Neutral Citation No: [2021] NIQB 89	*Ref:* SCO11641
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:* 21/057114/01
	Delivered: 14/10/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY
FERNMOUNT TRADING (NI) LIMITED AND SHARP (NI) LIMITED
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF BELFAST CITY COUNCIL

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William Orbinson QC and Fionnuala Connolly (instructed by Quantum Law Solicitors Limited) for the applicants
Denise Kiley (instructed by the Belfast City Council Legal Services Department) for the respondent
Stewart Beattie QC (instructed by Tughans, solicitors) for the notice party

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SCOFFIELD J

Introduction

[1] This is an application in which the applicants, two companies with an interest in Beckett's Bar and Restaurant on the Stewartstown Road, Belfast, challenge a decision of Belfast City Council ('the Council') made on 20 April 2021 granting planning permission (reference LA04/2020/0426/F) for reconstruction of a petrol station and ancillary retail units at 228-232 Stewartstown Road.

[2] The applicants relied on a range of grounds of challenge, the central contentions of which were that the Council's Planning Committee did not properly consider and assess roads and parking considerations and/or did not properly apply planning policy in relation to those considerations.

[3] The applicants' pre-action correspondence was sent on the same date on which the application for leave to apply for judicial review was lodged with the court (19 July 2021). As a result, the applicants' solicitors suggested that the

proceedings be stayed pending the proposed respondent's response to that correspondence. The court permitted the Council some time to respond, which it did by way of a position paper filed with the court on 26 August. In this position paper, the Council accepted that its decision was flawed (for reasons discussed further in brief detail below) and consented to it being quashed.

[4] However, in its position paper the Council also indicated that it had been in contact with the beneficiary of the impugned planning permission, the Hoey Family Pension Fund (the notice party in these proceedings); and that the notice party had advised that it did not consent to the planning permission being quashed and, indeed, that some 50% of the works on site on foot of the planning permission had now been completed. In further correspondence, it became clear that the applicants were pressing for the impugned planning permission to be quashed (and took issue with the level of work alleged to have been completed on site); and that the notice party was resisting this form of relief, principally on the basis that it was not given notice of the intended proceedings until at or after their commencement and had acted to its detriment in reliance upon the planning permission in the meantime.

[5] After a number of case management reviews (through which a threatened application for interim relief on the part of the applicants was averted) and the filing of some further evidence by both the applicants and the notice party, a short remedies hearing was convened on 8 October 2021. There were three issues to be addressed: first, whether the impugned permission should be quashed; second, whether the notice party should be restrained by way of injunction from undertaking further work at the site pending a redetermination of the planning application by the Council (or would give an undertaking to this effect) in the event that the planning permission was quashed; and, third, the issue of costs.

[6] At that hearing, I ruled that it was appropriate that the impugned planning permission be quashed. I undertook to give brief reasons for that decision in writing, which are set out in this judgment. The final order to be made in the proceedings was not settled, however, until the parties had had a further opportunity to consider and negotiate between themselves as to an undertaking which might be given by the notice party. This was settled and included in the final order yesterday. In light of the resolution of the issue of the undertaking by agreement, the only remaining matter was costs, provision for which has been made in the court's final order. I also explain my approach to the costs issue below.

[7] Mr Orbinson QC and Ms Connolly appeared for the applicants; Ms Kiley appeared for the respondent; and Mr Beattie QC appeared for the notice party. I am grateful to all counsel for their helpful written submissions and focused oral submissions.

Factual Background

The grant of permission

[8] It is unnecessary for present purposes to rehearse in considerable detail the factual background to this application. As noted above, the applicants have interests in Beckett's Bar and Restaurant on the Stewartstown Road. The site in respect of which the impugned planning permission was granted adjoins their site. The planning permission which is under challenge is for the reconstruction of a petrol station and an ancillary retail unit including a variety of other ancillary development. The primary purpose of the application was to permit reconstruction of a petrol station and associated shops which had been damaged by fire. The application is submitted on behalf of their disparity on 28 January 2020.

[9] On the evidence before the court, there has been some difficulty with parking at the site for some time (at least according to the applicants). They say that, due to the creeping intensification of the notice party's site, there has been an ongoing issue with customers at the temporary petrol station making use of the car park of their bar and restaurant without permission. On the applicants' case the total planned development on the site would require 47 car parking spaces (excluding spaces at the petrol pumps); whereas there were 17 car parking spaces prior to the fire and only 17 proposed with the new development, *i.e.* there is to be no increase in the car parking provision. The applicants further say that this has had a detrimental effect on their business as their customers now have no car parking spaces left. For its part, the notice party contends that the proposed development would amount only to a "modest increase" in floorspace in order to reflect modern retail requirements.

[10] The applicants objected to the planning application through their agent, Carlin Planning Limited. They raised a variety of concerns before the Council's Planning Committee in relation to intensification of the use of the application site and resultant highway and parking issues. The key objection was that the proposals were not a 'like for like' replacement, as had been suggested by the Department for Infrastructure (DfI) Roads Section at one point. The applicants contended that there was in fact a 40% floorspace increase which would have knock-on impact on parking need and resulted in contravention of various planning policies in Planning Policy Statement 3: Access, Parking and Movement. The applicants attended the Council planning meeting on 20 April 2021 and objected to the application through representations made on their behalf, including by way of submissions made by junior counsel (although not the same junior counsel instructed for them in the course of these proceedings). Notwithstanding the objections, the Planning Committee determined that the application should be granted, in line with the recommendation of the professional planning officers in the case officer's report.

Developments after the grant of permission

[11] Shortly after the grant of permission, the notice party commenced site works. A significant amount of information about this has now been provided in the affidavit evidence filed on behalf of the notice party, in an affidavit from Mr Hoey. In particular, on 30 April 2021 the notice party entered into a building contract for demolition of the existing fire-damaged retail shop and associated substructures and the construction of a new retail shop unit, with two-storey back-of-house storage and staff quarters, to the stage of shell finish. The contract price was in the region of £960,000. A mere few days after that, on 3 May 2021, works to implement the planning permission commenced. This included some initial temporary works and ordering of materials, with erection of hoarding and fencing at the site commencing on 17 May 2021, but soon progressed to more substantial building operations.

[12] By early September the site had been cleared, foundations had been installed and the steel superstructure for the two-storey building and single-storey shop had been erected, with the brick of the two-storey element at an advanced stage. Mr Hoey has averred that the building was on target for a completion to shell finish in late October. The evidence before the court is that the notice party has incurred costs of approximately £325,000 to date. The notice party also averred that the first time that it became aware that there was any challenge to the validity of the planning permission was some 11 weeks into the build programme, in or around Saturday 24 July 2021, shortly after these proceedings had been commenced. Mr Hoey makes the common sense and forceful point that, during this period, the works which had been commenced on site were visible from the road and that, therefore, the applicants could not have been unaware of their commencement.

[13] Some details have been provided in the evidence of the costs figure which has been incurred and which is mentioned in the paragraph above. These can conveniently be split into three tranches. The first tranche (of around £103,000) relates to "costs incurred to the securing of planning consent and carrying out certain preparatory works which did not require planning permission." The second tranche (of around £132,000) relates to the cost of works commenced on site on 3 May 2021 until 20 July 2021 when these proceedings were launched. The third tranche of costs (of around £104,000) relates to works carried on at the site after the commencement of these proceedings but in circumstances where the notice party contends that it was required to continue with some works and was not simply in a position to cease building operations and secure the site.

[14] Mr Hoey further averred that at the time of the swearing of his affidavit in mid-September 2021 "significantly more than 60% of the works are now complete." As discussed further below, Mr Hoey went on to indicate that, in that event that the planning permission for the site was quashed, "The Fund will not proceed to the fit out of the shell premises until its planning status is finally resolved."

[15] The applicants take issue with suggestion in Mr Hoey's affidavit that significantly more than 60% of the works were completed as of 20 September. The applicants instructed a firm of surveyors to prepare a report on the extent of the works completed at the site; and I was provided with a letter and attached 'report' in this regard. The applicants' surveyor concluded that, as of 23 September 2021, only approximately 30% of the works contained within the planning approval had been completed. The surveyor also expressed the view that, in his opinion, the progress of the works at the site by 20 July 2021 (the date on which the proceedings for judicial review were commenced) would only have been in the region of 10% of the overall construction of the project.

[16] I am afraid I am bound to say that I did not find the surveyor's report provided by the applicants of much assistance. It is in cursory terms and it is unclear precisely what the methodology was in relation to its completion. For instance, the notice party asserts that it is likely the surveyor merely viewed the site from the roadside. The surveyor himself says that he has "set out a summary for the works completed in elemental format" in the attached schedule. The attached table is an obviously rudimentary assessment of the stage of completion of various aspects of the required works. In addition, and of concern to the court, is the fact that no expert's declaration has been completed by the surveyor involved. That said, the estimate of 30% completion is more consistent with the costings and expenditure which have been described (with some £325,000 spent and some £600,000 outstanding works) than the notice party's assessment of 60% completion. I recognise, of course, that that approach to be nothing more than a very rough and ready guide.

[17] The applicants' surveyor's conclusion that only 10% of the overall construction would have been complete by 20 July 2021 is based upon the 30% completion as at 23 September being correct and a further extrapolation "allowing for progress on a similar basis." Although there is reference to allowance being made for site mobilisation requirements, ordering of materials, submission of the building control application, etc. the assessment provided in that regard is clearly speculative.

[18] In any event, as discussed below, my assessment of the proper remedy to be granted in these proceedings is based on the correct approach as a matter of principle. The extent of the works undertaken, whilst relevant, is not the primary consideration; and a developer plainly cannot be permitted to effectively render toothless the supervisory jurisdiction of the court simply by means of proceeding at pace with development works. Insofar as it is material, I proceed on the basis that the correct figure for the percentage completion of the shell works at the time of Mr Hoey's affidavit was probably somewhere in between the figures of 30% and 60%; and, at the time of the notice party becoming aware of these proceedings, was likely to have been in excess of the 10% figure relied upon by the applicants. What is more important, however, is that the notice party made a significant contractual

commitment in terms of the works almost immediately after the grant of the planning permission.

The conceded ground

[19] In its position paper of 26 August 2021 the Council accepted that the case officer's report which had been presented to its Planning Committee "erroneously, and inadvertently, failed to accurately present the Department for Infrastructure's (DfI's) position on the planning application." It was also accepted that, although this was inadvertent, this had led the Committee into error. The pleaded ground on the basis of which the Council was prepared to consent to the quashing of the permission was that set out in paragraph 5.1(b) of the applicants' Order 53 statement. It was in the following terms:

> "The case-officer's report was flawed because it misled the Planning Committee as to DfI's *final* consultation position. Specifically, the Addendum to the case officer's report referred to some aspects of DfI's conclusions but entirely failed to bring to the attention of the Planning Committee that on 2 April 2021, DfI had (i) advised that 'With respect to parking the site is underprovided and always has been (in terms of our Parking Standards), so, as before the main impact will be spill over to adjacent sites and the effect on amenity for adjacent businesses and residents and (ii) advised that the amenity impact of spill over parking was a planning matter falling within the remit of the proposed respondent and not that of DfI Roads. The Planning Committee's reliance on the case officer's report in reaching its decision to grant planning permission amounted to an error of law."

[20] For their part, the applicants did not accept that the various other grounds of judicial review on which they had relied were without merit. However, they indicated that, in light of the overriding objective set out in the Rules of the Court of Judicature ("RCJ"), they welcomed the concession made by the Council and were content to proceed on that ground only. It was a concession that the relevant committee had not been properly informed in respect of one of the major planks of the applicants' objection.

Summary of the parties' submissions

[21] The key issue in dispute at the remedy stage is whether or not the impugned permission ought to be quashed by the court. The applicants relied upon the fact that this would be the usual order where an identified illegality had been found and the challenge was to an administrative decision which could now be shown not to have been taken on an appropriately informed basis.

[22] The notice party emphasised that the grant of relief in judicial review is discretionary and also the prejudice which had accrued to it by virtue of the proceedings having been lodged at a late stage (just one day within the three month time limit for judicial review proceedings set out in RCJ Order 53, rule 4). In the meantime, the notice party had acted on foot of the permission and had committed itself to a considerable amount of expenditure and work on the site which was likely to be redundant in the absence of the impugned permission. Although the notice party recognised that it could not contend that the proceedings were brought out of time (as it might have been able to do under the previous regime when judicial review proceedings were required to be brought "promptly" and in any event within three months of the grounds of challenge having first arisen), it nonetheless contended that the delay in issuing the proceedings in this case could be taken into account in the exercise of the court's discretion as to remedy. In particular, the notice party focused upon the fact that it had no notice whatsoever of the proceedings prior to their being launched; and that, had it had such notice, it may not have been prejudiced to the extent which it now has.

[23] For its part, the Council had consented to the quashing of the impugned permission in its early concession of the case. However, in light of the matters which have been raised by the notice party, the Council effectively took a neutral position at the remedies hearing on the question of whether or not the appropriate order for the court to grant was a quashing order.

Reasons for granting *certiorari*

[24] I held that it was appropriate in this case for the planning permission to be quashed. It is correct that the court has a discretion as to remedy in judicial review proceedings. However, the usual remedy where illegality has been identified in the making of an administrative decision is that that decision will be quashed: see, for instance, the authorities cited at paragraphs 24.3.14 and 24.3.15 of Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart). I do not consider that there is anything exceptional in this case which ought to displace the grant of the usual remedy.

[25] In particular, it is not open to the notice party to contend that the application for judicial review was brought out of time. The notice party is correct in its submission that there was a failure to comply on the part of the applicants with the requirements of the High Court's Judicial Review Pre-Action Protocol. However, in my view this was not sufficient to displace the applicants' *prima facie* entitlement to an effective remedy. The usual approach to breach of the requirements of such a protocol is that the relevant party is penalised in costs (see further below).

[26] I consider that there is force in the submission made by Mr Orbinson that, at least in the case of seasoned commercial developers such as those at issue in the present proceedings, a decision to proceed hastily with costly site works immediately after the grant of planning permission is undertaken at risk. That is

particularly so where, as here, the notice party was well aware of the firm objection maintained by its neighbour to the proposed development. (Much of the evidence provided for the purposes of the remedies hearing in relation to interaction between the parties was of little relevance to the core issue; but it did satisfy me that the notice party was aware that the applicants were opposed to the development plans.) In any event, it must have been clear to the notice party from the applicants' attendance at the Planning Committee meeting at which its application was considered – and their opposition to the application, including by means of having instructed a planning consultant, solicitors and counsel - that the applicants maintained a determined opposition to the development plans.

[27] Mr Beattie made a nuanced submission to the effect that, whatever the notice party's expectations may have been immediately after the Planning Committee meeting, as time passed without any service of judicial review pre-action correspondence, it would have been reassured that proceedings were unlikely. The principal difficulty with the submission is that the evidence establishes that, almost *immediately* after the grant of permission, the notice party entered into contractual commitments for completion of relevant works. Even if the applicants had sent pre-action correspondence within seven weeks of the date of the challenged decision, as the Pre-Action Protocol provides they should (at the very latest), the notice party would still have committed itself to considerable expenditure well in advance of that notification in any event. In my view, there is force in the submission made by Mr Orbinson that the notice party in this case proceeded with undue, or at least unwise, haste. There is, of course, nothing unlawful in the developer's approach in this regard; but, as indicated above, in a case such as this, the decision to proceed to quickly is undertaken at risk of subsequent legal challenge. The notice party would, or ought to, have been aware that there was a three month window within which proceedings could be commenced.

[28] In summary, in light of the fact that the application was brought within the judicial review time limit, it could not be viewed as having been made out of time. A valid concern has been raised by the applicants that, if the notice party was to succeed in resisting the grant of an order of *certiorari* in this case on the basis (even in part) that the application had not been brought in a timely fashion, that would essentially resurrect the promptitude requirement which is no longer a feature of the judicial review procedure regime in this jurisdiction since the coming into force on 8 January 2018 of the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017. That requirement was abandoned largely in order to promote legal certainty for all parties, rather than the uncertainty which could arise from the application of a time limit which was movable and based on retrospective assessment. I accept the force of that point.

[29] That is not to say, however, that the actions or inaction of an applicant for judicial review in this regard can never be taken into account when considering the court's discretion as to the grant of relief. It is merely to recognise (a) that such prejudice as may have arisen in a case such as this cannot be viewed as a result of

"undue" delay; (b) the court will be astute not to permit new life to be breathed into the prior requirement for promptitude which no longer has any basis in the court rules; and, therefore (c) that it will only be in a rare case where delay in the commencement of the proceedings brought within time defeats the grant of appropriate relief in the exercise of the court's discretion. An obvious example might be an application for judicial review where, by the time the proceedings have been launched, the matter has become academic. However, that concern does not arise in a case such as the present.

[30] I have also taken into account two further matters. First, a large tranche of the notice party's expenditure (described as the first tranche at paragraph [13] above) is irrelevant to any question of prejudice, since it was incurred independently of the grant of planning permission. Second, there is evidence that there was a significant family illness and bereavement on the applicants' side between the date of the grant permission and the commencement of these proceedings (and during the period when pre-action correspondence ought to have been, but was not, sent). I will not set out the full details of what has been disclosed in the evidence in relation to this aspect of the case. It is certainly not a full answer to what appears to have been a significant period of inaction for a time, particularly when legal representatives had been engaged at an earlier stage. However, the evidence does provide a compelling justification as to why, for instance, Mr Hughes (one of the applicants' deponents and an important figure on their side) would not have been focusing on the issues raised by these proceedings for some time during that period.

[31] Although this was not a particularly significant feature in my reasoning, it is also appropriate to note that the conceded ground in this case relates to the consideration of roads issues. It is clear that the DfI Roads consultation response cast the parking issue principally as an amenity issue for consideration by the planning authority. However, it is not uncommon for roads issues to raise concerns about public safety, which can be another factor tending towards quashing a planning decision where these issues have not been properly considered on a fully informed basis. In addition, even when the promptitude requirement was in force, a more forgiving approach to delay would sometimes be appropriate where roads issues raising public safety concerns were raised: see *Re Hill's Application* [2007] NICA 1 at paragraphs [21] and [33].

[32] In light of the above, I have granted an order quashing the Council's decision to grant planning permission and the resulting permission itself. The result of this is that the notice party's application for planning permission now stands undetermined. I accept Ms Kiley's submission that a further order directing or requiring the Council to take a fresh decision in respect of the application is unnecessary. That should now flow as a natural consequence of the quashing order; and I am satisfied that the Council is well aware of its responsibility in this regard.

The undertaking

[33] In light of the approach of the notice party to proceed with site works extremely quickly after the grant of planning permission, the applicants were concerned in this case to ensure that, if the planning permission was quashed, the notice party did not then seek to improve its position further by way of proceeding to complete the works. It was suggested that, by this means, the notice party might in some way place pressure on the Council to grant planning permission in the same or similar terms as before in order to avoid a requirement that completed works be demolished, either in the course of the Council's redetermination decision or by way of an application for retrospective planning permission.

[34] As a result of this concern, the applicants amended their Order 53 statement to seek a final injunction in the course of the proceedings restraining the notice party from carrying out any further works at the site pending the Council's redetermination of the planning application. In my experience, this is a relatively novel form of relief to seek in judicial review proceedings such as these. However, the basis for the applicants' concern in this regard is apparent from the evidence discussed above. The applicants were also encouraged in this application by the averment in the affidavit of Mr Hoey on behalf of the notice party referred to at paragraph [14] above.

[35] In the event, it was not necessary for the court to adjudicate on any aspect of this element of the dispute. That is because, consistent with Mr Hoey's averment to this effect, the notice party agreed to give an undertaking in suitable terms (which were agreed between it and the applicants). I do not set out the full terms of the undertaking in this judgment. It is recited as a schedule to the court's final order. It is in detailed terms, in order to seek to specify with clarity what particular works the notice party is (and is not) permitted to undertake in order to secure the building completed to date and stop works at an appropriate point. The central features of the undertaking are that the notice party will only complete the "shell construction phase" and will not go beyond this; and that all such works will be completed by close of business on 12 November 2021, at which time the site shall be secured and no further work shall take place until the Council has re-determined the planning application (unless the court has varied or discharged the undertaking). The parties are to be commended for reaching a negotiated resolution on this aspect of the case.

Costs

[36] In light of the concession of the case by the Council at an extremely early stage, I do not propose to make any award of costs against the Council. Indeed, the applicants have not pressed for these. That is no doubt because they recognised that there is authority to the effect that a respondent, or proposed respondent, to a judicial review will often not be penalised in costs for taking a sensible and pragmatic approach to conceding a (threatened) judicial review challenge and rectifying a legal error on its part at an early stage, particularly in circumstances

where the court cannot be sure that the applicant was bound to win had the case proceeded on a contested basis.

[37] However, the applicants do seek the costs of these proceedings against the notice party. That is because, they submit, the review hearings and remedies hearing which were required to be convened arose because, and solely because, the notice party was unwilling to allow the case to be disposed of by way of the grant of a quashing order on foot of the Council's concession. Put another way, the only party arguing *against* the grant of *certiorari* was the notice party and, since it has been unsuccessful in its opposition to the grant of such an order, the costs of that opposition (and the steps which were required to be taken by the applicants, including the filing of further evidence to meet it) should be visited upon the notice party.

[38] Although notice parties in judicial review proceedings in this jurisdiction usually participate on a 'costs neutral' basis (bearing their own costs and not being liable for the costs of others), there are a number of well-known exceptions to this general principle. One is where the court takes the view that the notice party has unreasonably added to the costs of the proceedings in a significant way (by, for instance, making irrelevant points or simply repeating points which have been made by one of the principal parties). Another is where, as here, the notice party steps into the shoes of one of the principal parties – in this case, the respondent – and is the only party arguing for a particular outcome, as to which they are unsuccessful. In such cases, where the notice party has materially added to the time and costs required to resolve the proceedings and has caused another party (here, the applicants) to incur significant further expense, the interests of justice will often require that the notice party bear the costs of that exercise. For these reasons, I start from the premise that it would be appropriate for the notice party to bear some or all of the applicants' costs of these proceedings which were generated by its opposition to the grant of relief which was not opposed by the Council.

[39] However, a highly material factor in the exercise of the court's discretion as to the award of costs is that the applicants did not comply with the High Court's Pre-Action Protocol in relation to judicial review, which is annexed to the Judicial Review Practice Direction, No 3/2018. The Practice Direction notes that the standard pre-action letters "will be used in every case"; and that there is a "duty of strict compliance" with the Pre-Action Protocol which "applies in every case, except in the most urgent or compelling circumstances and irrespective of whether the proposed Respondent is legally empowered to revoke or alter the impugned decision or action." In addition, the Practice Direction notes that, having regard to the judicial review time limit of three months, "it is essential to specify certain time limits belonging to the PAP phase." To that end, as a general rule, it is noted that the putative applicant's letter "will be transmitted not later than 7 weeks following the date of the impugned decision", with a response then required within three weeks. Significantly, the Practice Direction expressly warns that:

> "Any failure to comply properly with the PAP may have (*inter alia*) adverse costs implications for the default party or its representatives."

[40] The terms of the Pre-Action Protocol itself also emphasise that strict compliance is required in all but the most exceptional of cases; and warn again that any non-compliance may be reflected in the exercise of the court's discretion relating to costs. It is made clear that the applicant's pre-action correspondence should be copied to any interested party (as must the proposed respondent's response).

[41] There was no apparent attempt to comply with the Pre-Action Protocol in this case at an appropriate time. A 'pre-action' letter was sent at the same time as the proceedings were lodged (as they had to be in order to comply with the three month time limit set out in the Rules). In the section of the Order 53 statement (drawn from the model Order 53 statement set out in the Practice Direction) where the applicants' solicitor was required to certify compliance with the Pre-Action Protocol, it was certified that the PAP requirements had been fully observed "save insofar as the PAP letter has been served at the same time of these proceedings [*sic*] due to the deadline requirements in judicial review." The applicants sensibly suggested that no steps be taken in the proceedings until the Council had had time to respond; but the service of 'pre-action' correspondence along with the proceedings themselves plainly does not represent compliance with either the letter or spirit of the Pre-Action Protocol. It is designed to seek to avoid litigation, where possible. It is also designed, at least in part, to pre-warn potential respondents and affected third parties about the intended proceedings in order to allow them to take advice, take such steps as they then deem appropriate in response, and make clear to the court and other parties any points they have about the propriety of the proposed proceedings. In some cases, although litigation may not be avoided entirely, the issues may be narrowed by way of pre-action communications.

[42] Put at its most simple, had the applicants sent timely pre-action correspondence to the Council, copied to the notice party, the notice party may have been in a position to stop works at the site at a much earlier juncture. No such pre-action correspondence was sent notwithstanding that the applicants had instructed solicitors and counsel for the Planning Committee hearing at which the impugned permission was granted; and notwithstanding that, within days of the grant of permission, the notice party had commenced work, in plain view, quite literally next door to the applicants' premises.

[43] Perhaps most importantly for present purposes, had the applicants sent pre-action correspondence at the appropriate time, the notice party would have been robbed of its best point in terms of seeking to resist the grant of a quashing order. In those circumstances, it is much less likely that it would have sought to resist the grant of such an order and costs could thereby have been saved. In light of this, and in order to mark the court's disapproval in relation to non-compliance with the

Pre-Action Protocol, I was initially of the view that the appropriate course was that the applicants should not recover any costs from the notice party.

[44] Having reflected on Mr Orbinson's submissions, I consider that this initial approach went too far in terms of depriving the applicants of the additional costs incurred by them in meeting the unsuccessful opposition by the notice party to the grant of a quashing order. Nonetheless, a significant costs penalty for failure to send timely pre-action correspondence is warranted in this case. I have also taken into account the fact that, having filed evidence and written submissions, the notice party would have been content for the issue of relief to be determined by the court without an oral hearing, thus saving costs, although the applicants preferred that there was an oral hearing; and that the notice party's pragmatic approach to the giving of an undertaking in relation to further prospective works at the site has likely saved significant costs. I also take into account that, even without the notice party's intervention, the applicants would have had to have incurred some legal costs in moving the application before the court, since the Council is not in a position to simply voluntarily revoke a planning permission which it has granted (or, at least, is not in a position to do so without incurring a liability to pay compensation to the beneficiary of that planning permission).

[45] Taking all of these matters in the round, I have determined that the appropriate order in this case is that the applicants should be entitled to some element of their costs from the notice party; and that the appropriate amount is that the notice party should be liable to the applicants for one-third of their costs.

Conclusion

[46] In summary, since this case never proceeded to the stage of leave having been granted, I have exercised the court's power under RCJ Order 53, rule 3(9) to grant relief at the leave stage and have made an order quashing the Council's decision to grant planning permission and the resulting planning permission itself. I have recorded in the order the notice party's undertaking discussed above; and grant no further relief in the proceedings on foot of that undertaking having been given. All parties will have liberty to apply, including in particular that the applicants have liberty to apply to enforce the notice party's undertaking, as necessary; and the notice party has liberty to apply to vary or discharge its undertaking.

[47] I have also made a costs order in favour of the applicants, against the notice party, to the effect that the notice party shall pay one-third of the applicants' reasonable costs of these proceedings, such costs to be taxed in default of agreement. I have made no further costs order between the parties.