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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ARDS AND NORTH DOWN BOROUGH COUNCIL FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY GORDON DUFF FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE PLANNING APPEALS COMMISSION DATED 27 JULY 2016

MAGUIRE J

[1] The court has before it two applications for leave to apply for judicial review arising out of the same decision.

[2] The decision in question ("the impugned decision") is one made by the Planning Appeals Commission ("PAC") on 27 July 2016.

[3] The background to the impugned decision is as follows:

(a) On 16 September 2010 a planning permission was granted by the then planning authority, the Planning Service, in respect of what was described as a conversion of a garage and extension to side of a dwelling to provide parent accommodation at 283 Killaughey Road, Donaghadee, County Down.

(b) The conversion for this use was to be constructed in accordance with plans which had been lodged as part of the planning application process.

(c) In fact what was built appeared later to be inconsistent with the plans which had been lodged at the time of the planning application and this came to the attention of the applicant Council which by this stage had taken over as the authority responsible for the planning function in the area of the affected dwelling. The planning authority conducted a site visit and decided that the

development as built was unauthorised. This led the planning authority to issue an enforcement notice in respect of what was described as "an unauthorised dwelling" at 283 Killaughey Road. As the head of planning within the Council put it in her first affidavit herein: "Simply put, a 2 storey, 3 bedroom house has been built, rather than the permitted garage conversion with extension to create a 1 bed ground floor annex to an existing building". Under the notice, which is dated 22 January 2016, the unauthorised dwelling had to be removed within 250 days.

(d) The recipients of the notice were Mr and Mrs Howell who have been referred to in these proceedings as the "Notice Parties" or NPs. It is they who had the benefit of the grant of planning permission in 2010. They lived and still do live at 283 Killaughey Road, Donaghadee and they had wanted to build at their residence in order to enable Mrs Howell's mother and step father to reside with them in their declining years. The building work at their residence was completed in 2011 and Mrs Howell's mother and father in law moved into the new accommodation later in that year.

(e) Shortly after receiving the Enforcement Notice, the NPs decided to appeal against it. In their Appeal Notice the NPs relied on Article 143(3)(a) of the Planning (Northern Ireland) Act 2011 which enabled them to claim that a planning permission ought to be granted in relation to what the enforcement notice referred to as an unauthorised dwelling.

(f) The appeal under section 143 was to the Planning Appeals Commission and was heard on 14 June 2016 by a Commissioner.

(g) At the appeal the planning authority sought to resist the NPs claim under Article 143(3)(a). A similar position was adopted by Mr Gordon Duff, who had standing to appear at the appeal as an immediate neighbour of the NPs. In fact, Mr Duff (who the court shall refer to as the "second applicant") had been instrumental in initiating the enforcement proceedings as he had complained to the planning authority that the NPs had built an unauthorised dwelling at the site of the planning permission granted in 2010 and this step had set in train the planning authority's investigation leading to the Enforcement Notice.

(h) Following the hearing by the Commissioner of the NPs' appeal a decision was issued on 27 July 2016. Under this decision, the Commissioner quashed the enforcement notice and granted a deemed planning permission for the dwelling constructed on the site.

(i) On 12 October 2016 the planning authority initiated these proceedings for a judicial review of the Commissioner's decision aforesaid.

(j) On 25 October 2016 Mr Duff initiated proceedings for judicial review of the same decision.

THE GROUNDS OF JUDICIAL REVIEW

[4] As finally formulated, the grounds contained in the two applications for judicial review are broadly similar. They do not require to be set out in detail in this judgment as they are based on concessions which have been made by the PAC for the purpose of these proceedings.

[5] These concessions first came to light in a letter sent by the PAC to Mr Duff. Mr Duff had written on 30 August 2016 to the PAC and had complained about the Commissioner's decision in the case. In his reply to this letter dated 22 September 2016, on behalf of the PAC, the Deputy Chief Commissioner frankly stated that the decision of the Commissioner contained:

> "Several errors which go to the heart of the Commission's reasoning and which, taken together, are indefensible".

The Deputy Chief Commissioner explained that a draft version of the decision had been sent out and it had contained various statements, which he sets out in the letter, which were "plain wrong". The wrong policy relevant to the appeal, according to the letter, had been cited in the decision and there were factual statements in the decision about the development which could not be stood over. In addition, wrong assumptions had been made by the Commissioner about the relevant planning history and as to the similarity of the appeal development to the approved extension.

[6] In short, the PAC effectively disowned the Commissioner's decision but it was noted by the Deputy Chief Commissioner that "the Commission cannot make changes of substance to the decision which has been issued". Rather, he went on:

> "The appeal can be re-determined only if the decision is quashed by the High Court following an application for judicial review".

However, the Deputy Chief Commissioner made it clear that if such an application was made the Commission would be prepared to submit to judgment on the basis of the errors which had been identified in his letter. Finally, the Deputy Chief Commissioner registered that the beneficiaries of the decision, the Howells, would have to be notified of any judicial review application and be given an opportunity to make representations to the court.

[7] Later, in answer to pre-action protocol correspondence from each of the applicants, the PAC adopted a similar position.

[8] At the leave hearing in respect of these applications, the PAC did not seek to assert other than that the Commissioner's decision was flawed.

[9] It has followed from the above that at the leave application there was no dispute about the arguability of both applications for judicial review.

[10] The only issue which has been raised in opposition to the grant of leave to apply for judicial review has been put forward on behalf of the NPs, namely that leave to apply for judicial review should not be granted to either the planning authority, as first applicant, or Mr Duff, as second applicant, because of their delay in taking these proceedings.

[11] Subject to this issue of delay, the leave application in each case has been effectively conceded by both the intended respondent (the PAC) and the NPs and the court, therefore, need not dwell on the merits of the judicial review applications, save to say that the merits of the judicial reviews appear, when viewed in the light of what the PAC has conceded, to be strong.

DELAY

[12] The two applications for judicial review are not identical to one another in the area of delay. In simple terms, the planning authority's application was made 13 days before Mr Duff's application which was made just 2 days prior to the expiry of 3 months from the date of the impugned decision.

[13] The relevant legal provision dealing with the issue of delay in respect of the initiation of applications for judicial review is Order 53 Rule 4 of the Rules of the Court of Judicature. It states:

> "Delay in applying for relief
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> 4. (1) An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made".

[14] The law on delay in respect of the making of applications for judicial review in respect of planning matters is well settled both in England and Wales and Northern Ireland. In these circumstances there would be little purpose served by setting it out at length. However, it seems clear that:

- The need for speed in the initiation of judicial review proceedings in planning matters has long been recognised.

- Any challenge should ordinarily proceed without delay.

- The need for early certainty is important because of the effect judicial review proceedings may have on third party rights.

- Great expedition will normally require that the application is made well within the outer time limit for judicial review applications of 3 months.

- Ultimately, however, where the line is drawn, and whether time ought to be extended, will depend on the facts of the individual case.

HAVE THE APPLICATIONS BEEN MADE WITHOUT DELAY?

[15] In the case of the planning authority's application for judicial review it was not made until 12 October 2016. As the decision was made on 27 July 2016, the period prior to the issue of proceedings was 2 months and 15 days. In her second affidavit on behalf of the planning authority, Anne McCullough, the head of planning department in the Council, has sought to explain what occurred during this time. The matter is dealt with at some length between paragraphs 15-52 of her second affidavit.

[16] In general terms, what these paragraphs reveal is as follows:

(a) The impugned decision was not seriously the subject of consideration until in or about 13 September 2016.

(b) Even then, it was not until 19 September 2016 that the deponent formed a view negative to the impugned decision.

(c) Notwithstanding that the planning authority had access to legal advice on a standing basis from solicitors experienced in planning law, no advice was sought from them until 21 September 2016.

(d) The possibility of sending a Pre-Action Protocol letter was not discussed by the Council with their solicitors until 26 September 2016.

(e) After that date matters moved more speedily. By 30 September a first draft of the Pre-Action Protocol letter had been composed but it was not issued until 4 October 2016.

(f) On 6 October 2016 the proposed respondent's solicitor advised the planning authority that it would be conceding a variety of matters.

(g) On 12 October 2016 proceedings by way of judicial review were commenced by the Council.

[17] The court considers that the planning authority failed to act with due expedition for a period which is not far short of 2 months but that thereafter the authority appears to have treated the matter as one of considerable urgency. It is the court's opinion that no good reason for inaction has been put forward in respect of the first of the periods referred to above. In particular, the absence of the head of the planning department on holiday in circumstances where there was no arrangement for anyone else to stand in for her over a period of some 24/25 days is not, in the court's view, an acceptable excuse. Nothing occurred of note in the week immediately after the decision before the head of planning went on holiday and even after her return on 30 August 2016 very little of substance occurred *vis à vis* the decision which is now impugned for a further period. In effect, there was no positive action in respect of the impugned decision until in or about 21 September 2016 when the planning authority's solicitors were first contacted about the impugned decision. The court acknowledges that at that time another aspect of the position of the notice parties was the subject of consideration by the planning authority (largely at the instigation of the notice parties). This related to an application which the NPs had made in November 2015 for a retrospective planning permission in respect of the development which had yet to be decided by the Council. This matter was pursued by the NPs even after the PAC decision and this involved a series of exchanges between the NPs and the Council in the first part of September 2016. It seems to the court that this application may have been responsible for a lack of focus by the Council on the PAC's decision and, in particular, on whether it was defective.

[18] On the other hand, the court accepts that the planning authority's application was made within the 3 months period and in particular was made approximately at the point of the expiry of 2½ months from the impugned decision.

[19] As regards Mr Duff, his application for judicial review was not made until 25 October 2016, just 2 days before the expiry of 3 months. This is notwithstanding the fact that he referred in his affidavit grounding his application to the impugned decision being marred by "obvious errors".

[20] The court does not consider that Mr Duff was able to account satisfactorily for the pre-proceedings efflux of time. He told the court orally at the hearing that he was in shock when he received the PAC's decision. However, it was not until mid-August that he sought out any advice. Initially he obtained the advice of an architect. That advice, in effect, directed him to a planning consultant. It appears that Mr Duff left the papers relating to the case at the consultant's house in or about 17 or 18 August 2016. Thereafter the consultant appears to have given advice but Mr Duff was not content with it. This was just a few days later. By 22 August 2016 Mr Duff says he was seeking quotations in respect of the cost of legal assistance. He appears to have received quotations but in the end, feeling that the costs quoted were too high, he decided himself to compose a letter of complaint to the PAC. This he sent to the PAC on 30 August 2016. It appears that this initial letter was followed up by another letter from Mr Duff to the PAC dated 13 September 2016. By this time

Mr Duff was being assisted by an architect friend. A copy of Mr Duff's letter to the PAC of 13 September 2016 was, it appears, provided also to the planning authority. Mr Duff also appears to have been in contact with the planning authority *inter alia* by a further letter of 20 September and by telephone on 22 September 2016.

[21] It was on 22 September 2016 that Mr Duff received a reply to his correspondence to the PAC. In the response the PAC, as already noted, referred to the Commissioner's decision as being indefensible.

[22] On 27 September 2016 Mr Duff emailed a copy of the PAC's response to his complaint to the planning authority.

[23] The PAC sent a further letter to Mr Duff on 29 September 2016 in response to further contact from Mr Duff. The terms of this letter are of interest in that the letter advised Mr Duff, who by this stage had expressed his intention to initiate judicial review proceedings against the PAC, that "applications for judicial review must be made promptly and in any event within 3 months from the date when the grounds for the application first arose".

[24] Overall, the stance of Mr Duff, as provided to the court, was that as a non-legally qualified person he thought he had up to 3 months from the PAC's decision in which to mount a judicial review. He only realised that he had to act promptly, he told the court, at the end of September 2016. While he had before been an applicant for judicial review in a planning matter[1], this experience, he said, did not mean that he knew about the requirement of promptitude. He maintained that after he knew of the position about delay he acted with speed, albeit that it still took him over 3 weeks to file proceedings. His pre-action protocol letter to the intended respondent was not issued to 17 October 2016, after the first applicant had initiated its judicial review.

[25] While the court is prepared to make some allowance for the fact that Mr Duff was not legally represented during the period under consideration (and indeed at the leave hearing) such allowance can only, in the context of compliance with the rules of court, be a limited one. Speaking, albeit in a different context, Girvan LJ in the Court of Appeal, in the case of <u>Magill v Ulster Independent Clinic</u> [2010] NICA 33 has robustly indicated that procedural rules apply equally to the non-represented or self-represented as they do to the represented. The judge put the matter in the following way: "The application of legal principles poses a duty on the court to examine cases objectively without fear or favour to any party, represented or unrepresented. While the courts are conscious of the difficulties faced by a personal litigant representing herself and will strive to enable that person to present her case as well as they can, the dictates of objective fairness and justice preclude the court from in any way distorting the rules or the requirements of due process because one party is unrepresented" (see paragraph [16]).

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[1] See Re SOS Ltd's Application [2003] NIJB 252

[26] The court's conclusions in respect of the issue of promptitude are:

(i) That in the case of the planning authority by a narrow margin the court is of the view that its application was not made promptly. While there were significant delays at the outset of its consideration of the matter, to an extent these can be counterbalanced by the speed of action in the last period from mid-September 2016. However, the period which elapsed before the judicial review proceedings were initiated was greater than it should have been and in these circumstances the court is driven to the conclusion that the application was not made in a timely way and that no sufficient excuse has been provided for much of the delay.

(ii) That in the case of Mr Duff the court is of the opinion that his application, not having been made until 2 days before the expiry of 3 months, was not made promptly. In his case also the court is unable to conclude that a sufficient excuse for the delay has been made out in his case. It appears to the court that while Mr Duff was active is pursuing the matter initially he was slow to take any definite action, even after he had received the letter from the PAC of 22 September. His resolve to himself challenge the decision only seems to have crystallised at a later date and seems to have been stimulated by his view that a challenge wider than that initiated by the Council was needed. It is for this reason that Mr Duff's original Order 53 statement was in wide terms, though just before the leave hearing, he submitted an amended version which substantially brought his application in line with the first applicant's application.

PREJUDICE TO THE NOTICE PARTIES

[27] The notice parties have sought to make the case that they are prejudiced by any grant of leave to apply for judicial review in this case. The prejudice, it is argued, derives from the strain which will be placed on all of them but in particular on Mrs Howell's mother and father in law – neither of whom enjoys good health with Mr Galbraith (the father in law) being in notably poor health – if an issue they thought had been resolved by the PAC is revived again as a result of a judicial review.

[28] Secondly, they argue that on foot of the PAC's decision in their favour, Mrs Howell's mother expended sums of money on her and her partner's accommodation which, if leave was granted, is placed at risk. Those sums are set out in the papers and are in respect of:

(i) Expenditure in August 2017 on decoration of the house (£600).

(ii) Purchase of a new corner sofa for the living room in September 2016 (£1,840).

(iii) Expenditure on a chicken coop in May 2016 (£1,000).

[29] It seems to the court that all of this expenditure cannot be viewed as relevant to this judicial review. In particular item (iii) involved a purchase before the date of the decision of the PAC and the court, therefore, doubts that in the circumstances it can now be relied upon by the NPs as a feature of prejudice.

[30] The court also notes that the other items of expenditure at (i) and (ii) above were transactions which took place while the risk of judicial review could not be said to have expired.

[31] Even if the court viewed all three items of expenditure as capable of amounting to prejudice, the court is of the view that it should not regard any prejudice as being other than at the low end of the scale in this case. Even when the court adds in the inconvenience and strain which the possibility of the matter being reopened may engender, the court would still be of the view that any prejudice does not go beyond a very modest level.

EXTENSION OF TIME

[32] In the circumstances, the court is invited by each applicant to extend time.

[33] It has decided it should do so, in the planning authority's case. Its reasons for doing so are:

(a) It considers that the judicial review proceedings in this case serve an important public interest by offering the potential for correction of what, even the PAC itself, has described as an indefensible decision. It would be an offence to justice if such a decision was allowed to go unchallenged, notwithstanding its obvious frailty.

(b) The planning authority in this case originally pursued enforcement action. In so acting the authority was *prima facie* seeking to act on behalf of the public within its area. In these circumstances it is inherently unattractive to allow the enforcement action to be rendered nugatory by the decision of the Commissioner without its legality being tested by judicial review. It is therefore in the court's view appropriate that the planning authority should be able to mount a challenge to the Commissioner's decision.

(c) In the court's opinion it is entitled in a situation like this to have regard to the merits of the judicial review. On the face of the papers, it seems to the court that the first applicant's case for judicial review is strong and is not merely arguable or hopeful. The court is fortified in its conclusion in this regard by the terms in which the PAC has described the weaknesses in the Commissioner's decision. In short, the court appears not to be faced with a

minor or technical failure in the process of determining an enforcement appeal.

(d) The court does not think that the prejudice to the notice parties is of such significance or importance as to outweigh the arguments in favour of an extension of time so as to enable the planning authority to make its application for judicial review.

(e) While the Council's application was not made promptly, it seems to the court, that the period of delay in this case was not substantial.

(f) Should the judicial review be successful this will mean that the interests of all concerned can be lawfully considered at a new hearing.

[34] The court will therefore extend the time in the case of the planning authority's judicial review to the date when it lodged its proceedings.

[35] The court has also considered whether it should extend the time in the case of the second applicant's proceedings but, on balance, it declines to do so. It seems to the court that the applicant's delay was greater than that of the planning authority. Moreover, and of greater importance, the applicant represents only his own private interest in the matter and, unlike the planning authority, cannot be viewed as being representative of any public interest. In any event, given that the court is providing leave to apply for judicial review to the planning authority, it would appear to the court that the second applicant will indirectly be able to benefit from the grant of leave in relation to the first applicant's application. Finally, the court is of the view that there is no value in duplicating proceedings and that it is likely that the first applicant's case can be dealt with in a more efficient and cost effective way than the second applicant's application.

CONCLUSION

[36] The court in all of the particular circumstances of this case has decided as follows:

(i) That there is an arguable, in fact a strong, case for judicial review of the PAC decision.

(ii) That the planning authority's proceedings do fall foul of the requirement of promptitude. However, the court will extend the time in the case of the planning authority's application for the reasons it has given.

(iii) The application of the second applicant also fails the promptitude requirement. In the second applicant's case, the court for the reasons it has given declines to extend time in respect of the application.