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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Williamson's Application [2008] NICA 52

AN APPLICATION FOR JUDICIAL REVIEW BY MICHELLE WILLIAMSON

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Before Kerr LCJ, Girvan LJ and Coghlin LJ

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KERR LCJ

Introduction

[1] This is an appeal from a decision of Gillen J refusing to issue *subpoenae ad testificandum* requiring Dr Ian Paisley, the former First Minister, and Martin McGuinness, the deputy First Minister, to attend to give evidence under cross examination by the legal representatives of Michelle Williamson, during the hearing of her judicial review application. Ms Williams has applied for judicial review of the decision of Dr Paisley and Mr McGuinness to appoint four Commissioners Designate for Victims and Survivors. That appointment was announced by the First Minister to the Assembly in Northern Ireland on 28 January 2008.

[2] It is common case that the appellant does not require a court order to issue a *subpoena.* But it is clear that if the respondents had been served with a *subpoena* they would have applied to set it aside in which case the issues that arise on the appeal would have had to be addressed. Moreover, the issue of a *subpoena* could only have secured the attendance of the witnesses. What Ms Williamson seeks is that they should not only attend but that they should be available for cross examination.

[3] The judge held that he had power to order that the witnesses attend to be cross examined but, in the particular circumstances of the case, he declined to exercise that power. The respondents challenge his finding that he had that power and they have served a Notice of Appeal under Order 59 of the Rules

of the Supreme Court (Northern Ireland) 1980 in order to make that argument on the appeal.

The jurisdictional issue

[4] It is helpful to examine the nature and extent of interlocutory orders available in judicial review against the background of the historical development of this form of application. Judicial review was the product of a period of law reform which began in the late 1960s and culminated in the late 1970s when a new procedural regime was established. Before these changes occurred, prerogative orders had been the means by which the legality of actions of public authorities could be challenged. Interlocutory orders such as discovery and interrogatories were not generally available in this form of proceeding. As a consequence, litigants increasingly had resort to private law remedies such as injunctions and declarations where interlocutory relief could be obtained.

[5] In the seminal decision of *O'Reilly v Mackman* [1983] 2 AC 237 Lord Diplock addressed this experience in the following passage: -

> "I accept that having regard to disadvantages, particularly in relation to the absolute bar upon compelling discovery of documents by the respondent public authority to an applicant for an order of certiorari, and the almost invariable practice of refusing leave to allow cross-examination of deponents to affidavits lodged on its behalf, it could not be regarded as an abuse of the process of the court, before the amendments made to Order 53 in 1977, to proceed against the authority by an action for a declaration of nullity of the impugned decision with an injunction to prevent the authority from acting on it, instead of applying for an order of certiorari; and this despite the fact that, by adopting this course, the plaintiff evaded the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law.
>
> Those disadvantages, which formerly might have resulted in an applicant's being unable to obtain justice in an application for certiorari under Order 53, have all been removed by the new Order introduced in 1977. There is express provision in the new rule 8 for interlocutory applications for

> discovery of documents, the administration of interrogatories and the cross-examination of deponents to affidavits."

[6] Mr Maguire QC, who appeared for the respondent, argued that Lord Diplock had implicitly confined the availability of interlocutory orders to discovery, interrogatories and the cross examination of deponents. But the statement that these were now available under Order 53 rule 8 does not, in my opinion, necessarily preclude other forms of interlocutory relief. It merely reflects the terms of the relevant rule. Its counterpart in Northern Ireland is in the following terms: -

> "*Application for discovery, interrogatories, cross-examination, etc.*
>
> 8. - (1) Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to a judge in chambers. In this paragraph "interlocutory application" includes an application for an order under Order 24 or Order 26 or Order 38 rule 2(3), or for an order dismissing the proceedings by consent of the parties.

[7] Order 24 provides for discovery and Order 26 interrogatories. Order 38 rule 2 (3) deals with the adducing of evidence in proceedings begun by originating summons, originating motion or petition, and on any application made by summons or motion. It provides: -

> "(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court."

[8] Mr Barry MacDonald QC, SC, who appeared for the appellant, submitted that the first part of this provision - empowering the court to direct that evidence should be given other than by affidavit - should be interpreted as

investing the court with a general power to direct that oral evidence be given by a non-deponent. Resisting this, Mr Maguire pointed to the consideration by the Law Commission of the enactment of such a power in 1971. In Working Paper No 40 on Remedies in Administrative Law, the Commission made what it described as tentative proposals in paragraphs 102 and 103: -

> "102. We would hope and expect that in the vast majority of cases affidavit evidence would be the most convenient and suitable method for the presentation of the application for the order itself. Certainly cases will be disposed of more quickly than if oral evidence is heard and cross-examination allowed. The court already has power at the moment to order evidence to be given orally, and deponents to be cross-examined on their affidavits, if any party applies, on applications for prerogative orders, but in practice it rarely exercises this power. We think that the court should have this power on the application for the order itself.
>
> 103. We would like at this point to raise the question whether the court should not have limited investigatory powers of its own. We would not suggest that its procedure should be modelled along the lines of the French Conseil d'État, nor do we feel able to make any proposal for the appointment of a Registrar to the court to make a preliminary investigation of the plaintiff's case; but the court might be given powers to cross-examine deponents of affidavits, whether a party has applied for this or not, and further to summon witnesses to give oral evidence, where the court thought that the truth was unlikely to emerge from the affidavits submitted by the parties. *This would mark a radical departure from the rule that a judge can only call witnesses with the consent of the parties.* If such powers were conferred, we would expect that they would be exercised rarely. We would welcome views on this question." [emphasis has been added]

[9] When the matter was revisited by the Law Commission in 1976 the suggestion that the court should have power to summon witnesses to give oral evidence was not pursued. In paragraph 49 of its report of March 1976, the following appeared: -

> "… in spite of the generality of Order 26, rule 1 (1) [relating to interrogatories] and Order 38 rule 2 (3), we recommend that there should be specific provision in respect of the application for judicial review enabling the court in appropriate circumstances to order interrogatories or the attendance for cross-examination of persons making affidavits."

[10] The means employed to ensure specific provision for cross examination of deponents was the inclusion in Order 53 rule 8 (1) of an express reference to Order 38 rule 2 (3). This replicated a provision in similar terms in the Rules of the Supreme Court (Northern Ireland) 1936 which had provided that "upon any motion, petition or summons, evidence may be given by affidavit: but the court or a judge may, on the application of either party, order the attendance for the cross-examination of the person making any such affidavit".

[11] I am satisfied that it was not intended that Order 38 would invest the court with a general power to require the attendance of witnesses who are not deponents. It seems clear that the purpose of the first part of Order 38 rule 2 (3) was to allow the court to require evidence to be given orally where it considered that affidavits were not the appropriate way in which testimony should be received or if for some reason an affidavit could not be obtained, for instance, where a witness who is known to hold material that it is necessary for an applicant to adduce but who refuses to provide the material without a court order. In such a case, of course, the applicant would serve a subpoena to secure the attendance of the witness and then apply to the court for an order that the witness should be permitted to give oral evidence. It seems to me that the circumstances in which such a power might be exercised are likely to be extremely rare. Generally, a court would not sanction the calling of such a witness unless the nature of the material or information held was known and no other means of producing it was feasible. In particular, an order requiring a witness to give oral evidence would not be made if, as is the case in the present application, the evidence to be given is not specified.

[12] Order 38 rule 2 (3) cannot be prayed in aid to require witnesses to testify who *may have* some evidence which *might* assist an applicant's case (a so-called 'fishing expedition'). It had not been the purpose of the predecessor of this rule that the court should have a general coercive power to require witnesses to attend to give evidence and there is no reason to suppose that the cross reference to a provision in the 1980 Rules worded in broadly similar terms was designed to bring about the 'radical departure' from the general principle that a judge could only call witnesses with the consent of the parties.

[13] In concluding that the court had such a power, Gillen J referred to section 18 of the Judicature (Northern Ireland) Act 1978. Subsection (1) provides that rules of court shall set out the procedure for judicial review and subsection (2) deals with the content of the rules. In particular subsection 2 (e) provides: -

> "… the court may … direct pleadings to be delivered or authorise evidence to be given where this appears to the Court to be necessary or desirable"

[14] This does no more, of course, than authorise rules to be made to deal with the evidence that may be given. It does not assist in determining the ambit and purpose of Order 38 (2) (3). Gillen J considered that section 18 (2) (e) was a "widely based enabling provision" and that Order 38 (2) (3) contained "a wide discretion that clearly derives from the 1978 Act". The rule-making power may have been expressed in wide terms but it does not follow, in my opinion, that this has any connection with the breadth of the content of the rules made under its auspices. Moreover, it does not 'derive' from the 1978 Act but from its predecessor in the 1936 Rules.

[15] The learned judge also relied on a decision of Tucker J in *R v Secretary of State for Transport, Port of Ipswich Authority and Associated British Ports ex parte Port of Felixstowe Limited* [1997] COD 356, when he held that subpoenae should issue to two individuals who had been directors of a relevant company and who could give very material evidence but felt inhibited in giving such evidence unless obliged by witness summons to do so. There does not appear to have been any argument presented to the judge about his power to make the order sought. Indeed, it does not appear that the application was opposed. This is an example of the type of use to which Order 38 rule 2 (3) might legitimately be put. In that case the only means of securing the supply of relevant evidence (whose materiality and nature were not in dispute) was the giving of oral evidence. The decision is not authority for the existence of a general power to require a non-deponent to attend to give evidence in judicial proceedings.

[16] Mr MacDonald argued that to fail to recognise such a power incurred the risk of encouraging a lack of candour on the part of respondents to judicial review applications. This argument requires serious consideration. If it were the case that those who were the subject of judicial review challenge could with impunity deliberately withhold relevant material, that would indeed be a strong policy argument in favour of recognising a power to require non deponent witnesses to give evidence. It is clear, however, that where there has been a deliberate withholding of relevant material, the court is not powerless. It is open to a court, when confronted by an obvious failure to produce material that would properly inform the decision on a judicial review challenge, to draw an adverse evidential inference against the party that fails

to disclose this material. That such an inference can be drawn has been recognised in a variety of cases including *Quark Fishing –v- Secretary of State for Foreign Affairs* [2002] EWCA 149; *Rashid v Secretary of State for the Home Department* [2005] EWCA 744; and *Re Downes* [2006] NIQB 77.

[17] In the present case, if it were demonstrated that the First Minister and deputy First Minister had deliberately withheld material or, as the case against them appears to suggest, that they had taken steps to ensure that no contemporaneous documentary evidence of their deliberations was created, the court dealing with the substantive application would have to consider whether to draw the adverse inference that this was done in order to conceal the true reason for their decision to appoint the Commissioners designate.

[18] I am therefore satisfied that there is no general power to order non deponent witnesses to give evidence in judicial review proceedings. The power prescribed in Order 38 rule 2 (3) is one which permits the court to allow a witness to give oral evidence where it is not feasible or suitable that that evidence be given by affidavit. In general, however, the nature of the evidence would have to be known and specified by the person applying for the exercise of the power. As I have pointed out, the correct procedure would be for a subpoena to be issued by the party that wishes to have the order made. The issue of a subpoena does not normally require an order of the court. The application would then be made for the court to order that the witness be permitted to give oral evidence. If that application succeeded, the person to give evidence would then be the witness of the person applying for the order and the normal rules as to adducing the evidence would apply. Save where the witness was ordered to be treated as hostile, cross examination by the party applying to adduce oral evidence would not be permitted.

Whether, in the event that there was jurisdiction to make it, the order should be made

[19] Notwithstanding my conclusion on the jurisdictional issue, I should say something about the question whether the order should be made, if jurisdiction to make it existed. I am satisfied that the judge was right to refuse to make the order. To have done so would have been, at the very least, premature. The appellant contends that the First and deputy First Ministers had manipulated the manner of the appointment of the Commissioners designate so as to leave no documentary trace of the true reason for the appointment of four persons to a post which the legislation prescribed should be held by one. The respondents aver that there was nothing unusual about ministers holding a private, unrecorded meeting at the final stages of an appointment process and that there is no warrant for the manipulation that is imputed to them. In any event, the respondents say, both ministers made statements about the appointment to the Assembly and answered questions on those statements. They consulted and took advice from the Commissioner

for Public Appointments while arrangements for the appointment of the Commissioners designate were taking place and they gave assurances that the appointments were not made for a collateral purpose.

[20] The duty to make sufficient disclosure which is properly focused on the issues that arise in a judicial review application has been helpfully summarised in the opinion of Lord Walker in *Belize Alliance –v- DOE* [2004] UKPC 6. Having approved the statement of Sir John Donaldson MR in *Regina (Huddleston) –v- Lancashire County Council* [1986] 2 All ER 941 that, following the grant of leave to apply for judicial review, "… it becomes the duty of the Respondent to make full and fair disclosure", Lord Walker said (at paragraph 86): -

> "It is now clear that proceedings for judicial review should not be conducted in the same manner as hard fought commercial litigation. A Respondent authority owes a duty to the court to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings".

[21] Whether the respondents have fulfilled that duty in this instance and, if they have not, what the consequences of such failure should be, is not suitable for determination at the interlocutory stage at which the proceedings now stand. All sides accept that cross-examination should not be ordered save in the rarest of circumstances. It should only take place if a confident conclusion can be reached that the interests of justice require it. Such a conclusion is only possible after the evidence has been carefully weighed and a judgment is made as to whether, for instance, it is not more appropriate to draw an adverse inference than to order that a witness attend to give testimony. This is clearly a case where these judgments can only be made when a proper evaluation of the evidence has been undertaken in the context of a substantive hearing of the judicial review application.

[22] There is sharp conflict between the parties as to whether the manner in which this appointment was made was wholly unorthodox (as the appellant contends) or entirely unexceptional (as the respondents argue). If it proves that there was nothing untoward about the fact that the ministers reached agreement in unrecorded meetings at which no civil servants were present, it might well be concluded that there is no basis on which they could properly be required to give oral evidence. A decision on this issue should not be made pre-emptively. A view as to which of the competing cases is correct can only properly be made at the substantive hearing.

Conclusions

[23] I have concluded that the court does not have power to order the attendance of non-deponent witnesses in judicial review proceedings except in the very limited circumstances that I have described. If, contrary to my view, such a general power as the appellant has contended for did exist, I do not consider that it should be exercised at this stage of the proceedings. For these reasons I would dismiss the appeal.

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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Williamson's Application [2008] NICA 52

AN APPLICATION FOR JUDICIAL REVIEW
BY MICHELLE WILLIAMSON

_____

GIRVAN LJ

The appellant's application

[1] By a summons dated 28 May 2008 the applicant sought:

> "An order granting leave for the issue of a writ of subpoena ad testificandum requiring the attendance of the respondents before this court upon the hearing of the above entitled application for judicial review for the purpose of giving oral evidence in relation to this matter."

What the applicant in fact seeks to achieve by requiring the attendance of the respondents is set out in paragraph 10 of the grounding affidavit in support of the application:

> "Since the respondents have declined to file affidavits explaining their conduct it is respectfully contended that in order to ensure that the court is able to deal justly and effectually with all the issues in this application they should be required to attend this court for cross-examination under oath in respect of those issues."

The relevant questions

[2] Gillen J approached the question whether he should accede to the application in two stages. Firstly, he posed the question whether the court has power in judicial review proceedings to order the attendance of witnesses who have not sworn an affidavit to give oral evidence. Assuming that such a

power does exist, the second question is whether the applicant has made out a proper case for requiring the attendance of the respondents as witnesses. On the first question he concluded, correctly in my view, that the court does have power in exceptional circumstances to order a person to attend to give evidence even where the witness has not already sworn an affidavit in the proceedings. On the second question he concluded, again correctly in my view, that it was not appropriate to order the attendance of the respondents to give oral evidence and he dismissed the application accordingly.

[3] On one view it may not be necessary to answer the first question if the court concludes that even if the power to require attendance of non-deponents as witnesses exists this is not an appropriate case in which to exercise the power. However, since the question was considered by Gillen J and since it raises an important question of judicial review practice it is a question which should be addressed. In any event if the power does exist the nature and extent of the power is clearly relevant to the question whether it is appropriate to refuse to exercise the power in a particular case.

The first question

[4] Section 18(1) of the Judicature (Northern Ireland) Act 1978 laid the statutory basis of the modern practice relating to judicial review in Northern Ireland. It did so by imposing a requirement on the Supreme Court Rules Committee to introduce rules of court providing for a procedure to be known as judicial review, the powers of the court including a power to award damages under section 20. The Rules Committee duly complied with the mandatory duty by introducing the new Order 53 which incorporates expressly or impliedly references to other provisions in the Rules. Thus Order 53 rule 8 incorporates Order 24, Order 26 and Order 38 rule 2(3) in relation to interlocutory applications. Where leave is granted to make an application for judicial review Order 53 rule 5 requires the application to be brought by originating motion, a procedure dealt with in Order 8 which deals with all originating and other motions subject to any special provisions relating to such motions made by the Rules. Order 53 rule 5 does contain special procedural requirements in relation to originating motions in judicial review proceedings. Subject to those in so far as not inconsistent therewith the general rules relating to originating motions must apply. Order 38 which deals generally with the rules relating to evidence deals in rule 2 with the giving of evidence by affidavit in relation to any cause or matter begun by (inter alia) originating motion or applications by motion or summons. What Order 38 Rule 2 deals with is not dealt with in Order 53 nor is it inconsistent with anything therein. Order 38 rule 2(3) provides:

> "(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence

> may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the court."

[5] Order 38 rule 2(3) permits the use of affidavits in proceedings referred to ("evidence *may* be given by affidavit"). The use of the word *may* in rule 2 can be distinguished from rule 1 which provides that subject to the provisions of the Rules and of the Civil Evidence (Northern Ireland) Order 1997 and any other provision relating to evidence any fact required to be proved at the trial of an action begun by writ *shall* be proved by oral evidence and in open court. While Order 38 rule 2(3) is expressed in permissive terms, thereby implying that evidence if not given by affidavit may be given orally, it has been the invariable practice in judicial review proceedings and indeed in interlocutory applications by summons or motions for evidence to be given in the first instance by affidavit subject to the power of the court to permit cross-examination of a deponent if it is just to so order. However Order 38 rule 2(3) does not restrict evidence to affidavit evidence and the court is given a power to otherwise direct. Order 38 rule 2(3) confers a power on the court to permit or require oral evidence to be given in any of the proceedings therein referred to which must include a judicial review originating motion since, as we have seen, it is not excluded from the ambit of Order 38 rule 2.

[6] Section 18(2) provides that:

> "Without prejudice to the generality of sub-section (1) the rules *shall* provide:
>
> (e) that the court may … authorise or require oral evidence to be given where this appears to be necessary or desirable." (italics added)

Section 18(2) contains not merely a power to make rules but imposes a duty on the Rules Committee to ensure that the Rules so provide. If the Rules did not include a power authorising a court to authorise or require oral evidence to be given where this appears to the court to be necessary or desirable then the Committee would have failed to ensure proper compliance with the statutory requirement to implement section 18. The Rules made to give effect to the new statutory judicial review procedure introduced by the 1978 Act were introduced by the Rules Committee under the then chairmanship of Lowry LCJ, a master of court procedure. It can be safely assumed that the

Rules Committee satisfied itself that the power required by section 18(2) was to be found within the Rules without the need to spell it out further in Order 53. Gillen J considered that Order 38 rule 2(3) contained a wide discretion clearly deriving from the 1978 Act. Order 39 rule 2(3) does not derive directly from the 1978 Act itself but finds it origins in the predecessor Rules of 1936. However since it contains the power required by section 18(2)(e) no amendment to it was needed to fulfil the duty to have such a rule in place. In that sense it can properly be said that Order 38 rule 2(3) contains the necessary power which the court was intended to have to give effect to section 18(2)(e).

[7] While accepting that the ordinary rule in practice in judicial review of proceedings is to expect the parties to file their evidence by way of affidavit in support of or in opposition to the judicial review application situations can and will arise in practice when this cannot be done or cannot be done conveniently or in time, thereby rendering the admission of oral evidence necessary or desirable in the words of section 18(2)(e). The case of R v Secretary of State for Transport Port of Harwich Authority and Associated British Ports ex parte Port of Felixstow Limited (1997) COD 356 is a case in point and I consider that it was correctly decided. Munby J in R (G) v London Borough of Ealing (2002) EWHC 250 was correct when he stated that:

> "I have not the slightest doubt that the court has the power, in an appropriate case, to direct oral evidence and cross-examination in judicial review proceedings."

The swearing of an affidavit involves various steps requiring the co-operation and goodwill of a person with relevant evidence. It necessitates obtaining evidence from that individual consensually; drafting the affidavit and agreeing its contents with the proposed opponent; and persuading him to attend before a Commissioner for Oaths to sign the affidavit and swear the necessary oath or affirmation. There will be occasions when it is not possible to obtain the necessary agreement of the deponent in relation to all or sum of the steps. Yet the witness may have evidence of relevance to the application. Some witnesses including those in the medical field or in the service of public bodies, may consider that while they would be happy to attend court under subpoena, may feel that it is inappropriate to be seen to provide information or evidence to one party short of being required to do so by the court. There may be urgent applications for interim relief when affidavits cannot be prepared on time or in such cases oral evidence may be necessary to require urgent attendance of witnesses to give evidence (such a practice applies in relation to the obtaining of interim injunctions in appropriate cases). There may be cases for example at the stage of assessing damages in which it is necessary to require the attendance of witnesses (eg witnesses from the Valuation Office) with material information that they would not provide or

divulge in the absence of a court order. It is not difficult to multiply examples of cases in which requiring oral evidence may be necessary and desirable and where the absence of a power to require the attendance of a witness could work in justice. The absence of such a power could also in individual cases undermine and be incompatible with the individual's right of access to the court, a right which must carry with it the implication of a duty on the State authorities to ensure procedural rules of court which are so drawn and enforced that the citizen can effectively vindicate his rights and pursue his legal remedies in a just and fair manner. There is no procedure for the service of a subpoena on a person whom a party wishes or needs to swear an affidavit. Furthermore in cases raising questions of human rights where the court's obligation is to carry out a heightened form of scrutiny the approach to the court may be that in certain instances it may consider that oral evidence from a witness is necessary for it to carry out that function.

[8] Mr Maguire QC referred to the working paper No. 40 of the Law Commission on Remedies in Administrative Law and pointed to the contents of paragraphs 102 and 103. It is to be noted that Paragraph 102 of the working paper noted that "the court already has power at the moment to order evidence to be given orally and opponents to be cross-examined on their affidavits, if any party applies, on applications for prerogative orders but in practice it rarely exercises this power." In its Report the Law Commission did not recommend an investigatory or inquisitorial function for the court. There is a distinction between a court having a general coercive power in pursuance of an inquisitorial function on the one hand and on the other exercising procedural powers to enable parties to present their case in the manner that most accords with the justice of the situation. It is clear that in carrying out its supervisory functions the court continues to play an adjudicatory role in an adversarial context.

[9] I conclude that Gillen J was thus correct to conclude that there is power, to be exercised by way of exception to the normal procedure, to compel the attendance of witnesses not of its own motion but on the application of a party. Such party must show that in the exceptional circumstances of the case the normal practice of requiring the evidence to be by affidavit should not be followed and that the witness should be compelled in the interests of justice to provide oral evidence. Before the court accedes to an application to admit oral evidence it should be satisfied that for some good reason shown by the applicant he cannot adduce by the normal affidavit method the necessary evidence which he seeks to put before the court in support of his case.

The second question

[10] I consider that Gillen J was correct in his conclusion that this was not an appropriate case in which to order oral evidence. While the appellant's

application is expressed to be a request that a subpoena ad testificandum be issued to require the attendance of the respondents to give oral evidence the grounding affidavit makes clear that the true purpose is to seek to cross-examine the respondents. The application effectively conflates two different questions. There is a power to require a deponent to attend for cross-examination on his evidence, a power which the authorities show is exercised sparingly in judicial review proceedings. The respondents are not deponents and, accordingly, the power to require them to attend to be cross-examined in relation to evidence which they have given does not arise. While, as I have concluded, the court can require evidence to be given orally a party seeking to have evidence called by way of oral rather than affidavit evidence must satisfy the court that for some good reason the applicant cannot adduce the necessary evidence he wishes to adduce in support of his case by the normal affidavit method. In civil proceedings if a party calls a witness he is bound by the answers unless he is given leave to cross-examine on the basis of the witness being a hostile witness. Before a witness can be treated as a hostile witness the judge must take account of his demeanour as well as the terms of any inconsistent statement (Rice v Howard (1886) 16 QBD 681). The applicant at this stage has laid no basis for cross-examining the respondents as witnesses. She can point to no necessary evidence in support of her case that she seeks to adduce through the respondents by oral evidence. In Harrison v Bloom Camillin (unreported but referred to in Blackstone's Civil Practice 2009 at para 55.9 page 780) the court held that a witness summons will be set aside if it is being used for tactical purposes or in pursuance of a fishing expedition. The applicant can point to no particular evidence that she seeks to adduce by the respondents and essentially she is effectively seeking to carry out a fishing expedition. As the Lord Chief Justice has pointed out in his judgment at para [11] a party making such an application would normally have to demonstrate the nature of the evidence which it is proposed that the witness address and the applicant must show that other means of producing such evidence are not feasible. This has not been done in this case.

[11] Accordingly for these reasons I would dismiss the appeal.