Neutral Citation No: [2017] NICA 77	*Ref:*	**GIL10324**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	***30/06/2017***

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

IN THE MATTER OF AN APPLICATION BY CHRISTINE GIBSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

And

IN THE MATTER OF A DECISION OF NEWRY, MOURNE & DOWN DISTRICT COUNCIL MADE ON 29 JUNE 2015 & 25 FEBRUARY 2016

And

IN THE MATTER OF A DECISION OF THE DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS (MARINE & FISHERIES DIVISION) MADE ON 3 JUNE 2016

Respondents;

FRAZER FERRIES LIMITED

Notice-Party.

_____

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

_____

GILLEN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by Christine Gibson ("the appellant"), who is a litigant in person appearing with the help of a McKenzie Friend , against the decision of Colton J [2016] NIQB 82 refusing the appellant leave to apply for judicial review of three decisions namely;

(1) Decision 1 was made by Newry, Mourne & Down District Council ("the council") to grant permission on 29 June 2015 for the construction of ferry terminal facilities adjacent to A D Greencastle Pier Road, Greencastle, to allow the operation of a vehicular ferry across the mouth of Carlingford Lough ("Decision 1"). The application for leave to challenge this decision was lodged on 18 May 2016.

(2) Decision 2 was made on 25 February 2016 by the council to vary the original planning permission in Decision 1 relating to the original condition 15, the original condition 22 and the original planning condition 24. These conditions have been commonly referred to as "the water conditions", "the propeller conditions" and the "HGB conditions" ("Decision 2"). The challenge in this case was lodged on 18 May 2006.

(3) Decision 3 relates to a marine licence granted by the second respondent (hereinafter called "DAERA"). The licence was granted by DAERA on 3 June 2016 and subsequently varied on 30 June 2016 by the inclusion of 2 additional conditions ("Decision 3"). The licence permitted the following works:

- Construction of a reinforced concrete suspended pier supported by vertical tubular piles and a reinforced concrete slipway to allow vehicular access to the ferry and 12 berthing piles with fenders and a steel gangway to facilitate berthing and tying up of the vessels overnight.

- Floating navigational marks anchored to the bed of the lough and laid at the edges of the navigable channel to delineate appropriate channel boundaries or to mark shallow rock outcrops and provide safety of navigation. The judicial review application challenging Decision 3 was lodged on 2 September 2016.

Preliminary observations

[2] The appellant has adopted what can only be characterised as a scattergun approach to this litigation. She initially filed 2 Statements under Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980. She subsequently applied to amend the two previous Order 53 Statements. On 4 March 2015 she produced one single "consolidated" Order 53 Statement. This third Order 53 Statement differed substantially from the original two Orders and amounted to additional amended grounds of challenge.

[3] At a review hearing on 31 March 2017, this Court directed that the appellant lodge a comprehensive skeleton argument. This she proceeded to do in a document drafted over 56 pages dated 5 May 2017.

[4] Colton J faced precisely the same difficulty confronting this Court namely that disparate arguments lacking in structure and consistency have emerged from the appellant at various stages of the proceedings. It made for great difficulty in discerning precisely what were the salient points which the appellant wished to ventilate. In a final attempt to bring focus to this case and to ensure that the time expended on the case was used efficiently, we imposed a time limit on all parties for their oral submissions particularly in light of the extensive skeleton arguments which have been filed.

[5] In this context we cite the sage words of Simon Brown LJ in R (Richardson) v N Yorkshire CC (CA) [2004] 1 WLR 1920 at [80] where he said;

> "I am conscious that despite the unusual length of this judgment it nevertheless leaves unaddressed a number of Mr McCracken's disparate arguments. For that I shall hope to be forgiven. Where, as here, a challenge or appeal is pursued in a somewhat scattergun fashion, it is simply not practicable to examine every pellet in detail".

[6] We note that this passage was cited with approval recently in Smith v Secretary of State for Communities & Local Government & Others [2015] EWCA Civ. 174 in the Court of Appeal (Civil Division) in England and Wales per Sales LJ where similar difficulties had surfaced.

[7] Accordingly, we take this opportunity to restate the now oft repeated principle that personal litigants cannot have an unfair advantage against represented parties. They cannot seek to rely on inexperience or lack of proper appreciation of what the law requires. Courts must strive to bring structure and focus to their arguments with firm case management at the earliest stage available to ensure that there is clarity to the issues at stake and that the personal litigant is confined to relevant issues. There are great advantages to such an early management system. In addition to assisting the judge in determining whether or not leave should be granted, it may help to focus the real issues between the parties and provide an opportunity for early ground rules for the conduct of the hearing.

[8] Ms Gibson in the instant case had clearly invested much time and effort to produce her case. However, it was clear that she had failed to grasp in the first instance, the correct approach to judicial review and, before this Court, the role of an appellate jurisdiction.

[9] For the benefit of personal litigants in the future we make clear that the role of judicial review can be summarised in the following bullet points:

- The burden of proof to establish unlawful conduct rests with the applicant.
- The role of the court in judicial review is supervisory only.
- The court is not concerned with the merits of the decision or decisions at issue.
- The court will not intervene unless a public law wrong has been established.

- Issues which concern the weight to be attributed to various factors in the decision-making process will generally be for the decision maker and not the court subject only to a rationality challenge.

- The parameters of a judicial review challenge will ordinarily be set by the pleaded case contained in the Order 53 Statement (see Re Oasis Retail Services Ltd's application at paragraph [74] per Maguire J).

[10] Moreover, an appellate court should be slow to second guess the approach of a first instance judge in such matters. DBB v Chief Constable of PSNI [2017] UKSC 7 was a judicial review case arising out of the flag protest, as it became known in Northern Ireland, which was finally determined by the UK Supreme Court. At paragraph 78 Kerr SC said:

> "On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. For the purposes of this case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477. In para 1 of his judgment he referred to what he described as 'what may be the most frequently cited of all judicial dicta in the Scottish courts' - the speech of Lord Thankerton in Thomas v Thomas [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in Clarke v Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was 'plainly wrong'; that of Lord Greene MR in Yuill v Yuill [1945] P 15, 19, and that of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:
>
> > 'It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.'

> The statements in all of these cases ….. were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in Anderson that the first instance trial should be seen as the 'main event' rather than a 'tryout on the road' has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."

[11] The appellant in this instance has, throughout the proceedings and during this hearing, attempted to introduce a merits based approach which was unsuitable for the judge at first instance to adopt and for this Court to investigate. In addition she has sought to adduce evidence, often fresh evidence, based almost exclusively on her own ipse dixit without producing any or any adequate expert evidence to substantiate the case made.

[12] Unsurprisingly therefore Colton J may not have dealt with every argument which the appellant asserted before us had been presented to him. Correctly he has focused on the substantive issues that he discerned to be the thrust of the appellant's wide-ranging appeal.

[13] This Court, in the course of reviews and directions given to the appellant, has sought similarly to crystallise the issues that the appellant wished to raise and it is to these that we have addressed our attention during the course of this appeal.

[14] Accordingly, we have approached this appeal under the following headings:

1. Decision 1 (embracing the claim of an unfair hearing during the process).
2. Decision 2.
3. Decision 3.

4. The discrete issue as to whether or not to grant leave to amend the Appeal Notice, in addition to the original Order 53 Statement, to include fresh grounds of appeal, namely:

   (i) Breaches of Articles 2, 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

   (ii) The incompatibility of the Marine and Costal Access Act 2009 ("the 2009 Act") with her human rights insofar as Part 1 of the 2009 Act provides for a Marine Management Organisation ("MMO"). The MMO exercises no functions in Northern Ireland.

   (iii) An interim injunction to prevent further works being carried out at the site in question in light in the risk from erosion to the coastline without any effective mitigating measures or restrictions having been introduced and in the absence of any road safety audit to determine the safety of the roads.

   (iv) Miscellaneous other matters raised in the amended notice of appeal but not necessarily raised in the final skeleton argument.

Decision 1

[15] This decision concerned the granting of planning permission for the construction of the ferry terminal facilities and to allow the operation of a vehicular ferry across the mouth of Carlingford Lough.

[16] The key issue was whether the court found good reason to extend time where the application for leave had self-evidently not been made within 3 months.

[17] The legal principles that determine applications to extend time beyond the time limit set out in Order 53, Rule 4(1) have been set out in a plethora of judicial review cases and do not require recitation yet again in this Court. (See for example, Re Zhanje's Application [2007] NIQB 14).

[18] Suffice to say, as the learned trial judge pointed out, case law in Northern Ireland has long emphasised that an application for judicial review should be made promptly once time starts to run and that applications made within a 3-month period may still be deemed out of time for lack of promptitude. The rationale for the strict application of the time limit lies in the need to support the interests of good administration. The public interest requires that challenges to the legality of public law decision making should occur promptly in order to ensure certainty and finality in public decision making.

[19] Colton J adumbrated the correct legal principles. He noted that in terms of EU Law it is now well settled that the promptitude requirement does not apply (see

Uniplex (UK) Ltd v NHS Business Services Authority [2010] PTSR 1377). Wisely the judge concluded that this application had not been made either promptly or within the 3-month period from the date when the grounds for the application first arose. No challenge is made to his assertion of the legal principles.

[20] It is the appellant's case that she was denied a fair hearing on this issue. A number of points emerged:

- The respondents were invited to attend at the leave hearing and the judge asked the respondents to "inform him" on various aspects. The appellant seemed to fail to recognise that the courts do expect all parties to assist and inform the court in these matters. Although applications for leave are technically ex parte applications, it is common practice in this jurisdiction for the proposed respondent to be notified of the leave hearing by the court and invited to attend in order to assist the court in determining whether or not leave should be granted. We find nothing unusual about the procedure adopted in this instance.

- The appellant challenged the decision to deal with all three decisions together. However the fact of the matter is that she had instituted judicial review proceedings on the basis of a challenge to all 3 decisions and it is difficult to understand why the appellant did not appreciate that she would be dealing with all 3 at a hearing. She had at least one week of notice that all parties were being required to deal with all 3 applications together on 26 September 2016.

- The appellant was given ample opportunity to make her case. Once the issue of delay was raised by the Notice Party in the first affidavit of Paul O'Sullivan, the judge granted leave to the appellant to file a further affidavit addressing delay. In the course of that affidavit she fully outlined her reasons for the delay. Those reasons were fully ventilated by Colton J in his judgment which he had garnered not only from her affidavits but the opportunity that was afforded to her in the course of the hearing (which lasted over 3 days) to make full oral submissions. This included the judge adjourning the hearing to allow the appellant to have time to consider the points she wished to make in reply and prepare.

[21] We are satisfied that the appellant was afforded a fair hearing in dealing with Decision 1 and indeed throughout the proceedings.

[22] The appellant in this part of her case often adopted a purely merits based approach invoking arguments she had made to Colton J without recognising his reasons for dismissing them. These reasons included:

- The fact that this application was very substantially out of time.

- That her activities and involvement with campaigning and resident groups clearly evidenced her awareness of the relevant decision from a very early stage as instanced by the judge in paragraph 18(b). The judge was fully entitled to weigh up these various pieces of information before him and determine that the applicant had been fully aware of when the decision was made.

- Her argument that investment prior to the receipt of the Marine Licence by the Notice Party was premature ignores and only the fact that investment had been made by the Notice Party in the wake of the planning permission having allegedly relied on the 3-month expiry period but fails to recognise that a commercial operator with planning permission is entitled to progress it's scheme in the firm belief that the planning permission is now unchallengeable. We are not satisfied that there is any substance in the appellant's case that the Lough Foyle Ferry Company Ltd is the same body as the Notice Party itself and that, therefore, there was an arm's length memorandum of agreement between the 2 bodies.

- The conclusion by the judge that her health problems had not acted as an impediment to her ability to process this appeal was a perfectly reasonable factual finding which we are not prepared to disturb.

[23] The judgment sets out in some detail Colton J's consideration of whether there was "good reason" for failing to comply with the 3-month time limit in the course of paragraph [18]–[21] of his judgment. We find his assessment to be flawless.

[24] Accordingly we are satisfied that there was no reasonable excuse for applying late. The Court was entitled to take into account the prejudice to the third party rights and detriment to good administration which would be occasioned by allowing this late application.

[25] The appellant challenges the degree of care which the learned trial judge gave to the concept of whether or not the public interest required that the application should be permitted to proceed and failed to consider the overall merits.

[26] There is no doubt that courts do and should take into account in the exercise of discretion in this area the principle of legality which requires that administrators act in accordance with the law and within their powers. When they do things they are not empowered to do, this principle points towards the striking down of their illegal action even if the application in raising the point is out of time (see Schiemann LJ in Corbett v Restormel Borough Council [2001] EWCA Civ 330 at paragraph [15]-[17]).

[27] In particular in Corbett's case we note that Sedley LJ said at paragraph 32:

> "How, one wonders, is good administration ever assisted by upholding an unlawful decision? If there are reasons for not interfering with an unlawful decision, as there are here, they operate not in the interests of good administration but in defiance of it".

[28] Hence courts should be slow to ignore unlawfulness, for example, in the granting of a planning consent if that is proved to be the case; (see also Corbo Properties' Application [2012] NIQB 107).

[29] We are fully satisfied that Colton J was aware of these principles and indeed specifically referred to the interests of good administration and the public interest at paragraph [19] of his judgment.

[30] In dealing with Decision 3 in relation to the marine licence, he fully investigated the issues of the environmental information that was available and investigated. He found no sustainable argument on the merits.

[31] Moreover, neither before Colton J nor before this Court did the appellant produce any evidence, other than her own ipse dixit, to suggest that the grant of the planning permission had been unlawful. She failed to grasp the notion that the grant of the planning permission was valid until it was quashed. Not only was the developer entitled to proceed on that basis until it was quashed—on which matter there was evidence -- but it was necessary for her to satisfy Colton J, in the course of her affidavit and over the 3 days of the hearing, that there was an arguable case that the planning permission was unlawfully granted. Her own assertions, however forcefully and eloquently expressed, were insufficient to produce an arguable case that it was in the public interest to grant leave.

[32] Accordingly, we dismiss the appeal on Decision 1.

Decision 2

[33] Decision 2 concerned approval by the council of the variation of 3 conditions attached to the grant of planning permission.

[34] Original Condition 15 read:

> "No development shall take place on site until method of sewage disposal has been agreed in writing with Northern Ireland Water or a consent to discharge to demonstrate a waste water treatment solution that ensures <230 E.Coli colony farming units (CFU) per 100 mls of water over the shellfish harvesting area for <75% of the time prior to commencement of development on

site has been granted. This must be submitted to and agreed in writing by the Planning Authority."

[35] Under Decision 2 Condition 15 was amended to read:

> "No development of the welfare facilities hereby approved shall take place until either a relevant consent has been issued under the Water (Northern Ireland) Order or a method of sewage disposal has been submitted to and agreed in writing of a planning authority to demonstrate a waste water treatment solution that ensures <230 E.Coli colony farming units (CFU) per 100 mls of water over the shellfish harvesting area for >75% of the time."

Original Condition 22

> "Any vessel that is intended to be used on this very route shall not be fitted with ducted/shrouded propellers.
>
> Reason: to minimise impact to seal population."

The effect of Decision 2 was to remove this condition.

Original Planning Condition 24

> "No vehicle over 3.5 tonnes which has three axles or more shall be permitted to use the ferry and the proposed car parking facilities following the proposal becoming operational.
>
> Reason: to protect residential amenity."

[36] Under Decision 2 Condition 24 was amended to:

> "No category 2 other goods vehicles (OGV2) as defined in the design manual for roads and bridges (DMRB) shall be permitted to use the ferry or associated approved car parking facilities following the proposal becoming operational."

Relevant Legislation

[37] Article 54 of the Planning Act (Northern Ireland) 2011 provides at 54(3) as follows:

> "On such an application (*where the developer wishes to develop land without complying with conditions previously attached to planning permission*) the authority which granted the previous planning permission must consider only the question of the conditions subject to which planning permission should be granted, and
>
> (a) if it decides that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, the authority must grant planning permission accordingly."

[38] We pause to observe therefore that it is clear that the council at this stage is considering only the question of the conditions and the approval of the development itself is not the issue.

[39] The planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 addresses the question of environmental information previously provided in the context of an environmental assessment ("EA"). Regulations 12(2) and (3) provide as follows:

> "12(2) Where it appears to the council that the environmental information already before it is adequate to assess the environmental effects of the development, it shall take that information into consideration in its decision for subsequent consent.
>
> 12(3) Where it appears to the council that the environment information already before it is not adequate to assess the environmental effects of the development it shall serve a notice seeking further information in accordance with Regulation 23(1)."

[40] We note therefore that the council is vested with wide discretion in coming to a conclusion as to whether the environmental information before it is sufficient to allow it to consider and assess the environmental effects of the development.

[41] We also repeat that the role of judicial review is to review the legality of the decision making process. It is not the role of the court to substitute its judgment on the weight to be attached to the relevant factors in place of the judgment of the planners, absence evidence that it was plainly wrong and in the most extreme of cases.

The determination of Decision 2

[42] It was the appellant's content that the council had failed to implement an EA of the impact of the change in the conditions that were now to be varied.

[43] The background of this was that an environmental statement ("ES") had already been provided by the notice party together with further environmental information ("FEI").

[44] A detailed EA had been carried out by the relevant authority and, as Colton J specifically sets out at paragraph [41], the issue of whether a further ES needed to be submitted was carefully considered. An EA determination sheet dated 7 January 2016 asserts, inter alia:

> "Under Regulation 12(2) of the EIA Regulations 2015 the council are of the opinion that the recent ES together with some additional information supplied by the agent on submission of this application can be utilised to assess any potential impact this application may have. It is not thought that the changes within this variation of condition application represented any significant likely effects other than previously assessed and mitigated against."

[45] This is a class example of the council exercising its wide discretion under the provisions of Regulation 12 of the EIA Regulations.

[46] This is a paradigm instance of where the court must be careful not to substitute its judgment on the weight to be attached to the relevant factors in place of the judgment of the planning decision-maker. There is no evidence that the conclusion was irrational or plainly wrong.

[47] Moreover, consideration was given by the council to whether the proposed variations would bring about any likely significant effects on European sites and in that context whether a fresh Habitats Regulation Assessment was required. Further consideration was given to the impact on conditions in Carlingford as a RAMSAR and SPA site together with the likely impact on the nearby SAC at Rostrevor. In all these instances it was concluded no likely significant effects would occur and that any potential effects had been dealt with by the mitigating measures taken within the ES accompanying the application for the original planning permission.

[48] So far as Condition 15 is concerned, it is tolerably clear that the amendment was necessary to ensure the protection of the designated shellfish water protected area. As Colton J sets out at paragraph [45]:

> "The main purpose of the variation was to … correct an error in the original draft and only increases rather than reduces the environmental protection provided. The remainder of the change by way of specific reference to welfare facilities is entirely sensible as the requirement only arises when the welfare facilities are constructed."

[49] Turning to the removal of Condition 22, this is another instance where the relevant authority relied on expert evidence. On foot of research carried out by the SMR Unit which indicated that there were no longer any restrictive conditions required regarding the type of propeller used, and further advice from the DOE that it was content that Condition 22 was removed. As part of the consultation process the council received further comment from the DOE Marine Division on 18 December 2015 in response to 39 objections to the proposed variations the DOE Marine Division maintained its advice that ducted propellers did not pose a greater risk than non-ducted propellers to seals. This is another classic example of where the decision maker relied on expert advice and it is not the role of this Court to contradict it in the absence of evidence it was plainly wrong or irrational. The appellant had produced no evidence by way of expert opinion to contradict or gainsay this expert advice from the respondents.

[50] We pause at this stage to deal with a matter which has coursed through this appeal and which is relevant to these conditions. It was the contention of the appellant for the proper assessment of the impact of sediment transportation from the construction of the terminal and the use of vessels with ducted propellers had not been carried out.

[51] It was the appellant's case that in February 2016 she had requested a Freedom of Information (FOI) request from DAERA to provide reasons why the Marine Licence was late in being issued and was only responded to on 4 August 2016 after she had lodged her papers for the cases and was awaiting a hearing for leave on 26 September 2016. She asserts that it was only upon receiving that information that she began to research into "long-shore drift" and the potential impact of this effect. She claims that it only then became apparent that grounds regarding missing information in the ES in this regard regarding sediment transportation were more serious that previously had been apparent. In particular she asserts that there is a risk of erosion to her home in Greencastle apparent from a storm in 2014 and within the ES which records that the ferry could cause localised resuspension of sediments along its course.

[52] The appellant further contended that the FEI of December 2013 on behalf of the developer raised further concerns about the potential impact of turbulence on increased sediment transportation. It is on foot of these matters that she seeks also an interim injunction with which we shall deal later in this judgment.

[53] However, in the context of the proposed variations, it is important to appreciate that the impact of the construction on sediment is addressed in the ES (Chapter 9). In particular the Marine Environment Division asserts that expert evidence confirms that ducted propellers do not pose a greater risk than non-ducted propellers in this regard. This is another example of where the appellants misunderstands the role of this Court in the decision making process. Matters of expertise are peculiarly within the remit of the decision maker. Not only is there complete absence of any *expert evidence* adduced by the appellant other than her own assertions but the expert evidence relied on by the respondents is completely contrary to her assertions.

[54] Condition 24, the transport condition, is the subject of a challenge which must meet a similar fate. It appears that the wording of the original condition did not accurately meet the restrictions which councillors had originally intended, namely that only articulated vehicles would be prohibited to use the ferry.

[55] Essentially, the amendment of this condition purports to be an amendment to ensure the original intention was met. Transport NI was the appropriate statutory consultee under paragraph 3(a) of Schedule 3 to the General Development Procedure Order and it raised no objection to the proposed variation.

[56] The learned trial judge carefully considered all the issues in the matter between paragraphs [47] and [49] and we see no reason to depart from his conclusions on the matter relying as they did on the fact that this was entirely a matter of judgment for the planning authority. It was clear that commercial/vans, caravans, trailers and coaches were part of the EA and the change simply reflects this.

[57] A further source of complaint from the appellant on this matter was that a particular councillor had been guilty of bias. The learned trial judge carefully considered the relevant emails passing from the councillor who had chaired the meeting and decided to approve the planning application and concluded that he had simply been responding to a call from the notice party to the effect that the wording of Condition 24 did not accord with what was agreed at a previous planning committee meeting. Colton J considered that there was nothing objectionable contained in the emails and we find no reason to depart from that conclusion.

Decision 3

[58] The third decision under challenge was the department's granting of Marine Licence ML33/13 on 3 June 2016. The Marine Licence was varied on 30 June 2016 by inclusion of two additional conditions and a number of additional minor variations. The permission and licence respectively were granted to Frazer Ferries Ltd, the Notice Party to the appeal. The licence relates to that portion of the terminal ferry facility which is constructed below mean high water springtide level off Carlingford

Lough at Greencastle. This contrasts with the planning permission contained in Decision 1 which relates to the development above mean low water.

The relevant legislation in the context of Decision 3

The Habitats' Directive - Directive 92/43/EEC

[59] This directive requires Member States to identify areas within its territory which contain certain priority habitats or species. These are known as Special Areas of Conversation (SACs).

[60] Article 3 includes Special Protection Areas (SPAs) which are designated under Article 5 of the 2009 World Wild Birds Directive.

[61] Article 6(3) of the Directive provides as follows:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment for the site in view of the site's conservation objectives. In light of the conclusion of the assessment of the implications for the site and subject to the provisions of paragraph 4 the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

[62] The leading authority on interpretation of this Article is C-127/02 Waddenzee. This case is authority for the proposition that when considering an application for development consent the authorities must adopt "the precautionary principle" namely that the risk to the environment will exist if it cannot be excluded on the basis of objective evidence that the plan or project will have significant effects on the site concerned.

[63] As Colton J sets out at paragraph [80] of his judgment:

> *"If after carrying out an appropriate assessment or HRA if the relevant authority is in doubt based on objective information it is obliged to refuse the application."*

In dealing with the ducted propeller decision, the appellant again relied on factual evidence emanating from her alone that the propeller thrust can increase sediment transportation coupled with the fact that it can take time to settle. Her assertion that the Marine Division had not carried out the responsibility in assessing the

characteristic of longshore drift was contradicted by the factual finding of the learned trial judge that all relevant material had been considered and as already indicated above in paragraph [] Chapter 9 of the …….. dealt with this concept. The appellant was once again attempting to introduce a merits based approach into a supervisory jurisdiction.

The learned trial judge did specifically avert to the concept of the public interest. Whilst not specifically citing in paragraphs [18]-[20] he dealt with all the principles contained in that case.

Chapter 9 of the "Coastal Processes" of the ES submitted by the noticed party does assess the impact of the proposed construction on the hydrodynamic and sediment regime using computational modelling techniques. That document was before us and carried a detailed analysis and includes for example at:

- 9.4 "The costal impacts above have all be addressed both independently and with regards to any potential cumulative impacts resulting from potential interactions between the construction or operational phases of any on-going developments, recently approved development and pre-application developments outlined in Chapter 3. Due to the small scale of the proposed Carlingford ferry development and the distance from developments outlined in Chapter 3 no cumulative impacts (on coastal processes and currents) are predicted".

- The vessel is anticipated to be 40-60m in length and travel at 8-12 knots. This would give rise to a critical depth in terms of ferry wash of around 3m at the highest speed. Given the draft of the vessel and available water depth the ferry should always be operating in water of a greater than critical depth and therefore resident frequency of waves are not likely to occur. Across the range of operating conditions described i.e. vessel speed and tidal range, the period of the waves generated due to wash are likely to be between 2.7 and 4 seconds. These waves conditions would be similar to those experienced within the lough due to relatively frequent meteorological conditions. Wave height will attenuate with distance from the ferry and therefore waves at Greenore Island which is at a minimum 200m from the route the wave climate would be within the norm experienced on the shoreline of the island.

In relation to Condition 24, the appellant asserted that there had been no road safety audit undertaken for this project to date and in light of introducing larger and heavier goods vehicles that would be contrary to sustainable development under PPS1. The appellant asserted that she had highlighted to the court that there had been no road assessment for commercial vans etc nor any assessment as to the increase in weight and frequency upon the road which were already susceptible to flooding.

This failed to appreciate that a number of conditions had been imposed by Transport Northern Ireland which required to be complied with. Transport Northern Ireland had been consulted, had suggested conditions and conditions had therefore been imposed in the planning permission. We had before us a Certificate of Completion of January 2017 which referred to road widening along Greencastle Pier Road to facilitate the Carlingford ferry terminal. We are satisfied that there was evidence before the learned trial judge that the traffic and transport issue had been assessed under the aegis of Transport Northern Ireland. The planning authorities were relying on assessments made by them. On 20 January 2017 the planning authorities were informed that there were no further concerns from Transport Northern Ireland and that they could act on this.

The Northern Ireland Environment Agency Casework Report of May 2015 indicated *"although as predicted that sediment transport along the shoreline south of Greenore Point would be affected to some degree, the long term effects on local acquaculture and fisheries interests are likely to be of negligible significance"*.

[64] Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, known as the Habitats Directive provides that Article 12(1):

> "Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV:
>
> (a) In their natural range, prohibiting:
>
> (b) Deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration."

[65] Thus, as the learned trial judge pointed out at paragraph [82] the obligation on the State is to "take measures to protect". This is done in Northern Ireland under Part III of the Conversion (Natural Habitats etc) (NI) Regulations 1995. Annex IV species are not protected by means of SAC designations and fall outside the obligation to conduct appropriate assessment/HRA.

[66] The learned trial judge cited R (Morge) v Hampshire County Council [2011] UKSC 2 as authority for the proposition that where a proposed development might give rise to disturbance of an Annex IV species, this was a material consideration to be taken into account by the planning authority although with the extent of the likely impact upon the local population and the possibility that a licence may be granted. The regime should involve consultation with the relevant agencies, the consideration of all responses including an assessment of identified disturbances.

[67] Directive 2011/92/EU. In the context of marine licences this has been transposed in the UK by the Aim for Marine for Works (Environmental Impact

Assessment) Regulations 2007. The same obligations require the conduct of EIA prior to granting planning permission but has been transposed in separate regulations which specific to the planning system namely Planning (EIA) (NI) Regulations 2015.

[68] A developer is required to provide an ES containing a description of the likely significant effects upon the environment. Article 6 of the Regulations requires the ES to be published for public consultation and be sent to the relevant public authorities for consultation.

[69] The appropriate authority can require the developer to submit FEI on any issues which are addressed in the ES. Any FEI must be the subject of consultation with the public on the relevant authorities. Under Article 8, the results of the consultation and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.

[70] As the learned trial judge indicated, the ES is not the environment assessment but rather the developer's view about the likely significant effects. The final decision is informed by all the other information received and by the expertise of the authorities.

[71] The learned trial judge cited a number of authorities which established that it is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Whilst its decision is subject to review by the courts, they will defer to the Local Planning Authority's judgment in all but the most extreme cases (see R (Buglife)) cited above and Re National Trust for Places of Historic Interests or Natural Beauty [2013] NIQB 60.

Applying these principles to Decision 3

[72] Wending our way through the various points raised by the appellant, it seems to use that the following are the salient points raised by her in the course of this appeal.

[73] First, that SAC status is a fundamental trigger for protection of wildlife in Northern Ireland and that it was the responsibility of DADRA to allocate this designation for the Carlingford seal population. This, it is submitted, would have had a fundamental impact on the entire judgment in that the NIEA would have carried out a proper EA. The appellant clearly relies on the reports from Dr Susan Wilson to the effect that the seal population in Carlingford Lough is sufficient to justify it being designated as a SAC site.

[74] This matter can be dealt with shortly. The issue of whether SAC status should be granted to this location is a matter entirely distinct from the challenge to Decisions 1, 2 and 3 in this matter. It has absolutely no role to play in the determination of this appeal.

[75] Secondly, the appellant contends that the learned trial judge was in error to treat the conditions imposed as being mitigating measures. This matter fails to recognise that the learned trial judge had indicated that the presence of these conditions, which are liable to enforcement measures, clearly indicate that potential adverse effects on the environment had been taken into account by the Department and have been addressed. We find on this no basis to challenge the decision made Colton J.

[76] Thirdly, the appellant contends that there was deficit information within the ES. This is yet another example of a merits based approach. The council applied the EIA process to the entire application and took into account all the information provided to it subject to the conditions imposed.

[77] The learned trial judge correctly indicated that the application for the marine licence, having been made on 23 June 2014, had reached a point where the application for planning was already under consideration and subject to the EA process. The Department was perfectly entitled to rely on the same material as was considered in the planning application. It is for the Department to decide if there is sufficient information with the capacity to require further information from an applying applicant. The appellant seemed to think that by picking a choosing various disparate pieces of evidence e.g. that in a video she had produced there was no lagoon in situ when the pile driving was taking place is insufficient to overturn the overall assessment by the Department absent some irrational approach on the part of the Department.

[78] Fifthly, it was the contention of the appellant that by submitting a Construction Environment Management Planned ("CEMP") after the works had commenced that this somehow invalidated the decision.

[79] This fails to recognise that the licence itself contained very significant conditions directed at mitigating any environment issues. The final CEMP was part of this process requiring for example the developer to provide a final CEMP with associated method statements and finalised layout plan to be agreed by the Department prior to any works commencing on site. That was bound to reflect all mitigation and avoidance measures employed as outlined in the CEMP. In paragraphs [108]-[119] the imposition of conditions as carefully considered by the learned trial judge together with the right of enforcement proceedings if those conditions are not met. *In any event, no evidence was adduced as to what effect any further data would have had.*

[80] Sixthly, the appellant criticises the failure to integrate the two applications namely the planning and marine licence matters. She fails however to provide any logical reason why there is a requirement for the integrated approach which she demands. None of the various pieces of legislation are guidance to which she adverts – and which were apparently not referred to in court at first instance –

requires such an integrated approach. She relies on the Marine Coastal Access Act 2009 Chapter 1 but of course fails to recognise that this legislation does not apply in Northern Ireland – hence her new claim for a declaration of incompatibility. There is no basis for this objection.

[81] Next the appellant adverts to the failure on the part of the Marine Division to publicise the applications for two weeks pursuant to Regulation 16(1)(a)(i) of the Marine Works (EIA) Regulations 2007 mandating that the ES should be advertised in two successive weeks. We note the manner in which Colton J dealt with this and his approach is flawless. We agree entirely that it cannot be sensibly argued that the appellant are anybody else was prejudiced by this and he correctly cites Walton v Scottish Minister [2012] UKSC 44 and R (Champion) v Norfolk DC [2015] 1 WLR 3710 to found the proposition that even if procedural irregularities in the EIA process occur these will not result in permission being quashed if the error is small and no substantial prejudice occurs.

[82] The appellant contended that the respondents had failed to answer FOI queries. As the learned judge properly pointed out, there are statutory remedies if there has been a failure to properly respond to a FOI request and none of these steps has been taken by the appellant in the manner that is to be expected if she really sought a remedy for these failures.In any event, it has to be recognised that the appellant's allegation that the council did not have the requisite expertise to determine the environmental aspects of planning applications is well met by the rejoinder that the Councils benefited from the planning staff being transferred to Councils at the same time that planning functions were transferred.

[83] The appellant has attacked the consultation process in general. However the attack was somewhat short on detail and long on criticism. She highlights consultees who had been ignored e.g. Greencastle Oysters and the Farmers Union. However as in all consultation processes, it is impossible to satisfy everybody that would have hoped to have been consulted. The Planning NI (DOE) on 10 February 2012 had written to the noticed party with a further list of consultees than those originally suggested and we find no evidence that the width of the consultation process was flawed. Moreover it is clear that the nature of this challenge is far too vague and uncertain to present a ground for appeal at this time.

[84] A further challenge is presented to the various EAs which were carried out and which the appellant describes as deficit. We share the view of the learned trial judge having considered the contents of the appellant's affidavits that the challenge "amounted to a rehearsal of the applicant's disagree with the assessments". She thus for example:

- The appellant asserts the definition of suitable planning being that the project must maintain and/or enhance the social environmental and economic factors. She references the fact that this "fundamental planning consideration" was not referenced within the judgment at all" and no

mitigating measures have been put in place to ensure that this proposal does not increase the risk of coastal erosion and flooding. Photographs were provided of the evidence of the erosion but they too she claimed had been ignored. This of course ignores that this amounts to an appeal on the merits rather than the legality of the impugned decision. More importantly the appellant has failed to adduce evidence which could have supported this challenge. She has not produced any evidence of the environmental assessment which was undertaken by her or any expert on her behalf and fails to address the EA which was undertaken, the consultation process as a whole, and the responses received. There is simply no basis upon which the court could conclude that the judgment of the Department in this matter was irrational.

- Carlingford Lough has not been designated to a SAC for the purposes of conserving the habitat of any Annex II species. Therefore the HRA assessment carried out in respect of the UK SPA is restricted to those specifically protected birds. It is not enough to say that because there is a SAC in part of Carlingford Lough that this protection applies across other species such as seals. The SAC status does not protect wildlife generally.

- The obligation to prohibit a disturbance of Annex IV species is limited to being a material consideration as indicated in the authorities above.

- For the purposes of the marine licence, the assessment carried out by the Department was appropriate and it considered the likely significant effects of the development upon all of the habitats and species for which the lough had been designated as a SAC including the seal population in Murlough Bay SAC. Moreover the developer provided "a shadow appropriate assessment" as an annex to the ES. On the basis of this information the Department was able to assess that the development would not have adverse effects upon the protected interests taking account of the proposed mitigation measures.

- Once these steps had been taken, this in turn established that potential effects of the development upon Annex IV protected species did not require an appropriate assessment, did not attract the application of the precautionary principles set out in Waddeizee's case. Moreover consent was not to be refused unless adverse effects could be excluded.

- The impact of the project on seals and other Annex IV's species was considered through the EIA process. This process embraced consideration of all other likely environmental effects and were addressed by means of the EIA process which included the developers ES, consultation with the public and statutory authorities together with the Department.

- We reiterate that the licence conditions include such matters as requirement for final approval of CEMP, effects of impact piling, appointment of an

> independent marine mammal overseer, designated routes for the ferry, monthly seal counts, …… a turbidity monitoring etc. In short the SACs and SPAs are not designated for the purpose protecting sand eels and Atlantic salmon etc an appropriate assessment is not specifically required. However the appropriate assessment which was carried out did consider the SPA features and foraging habitats together with the litigation with the advent of CEMP. Similar points have been made in relation to the impact upon mussel oyster beds which were included within the appropriate assessment.

[85] We conclude that the relevant environmental impacts were properly considered by the Department. Unless evidence could have been adduced that they were irrational the appellant's challenge could not get off the ground.

[86] The contention of the appellant that sediment transportation was not taken into account has already been deal with earlier in this judgment.

In short it is a condition of the grant of planning permission that the developer submits a final CEMP which must be agreed by the planning authority prior to works commencing on site. The council is currently assessing the revised CEMP at the time of the application. The approval of the CEMP was a matter relating to the compliance by the developer with the conditions attached to the planning permission and separate therefore to the challenge before this court.

The appellant claimed that no transboundary notification had been submitted and that this had been omitted from the judgment. This matter was dealt with in an affidavit by Jacqueline McParland, senior planning officer with the council. This affidavit indicates that transboundary consultation is required where a proposed development in Northern Ireland is subject to an EIA application and is likely to have significant effects on another European economic area State. However in this case transboundary consultation did take place in relation to the original application for planning permission. Louth County Council notified the relevant authorities within the Republic of Ireland and issue a consultation response that the proposed development would not cause any likely significant effects in its area. The Minister for the Environment (ROI) concurred.

Since Ms McParland considered that the proposed variations and conditions were not such that they would materially affect the development proposal – Condition 24 was consistent with the vehicular use assessed within the ES which the Louth County Council had cite of, Condition 14 corrected a typing error and represented a further protection and Condition 22 (the propeller condition was in line with expert advice from NIEA and not a condition which the Republic of Ireland's planning authority had attached to its grant of planning permission to the noticed party in relation to the ferry terminal proposed at Greenore, County Louth as part of this development, Ms McParland did not consider the proposed variations were likely to have significant effects on the environment. Therefore it did not require further transboundary consultation. We find no reason to disagree with this. Its absence

from the judgment of Colton J was another example of where a judge, confronted with a plethora of points, concentrated on the salient matters which appeared to him to determine the outcome.

[87] We conclude by indicating that many of the points now raised were new matters which had not appeared in the original Order 53 applications before the court and others were simply repetition of issues already made in a different format. Often the boundary between two concepts was difficult to discern and hence we have treated them on their own merits in each case. Suffice to say we find absolutely no reason to depart from the conclusion by Colton J that there was no arguable case made in relation to Decision 3 and we affirm his decision.

[88] Certain matters were palpably new grounds. These included.

A declaration of incompatibility

[89] The appellant's case appears to be that the Marine and Coastal Access Act 2009 is incompatible with the appellant's rights under Articles 2 and 8 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention").

[90] This argument derives from the submission that whilst Part 1 of the 2009 Act provides for a Marine Management Organisation ("MMO"), the MMO exercises no functions in Northern Ireland. It is appellant's case that it would be better if one organisation had sole responsibility for both the decision on the planning application and the marine licence. The Marine Policy Statement and the Marine (Northern Ireland) Act 2010 establishes a comprehensive regulatory and planning system for the UK's marine environment which do not integrate management of Northern Ireland's marine resource. In other words Northern Ireland has not translated into its own primary legislation the MMO invoked in the rest of the United Kingdom.

[91] In short the 2009 Act does not provide for a body such as a MMO which has dual decision-making functions. Whilst Part I of the 2009 Act does extend to Northern Ireland, no functions have been transferred to the MMO in respect of the inshore regions of Northern Ireland and it therefore has no jurisdiction in Northern Ireland. DAERA remains the sole marine licensing authority for the inshore region of Northern Ireland.

[92] This incompatibility point was not raised before Colton J and it is the subject now of a late application to amend the Order 53 Statement to include it.

[93] This argument is patently unsustainable. This is entirely a matter for the Executive or Ministers in Northern Ireland to determine the method of environmental governance. It is not the role of this Court to determine whether an independent MMO should be established in this jurisdiction.

[94] The fact that there may not be an integrated framework for marine management of coastal processes does not mean that the Department has acted unlawfully in reaching the current decisions.

[95] Helpfully Mr McGleenan drew our attention to Re S (Children's Care Plan) [2002] 2 AER 192 where the House of Lords, in the context where the court was construing the Children Act 1989, concluded that the failure by a State to provide an effective remedy for a violation of Article 8 of the Convention was not in itself a violation of that provision, and accordingly even if the 1989 Act failed to provide an adequate remedy, it was not for that reason incompatible with Article 8. Lord Nicholls of Birkenhead said at paragraph [85]-[86]:

> "The Convention violation now under consideration consists of a failure to provide access to a court as guaranteed by Article 6(1). The absence of such provision means that English law may be incompatible with Article 6(1). The United Kingdom may be in breach of its treaty obligations regarding this article. But the absence of such provision from a particular statute does not, in itself, mean that the statute is incompatible with Article 6(1). Rather, this signifies at most the existence of a lacuna in the statute."

[96] Apart although from the lack of merit on this point, we are satisfied that there was no reason why this matter had not been raised before Colton J. It is totally insufficient to submit as she does now that she intended to raise this matter of leave had been granted. The delay until March 2017 to raise this matter would in itself have been sufficient for us to refuse relief.

Breaches of Article 2 and Article 8 of the Convention

[97] The appellate further seeks to amend her Order 53 Statement to include a breach of Article 2 which she had canvassed before Colton J but which had not formed part of her Order 53 Statement.

[98] The appellant's case amounted to an assertion that the operation of the ferry will cause erosion of the coastline, a risk of flooding, the possibility of coastal erosion (based on a report from Mr Robert Walsh), that increased traffic has compromised her right of way along the beach to her mother's house, that she will have to walk through high pollution levels of large diesel engines, that the increased noise and vibration will affect her immediate environment and other similar assertions.

[99] None of this even begins to suggest a real and immediate risk to her life under Article 2 of the Convention. Certainly there is no evidence to provide a basis for such an assertion.

[100] In this context the appellant invokes a consultation response prepared by DAERA in relation to a quite separate proposed development at Cranfield beach. The respondents assert that this is not in any event a full assessment of the impact of coastal erosion on the site but a request from DAERA for further information on coastal processes. This constitutes an entirely separate development which is also the subject of challenge and has to be looked at in its own particular circumstances. It cannot be aligned to the present application.

[101] The appellant further complains that the grant of planning permission breaches her rights under Article 8 of the Convention. The allegations of high pollution levels, road safety, increased traffic and increased noise and vibration are drawn on in this regard. Once again there is no evidence to sustain these arguments. Transport Northern Ireland has already looked at the question of road safety of increased traffic had it been relevant. Transport Northern Ireland were satisfied the development was acceptable subject to conditions. Environmental health confirmed that it had no objection to the grant of planning permission. Council environmental health officers have visited the site that carried out inspections of noise levels during the construction phase of the works and have confirmed that they are content with the noise levels at the site.

[102] We share the view expressed by the learned trial judge in the context of Article 2 that the appellant had not produced "any or sufficient evidence to suggest that Article 2 is remotely engaged in this case and I could not consider this is a ground for granting judicial review". We consider that the same argument precisely applies to the case made under Article 8 of the Convention.

The interim injunction

[103] The appellant has raised a claim for interim injunction by way of a new amendment to the Order 53 based on the FOIs which are still outstanding, the lack of information within what is alleged to be a bona fide assessment of the site, the fact that many conditions allegedly have been breached to date and that mitigating measures as outlined in the outlined and final CEMP and HRA have not been implemented. The appellant then outlines in some detail the various breaches of the conditions which she alleges have occurred and are still occurring.

[104] We accept the argument of the Department that these issues raised by the appellant in pursuit of this injunction are properly to be viewed as matters for enforcement action through the proper the channels. Apart although from the fact the alleged breaches are based on her ipse dixit, it not the role of this Court to determine if she has sustained those alleges breaches or not. The council is the enforcing authority in relation to breaches of planning control Part 5 of the Planning Act (NI) 2011 which affords the council power to take enforcement action in relation to breaches of planning control e.g. with contravention notices, enforcement notices,

stop notices, breach of condition notices and the making of an application for an injunction.

[105] The affidavit from Mr McKay the council's Chief Planning Officer makes clear that a number of complaints alleging breaches of planning conditions have been made by the appellant to the council in or around March 2017 and are the subject of on-going investigations. The council must be allowed to fulfil its statutory role and carry out appropriate investigations. It is not the role of this Court to usurp the functions of the council as the statutory enforcement authority.

[106] This ground of challenge surfaces for the first time in the appellant's third skeleton argument and does not appear on the consolidated Order 53 Statement that in itself would provide another reason for refusing this injunction.

[107] Finally the appellant now requests additional documents and information including the consent to a right of way, environmental information, ferry routes, salmon migration, ducted propellers, work outside the red site boundary, the archaeologist's report and his "credentials", the up-to-date programme of works, the return of plant and equipment, the name and qualifications of the environmental manager etc. She also requested the response to carry out a number of assessments into the use of explosives, cycle safety, road safety, marine ecology etc.

[108] This all reflects a merit based approach by the appellant and a failure to under the nature of judicial review. They do not speak to the essential issue in this case namely whether or not the decision of Colton J should be reversed.

Conclusion

[109] We have attempted in this appeal to address the salient issues which the appellant has raised in the course of an extremely wide-ranging collection of objection to the decision of Colton J. We have come to the conclusion that there is no basis upon which this Court can depart from the decision of Colton J and accordingly we affirm the decision made by him.