no authority in law to grant permission for the same development. With respect to irrationality, JIPFA argues that, to the extent that there were no material changes between the first and second applications, having regard to the reasons for the rejection by the Planning Authority and the Appeals Tribunal, the defendant's decision was irrational in that he failed to take account of relevant considerations.

[32] It seems, therefore, that the decisions on the first application and the reasons stated for the refusals are pivotal to the grounds of illegality and irrationality in relation to the second application which is at the heart of the present claim for judicial review.

[33] To my mind, JIPFA faces no small hurdle linking the decisions made with respect to the first and second applications. However, since "the jurisdiction to strike should only be exercised in clear cases" and it is by no means clear at this stage that JIPFA's pleaded case is untenable, it is far from clear that each and every reference to the first application constitutes irrelevant material that should be struck out. I further agree with Mr. Farara, QC that some of the paragraphs constitute "relevant background information" which the Court should not exclude: see R v Humberside CC ex p Bogdal (No. 1) [1991] COD 66, R v Humberside CC ex p Bogdal (No. 2) [1992] COD 467; R v Humberside CC ex p Bogdal (No. 1) Court of Appeal, 6 December 1996.[17]

[17] See Claimant's Written Submissions filed Jun 06, 2011 at Tabs 6 – 8.

[34] Scrutinizing the deponent's affidavit, I hold that paragraphs 7 and 9 contain pertinent background information relevant to JIPFA's claim. Paragraphs 8, 10, 11, 18 and 20 are considered later below.

Opinion and Legal arguments or Submissions

[35] Paragraph 2 of the Notice of Application seeks an order that the whole or parts of paragraphs 11, 13, 14, 15, 16, 18, 19 and 21 be struck out on the ground that they contain statements which are not facts which the deponent is able to prove from his own knowledge, and are therefore, hearsay and inadmissible. The Minister[18] contends that paragraphs 11, 16, 18, 19 and 21 contain hearsay and opinion evidence which conflict with CPR 30.3. First, the statements in paragraphs 11, 16, and 18 are mere opinions of the deponent who has not been deemed an expert in development planning and, he is, therefore, unqualified to give opinions and conclusions on technical aspects of development planning matters. It is submitted that the said statements are not facts, which he will be able to prove within his own knowledge, and should therefore be properly struck out. Further, the statements contained in paragraphs 19 and 21 are matters that are wholly unsupported by evidence, and, are accordingly, scandalous and irrelevant, and should be properly struck out.

[36] Learned Queen's Counsel Mr. Farara argues that the deponent has merely stated facts which are apparent on the face of the second application, that is, that there was no material distinction between it and the first application. He says that it is clear that the second application pertained to the same development, that is, a 56 feet high medical complex with a parking lot. Upon review, the second application however proposed a site coverage of 24% instead of 26% as proposed in the first application and the total floor coverage was 17,343.35 instead of the original 18,527.38 sq ft. He says that these are direct observations that may be made from a review of the applications and it is a matter for the Court to decide at trial

[18] Affidavit in support of application sworn to by Karen Reid on the 4 April 2011, para. 8.

whether in view of the differences between the two applications, the changes were significant. He submits that they are not.

[37] The general rule is that witnesses must speak only to facts which they have observed and should not give evidence as to the inferences which they believe can be drawn from such facts: Director of Corporate Enforcement v Baily and Anor[19]. See also section 76(1) of the Evidence Act 2006.

[38] Scrutinizing the affidavit, I am of the view that the following paragraphs referred to in the application do contain statements which constitute commentary on the facts, unnecessary opinion, or submissions: paragraphs 8, 10 and 18 in their entirety, and portions of paragraphs 11, 16, 19, 20 and 21. (See paragraph 50 of this judgment). To my mind, they are entirely superfluous and ought to be properly struck out.

[39] Ms. Vanterpool also submits that parts of paragraphs 13, 14 and 15 are legal arguments and conclusions, which ought not to be included in an affidavit, and are therefore scandalous, irrelevant or otherwise oppressive and should be struck out.

[40] Mr. Farara QC argues that, in a claim for judicial review, it is necessary and moreover required, that a claimant sets out the facts and grounds on which he intends to rely to prove his case. The facts, where disputed, can be proved or disproved at trial by the use of expert evidence, if necessary. In compliance with CPR 56.7, he says JIPFA has set out the grounds and facts on which the challenge is based. The grounds must necessarily include points of law as the challenge is that the public body's actions are outside the parameters of his lawful authority.

[19] [2007] IEHC 365

[41] In Sierra Club of Canada v The Minister of Finance of Canada and others[20], the respondent in a judicial review action, sought to have a number of paragraphs struck out from the applicant's affidavit. The Court observed:

> "The Impugned Affidavit
>
> May Affidavit of 20 January 1997
>
> [27] Ms. Elizabeth May is the executive director of the Sierra Club of Canada. She has a legal background, but she also has personal experience involving not only the relevant environmental legislation, but also the nuclear reactors in question. As such she a person with a relevant background. Moreover she has done her homework thoroughly. Many of the exhibits consist of material from the media, together with AECL and Canadian government press releases. The judge hearing the judicial review application should have the opportunity to assess the weight and admissibility, of the material that is properly in Ms. May's affidavit.
>
> [28] There may be some portions of the May affidavit which have less relevance than others. There is no reason to strike out the affidavit or some portions of it on this basis, for such discretion should be exercised with restraint.
>
> [29] Some of the May affidavit may border on interpretation of statutes. Some of the material is in the nature of submissions which might better be made in argument. However, with some clear exceptions, the May affidavit is not, for the most part, pure opinion or pure interpretation of law. Indeed, given Ms. May's background the affidavit provides a useful and informative framework which the judge hearing this application might find helpful in putting a fairly complex application into perspective, without having to give some portions of the affidavit much weight.
>
> [30] Some of the affidavit touches on relevant personal experience and direct involvement with the nuclear industry. I think it is by reason of this background that this Ms. May does express opinions. Some of these are irrelevant. However a number of paragraphs cross over the boundary to unacceptable opinion, legal conclusion, conjecture and speculation…. These paragraphs are struck out, in part or entirely, as I have indicated."

[20] Federal Court T-85-97 (Hagrave, John A – Prothonotary) Decision 10 November 1998. Available at: http://decisions.fct-cf.gc.ca/en/1998/t-85-97_2773/t-85-97.html (Accessed 18.10.2011).

[42] Similar observations are applicable in this case. The deponent is a senior well-respected member of the bar who even though, technically a lay person in this matter, brings a great deal of legal expertise to bear. Much of the affidavit provides a useful outline of JIPFA's case, and the statements made, while perhaps borderline, do not warrant striking out. However, a number of other statements more properly belong to JIPFA's arguments and submissions at trial – not in an affidavit of facts.

[43] Our court has made similar pronouncements that legal submissions are impermissible in an affidavit: see National Insurance Corporation v Rochamel Development Company Limited[21] at paragraphs 11, 14, 21 also Anthony Eugene v Joseph Jn Pierre[22] at paragraph 41:

> "…The rules do not permit a law clerk or anyone else to make legal submissions in their Affidavit. Affidavits are to address questions of fact and are not supposed to raise questions of law…"

[44] Accordingly, I agree with Ms. Vanterpool that in paragraphs 13, 14 and 15, JIPFA surpasses what is necessary to set out as the grounds of its challenge and the said paragraphs contain statements which ought to be struck out.

Hearsay

[45] Mr. Walwyn has also submitted that JIPFA's reliance on the letters between the Developers and the Planning Authority is impermissible hearsay[23] because JIPFA should be required to produce first-hand evidence to the Court.

[46] While I agree with Mr. Walwyn that, strictly speaking, the letters do constitute hearsay, I also agree with Mr. Farara QC that the facts where disputed can be proved or disproved at trial. Further, I take into consideration that a defendant's public authority is expected to proceed with "all the cards face upwards on the

[21] SLUHCV 2006/0638 (Edwards J), Judgment 26 September 2008.
[22] SLUHCV 2004/0097 (Edwards J), Judgment 21 February 2007.
[23] Transcript of Chamber Proceedings Wednesday, June 8, 2011 at page 28 – 30.

table"[24] and until it is otherwise decided, the disposition of the first application remains a relevant issue at this trial. I adopt the words of Stollmeyer J in NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Ltd. He said at page 15:

> "It remains incumbent on an applicant – indeed, any party – to judicial review to put first hand evidence before the Court. Not doing so results in the information or material not being considered at all, or being given little or no weight."

[47] If no further evidence is adduced in this matter, then JIPFA runs the risk of its evidence being given little or no weight. However, at this stage, in the interests of justice and a full ventilation of all the relevant issues there is no need at this time to strike out these paragraphs.

The Order

[48] In the premises, I hereby order that the following paragraphs or portions of paragraphs be struck out on the ground that they contain scandalous, irrelevant or otherwise oppressive matter:

1. Paragraphs 8, 10, and 18 in their entirety, and portions of paragraphs 11, 16, 19, 20 and 21 be struck out on the ground that they contain statements which are not facts which the deponent is able to prove from his own knowledge;

    a. Paragraph 11:

        i. Lines 2 – 3: "for substantially the same development as proposed in the original application to be constructed on Parcel 21."
        ii. Lines 6 – 8: "It should be noted that one of the reasons for the Planning Authority rejecting the proposed development was the inadequacy of the proposed parking and the detrimental impact it could have on road safety given the increased traffic."
        iii. Lines 11 – 13: "Neither of these changes was significant and" the proposed development under the August 2010 application remained substantially the same as in the previous rejected application."
        iv. Lines 13 – 13: "It is apparent that."

[24] R v Lancaster County Counsil ex-parte Huddleston [1986] 2 All ER 941 at 945G.

b. Paragraph 16:

i. Lines 4 - 8: 'The changes contained in the August 2010 application were minor and did not in essence alter the nature or character of the proposed development from that contained in the July 2009 application. In those circumstances it was substantially the same application before the Minister as was before the Planning Authority and the Appeals Tribunal and the Minister had no authority to consider it"

c. Paragraph 19:

i. Lines 4 – 8: "To the best of my knowledge, the Developers did not address this concern when it re-submitted its application in August 2010 and the absence of any provision to guard against dangers to motorists and pedestrians in and around the facility, planning permission ought not to have been granted. Furthermore, this concern could only be adequately addressed by not carrying out the proposed development at all on Parcel 21."

d. Paragraph 20:

i. Lines 4 – 8: "It was clear that a development of the nature and size proposed by the Developers would attract increased traffic to the area and sufficient parking would be required to accommodate visitors to the medical complex. Further, there was no alternative means of access to the property which would be detrimental where emergency vehicles needed access in the event of a man-made or natural disaster.
"

ii. Lines 10 – 11: "the original application having been rejected partly on the basis of inadequate parking. Notwithstanding this patent defect"

e. Paragraph 21:

i. Lines 4 – 6: "and in the absence of any suitable remedy to address the obvious and fair concerns to public safety, the development permission ought not to have been granted"

2. Paragraph 14 in its entirety and portions of paragraphs 13 and 15 on the ground that they contain legal submissions and not facts which the deponent is able to prove from his own knowledge:

f. Paragraph 13:

i. Lines 6 – 9: "As such, a proposed development for which permission is properly considered by the Planning Authority and

the Appeals Tribunal and rejected, ought not to proceed unless there are material changes to the proposed development having regard to the reasons for its refusal and a fresh application is submitted for development permission"

g. Paragraph 15:

i. Line 1: "It is apparent that"

ii. Lines 2 – 11: "However, I am advised by my legal counsel and verily believe that the Minister could not invoke section 38 in circumstances where the applicant for development permission had already exhausted the procedure under the Act to obtain such permission and that application had been reviewed and denied for lawful and valid reasons. The application before the Minister, therefore, having been already properly and finally adjudicated upon by the Planning Authority and the Appeals Tribunal and rejected by both of them was not open to the Minister for consideration for his approval and could not proceed unless a materially different application was submitted to the Minister which must be for the kind of development (residential) which Parcel 21 and the neighbourhood has historically been used.

3. From henceforth, the name of the defendant will be reflected as "The Premier and the Minister of Finance and Tourism.

4. The Minister is directed to file and serve his affidavit in reply within 21 days of this ruling so that the case may proceed to trial without any further delay.

5. Costs will be dealt with at the substantive hearing of the claim for judicial review.

[49] Last but not least, I am grateful to all counsel for their helpful submissions and their forbearance as they await the protracted delay in the delivery of this judgment.

Indra Hariprashad-Charles
High Court Judge