Neutral Citation No: [2021] NIQB 31	*Ref:* **SCO11452**
	ICOS No: **19/059411/01**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **18/03/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PORTINODE ENVIRONMENTAL LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF FERMANAGH AND OMAGH DISTRICT COUNCIL

Mr Conan Fegan BL (instructed by Phoenix Law, Solicitors) for the applicant
Mr Philip McAteer BL (instructed by Derry City & Strabane District Council Legal Services Department) for the proposed respondent

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review which has been dogged by a variety of procedural difficulties for quite some time. I heard the application for leave at the same time as considering an interlocutory application brought (unusually, in advance of the application for leave being determined) by the proposed respondent challenging the propriety of the applicant bringing these proceedings; and asking the court to strike out the proceedings on the bases described below.

[2] I am grateful to Mr Fegan who appeared for the applicant, and to Mr McAteer who appeared for the proposed respondent, for their helpful written and oral submissions.

The history of these proceedings

[3] The decision under challenge in these proceedings is a grant of planning permission made by Fermanagh and Omagh District Council ('the Council') on

21 March 2019. The grant of planning permission was for the construction of six self-catering holiday cottages in a rural location beside Lough Erne.

[4] Subject to the discussion below as to whether the proceedings were validly brought as a matter of law, the proceedings were initially lodged with the court on 19 June 2019, within the 3 month time limit for the initiation of proceedings from the date on which the grounds of challenge arose pursuant to Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 (the 'RsCJ'). The proceedings were brought in the name of Portinode Environmental Limited ('Portinode' or 'the Company') and were supported by an affidavit from Mr Gordon Duff sworn on 19 June 2019. Mr Duff's affidavit stated, *inter alia*, that he was employed as a director of the Company, which had been incorporated that same day (19 June 2019) with the objective "*to monitor the environment, promote conservation, preserve rural character and challenge planning decisions detrimental to Portinode, Lough Erne and Fermanagh.*"

[5] The affidavit also explained that the applicant company was "*aware of and reflects numerous objections from the holiday home owners and local residents who believe this approved development is totally inappropriate and unlawful…"* and who objected to its detrimental impact on the environment and on existing residents and guest house businesses in the area. It further explained that the sole shareholder of the applicant company (at that point, at least) was Mr Steven Johnston, who owns a holiday home adjacent to the approved development which, it was contended, would be affected by the proposed development. The "*status and circumstances*" of the applicant's sole shareholder was said to give the applicant company standing to bring the proceedings.

[6] By way of Case Management Direction Order No 1 in these proceedings, made on 1 July 2019, McCloskey J (as he then was) raised a number of issues about the applicant company in the following terms:

> "*It is far from clear that the Applicant has sufficient standing to bring these proceedings. Further, or alternatively, it is not clear that the proceedings are a proper invocation of the process of the High Court. A series of questions arises. Why is Mr Johnston not bringing this case in person? Why has he not sworn an affidavit? Why has no director, shareholder or officer of the company sworn an affidavit? …*"

[7] A number of these queries were answered in a series of further affidavits filed over the following months. In the meantime, the court's case management direction order invited the proposed respondent to signify its approach to the application for a protective costs order which had been contained in the applicant's papers and "*whether it is minded to bring any particular application before the court at this stage*", further directing that "*no further cost incurring steps should be taken by the council*" other than those directed.

[8] McCloskey J later directed that an oral *inter partes* leave application should be convened; and, at a case management review hearing, that any application on the part of the proposed respondent to dismiss the proceedings should be filed by 20 September 2019. That time limit was later extended in a further case management direction order to permit the Council to bring an application by 10 February 2020. The reason for this was because similar issues as those which had caused the court concern in the present case had also arisen in a range of other judicial review applications brought by a variety of companies sharing the title of 'Rural Integrity' and the legal issues raised by the use of a limited company to pursue an application for judicial review in a planning case such as this were being argued and addressed more fully in the Rural Integrity cohort of cases. The outcome of that process is discussed below.

[9] In a further affidavit from Mr Duff (sworn on 13 September 2019), he indicated that he was one of the two directors of the Company, the other being Mr Johnston. He noted that, prior to forming the applicant company, Mr Johnston and he had discussed the merits of the case and he had informed Mr Johnston that he would "*require to be paid as there may be a lot of work involved if the matter proceeded to judicial review.*" They agreed to make the application for leave to apply for judicial review on the understanding that Mr Duff would receive £2,000 "*to bring the application for judicial review.*" The aim of this affidavit appears to have been, at least in part, to contend that Mr Duff was an employee of the Company or, as he averred, "*can be regarded as an employee of the company.*" [My emphasis]

[10] Mr Johnston has also sworn an affidavit in support of these proceedings on 30 September 2019, in which he explains his interest in, and opposition to, the proposed development; and the history of his planning objection. He explained the status of the ten existing properties adjacent to the application site, which is relevant for reasons summarised below. These ten properties, Mr Johnston averred, are in private ownership and not in 'tourism' use, albeit that some of them are rented out and three are registered with the Northern Ireland Tourist Board.

[11] Mr Johnston also described how he came into contact with Mr Duff and how Mr Duff became involved in managing the proceedings for the applicant company. He states that he found out about Mr Duff through his planning consultant (Ross Planning, who had acted for the owners of the ten cottages to the east of the application site) and that:

> "*I discussed the issues and concerns I had with Mr Duff and he explained that an affordable alternative to employing solicitors was to bring the case before the court as a personal litigant. I am not familiar with these complicated types of proceedings so would not have had any knowledge or confidence to act as a personal litigant. I agreed with Mr Duff to form a company and that, as a Director, he would then act for the company to bring the judicial review. From the outset Mr Duff explained*

> *the considerable amount of work involved and we agreed a modest payment of £2,000 in order that he would prepare the judicial review and act on behalf of the company in court. The company Portinode Environmental Ltd was formed on 19th June 2019 and the judicial review was submitted on the same day."*

[12] Mr McAteer relies strongly on this passage as evidence that the company was expressly formed to bring the proceedings without solicitors being involved and in order to minimise costs exposure for Mr Johnston, the real applicant behind the scenes.

[13] Mr Duff filed a further affidavit in these proceedings, now his fifth, in December 2019, in which he further discussed the shareholding in the applicant company, his purported employment by the applicant company, and the remuneration which was to be made available to him from the applicant company in respect of his conduct of the proceedings for the applicant. Mr Duff has denied, as the Council asserts, that he has been charging for "*quasi legal services.*" He avers that he considered that the company was acting as a personal litigant at all material times, albeit through him, and that the income he would receive for this work was to be modest (£9.25 *per* hour). His evidence to the court is that he believes he acted properly and in good faith at all times and that, if there was any wrongdoing, it was unintentional and he accepts his duty to rectify this promptly.

[14] In this affidavit Mr Duff also explained that he had, by that time, become a 50% shareholder in the company alongside Mr Johnston. He has also averred to his love for the environment and the fact that it was environmental concern, rather than any financial incentive, which has motivated his involvement with these and other proceedings. He further averred that he had in fact received no remuneration for any activity in relation to this application for judicial review to that point; and that he had now informed his fellow director that he would not take any remuneration in this regard. His position therefore, he said, is that he was now working in the capacity of secretary and director of the applicant company for no wage.

[15] In due course the proposed respondent issued a summons (dated 10 February 2020 but amended on 7 December 2020) seeking:

(a) An order pursuant to Order 5 rule 6 and/or Order 53 rule 8 of the RsCJ and/or the inherent jurisdiction of the court striking out or staying the application by reason of the failure of the applicant to comply with Order 5 rule 6 in a number of important respects;

(b) An order striking out the application or staying it on the basis that the applicant does not enjoy sufficient *locus standi* to bring the application;

(c) An order striking out the application on the grounds of the applicant's pleadings disclosing no reasonable cause of action or otherwise being

scandalous, frivolous or vexatious or an abuse of the process of the court pursuant Order 18 rule 19(1) and/or Order 53 rule 8 or pursuant to the inherent jurisdiction of the court;

(d) An order striking out the application pursuant to the inherent jurisdiction of the court for want of prosecution; and

(e) An order pursuant to Order 23 rule 1 and/or Order 53 rule 8 and/or the inherent jurisdiction of the court requiring the applicant to give security for the proposed respondent's costs in the sum of £10,000 and striking out the applicant's application unless any such order was complied with.

[16] The summons is grounded on the supporting affidavit of Mr Philip Kingston, the proposed respondent's solicitor in these proceedings. As appears from the above and the discussion below, a number of these reliefs overlap with the proposed respondent's objections to the grant of leave, notably the contentions that the applicant's case is frivolous (which amounts to a contention that it is unarguable) and that the applicant lacks standing (which is an objection to the grant of leave which is encountered not infrequently in judicial review proceedings).

[17] It is immediately apparent there has been very considerable delay between the issue and service of the proposed respondent's summons dated 10 February 2020 and the resolution of the issues which it raised. There are at least two reasons which contributed significantly to this. The first is that the same issues were being addressed in the Rural Integrity litigation, involving an appeal to the Court of Appeal, and it was quite properly thought appropriate to await some clarity from those proceedings before finally addressing the issue in this case. The second is that there was undoubtedly some additional delay occasioned by the interruption to court business to which the Covid-19 public health emergency gave rise throughout much of 2020. As to the first of these factors, a leave hearing in this case scheduled for late 2019 was vacated by the court in light of the fact that the appeal proceedings in the case of *Rural Integrity (No 1) Limited* were to be heard by the Court of Appeal in January 2020. Thereafter, McCloskey LJ (as he by then was) returned to these issues promptly in February and March 2020. As to the second factor, Mr McAteer accepted that the applicant bore little responsibility for delay post-March 2020, although he submitted that the applicant was fixed with the consequences of any such delay because it was the applicant's delay to that point which meant that the case had not been progressed more quickly.

[18] I propose to deal with the issue of the applicant's compliance or otherwise with Order 5 rule 6 of the RsCJ first and to consider the other objections to the grant of leave thereafter.

The Company bringing proceedings without a solicitor

[19] The core issue raised by the proposed respondent's summons is that the applicant company purported to bring its application for leave to apply for judicial review through a director, and not by a solicitor, without the leave of the court. It is contended that the applicant company had no power to do so and that, as such, "*the application is not properly before the court.*"

[20] Order 5 of the RsCJ, which deals with the mode of beginning civil proceedings in the High Court, provides, at rule 6, as follows:

> "*(1) Subject to paragraph (2) and to Order 80 rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a solicitor or in person.*
>
> *(2) Except as provided by paragraph (3), or under any other statutory provision, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.*
>
> *(3) A body corporate may begin and carry on any such proceedings by an employee if –*
>
> *(a) the employee has been authorised by the body corporate to begin and carry on proceedings on its behalf; and*
>
> *(b) the Court grants leave for the employee to do so.*"

[21] This provision has been carefully analysed by McCloskey LJ in his ruling in these and the related *Rural Integrity* proceedings: see *Re Rural Integrity (Lisburn 01) and Related Limited Companies' Applications* [2020] NIQB 25, a judgment delivered on 6 March 2020. I return to that ruling shortly. There are many advantages to acting through a limited company but these come at a price, one element of which is that the company must generally act by way of a solicitor in proceedings.

[22] The effect of rule 6(2) is that the applicant company was precluded by the Rules from beginning or carrying on these proceedings "*otherwise than by a solicitor*", unless it could avail of exception to that general rule specified in rule 6(3). That is why in some of the affidavit evidence referred to above there appears to have been an attempt to establish that Mr Duff was an employee of the applicant company, who might therefore be permitted to carry on proceedings on its behalf pursuant to rule 6(3). I do not accept that it has been established that Mr Duff was in an employment relationship with the applicant company, nor that, even were that so, it has been established that he was appropriately authorised by the applicant company

to begin and carry on the judicial review proceedings on its behalf in that capacity. The evidence suggests that the proceedings were initially brought by the company 'in person' with Mr Duff acting as a *director* who was not an employee of the company, and without any authorisation which would satisfy the requirements of Order 5 rule 6(3)(a). Put bluntly, it appears to have been simply assumed that Mr Duff could act in his capacity as a director in ignorance of the requirements of Order 5 of the RsCJ.

[23] In any event, it is also clear that at no point has the court granted leave for the proceedings to be carried on by an employee pursuant to this provision. This analysis is all entirely consistent with that of McCloskey LJ when he gave his March 2020 ruling. However, as of 19 March 2020 the applicant company has instructed solicitors (and now counsel) in order to represent it in these proceedings. It is therefore now acting consonantly with the requirements of Order 5. The question then is what, if any, continuing relevance the applicant's prior non-compliance with Order 5 has in determining whether or not to grant leave in this case.

[24] The respondent's objections to the mode of proceeding which has been adopted in this instance include that the applicant company was set up to avoid either Mr Johnston himself or another pre-existing company (Portinode Management Company, which had funded the services of the planning agents instructed to object to the planning application) from the financial risk of bringing a judicial review application; and, moreover, that the applicant company was in essence set up by Mr Duff and used to facilitate him "*receiving remuneration for providing unregulated quasi legal services by way of representation on a commercial basis in the High Court.*"

McCloskey LJ's ruling on the Rural Integrity group of cases

[25] McCloskey LJ dealt with the issues arising from the use of limited companies by Mr Duff, or companies in which he was involved, in some 32 judicial review cases, including this case, in a judgment and ruling of 6 March 2020, to which I have already referred: [2020] NIQB 25. I do not intend to rehearse the detailed background to this collection of cases, which is carefully set out in the judgment of the learned Lord Justice. However, it is worth making reference to a number of specific features of the background:

(a) In one of the cases the Rural Integrity company involved had been granted leave to apply for judicial review in a case against the Planning Appeals Commission (PAC).

(b) The court noted that it had ordered the applicant company to make security for costs by way of an order dated 9 March 2019 but that the applicant had failed to comply with this order. Accordingly, the application for judicial review was dismissed by way of further order dated 27 June 2019. The

applicant had appealed to the Court of Appeal and this appeal had been dismissed by the Court of Appeal on 22 January 2020: see [2020] NICA 12.

(c) In the case management of the cohort of Rural Integrity cases, McCloskey LJ had encouraged the identification of a single case, or a small number of cases which could act as lead cases, to determine issues of legal principle which were common to several of the cases; but had done so without success.

(d) After the decision of the Court of Appeal, at that point none of the applicant companies had retained a solicitor. However, as set out at paragraph [24] of the judgment, Mr Duff was hopeful that a solicitor would be retained in three of the cases: one brought by Rural Integrity (03) Limited; the present case; and the third case in which the applicant was a company called Clogher Environmental Group Ltd ('Clogher Environmental'), albeit Mr Duff was less hopeful that legal representatives would be retained in these latter two cases. (It is unclear how these three cases had been selected as the most likely to attract legal representation; but it might well be a question of whether the objectors to the relevant planning permission would be in a position to fund the company obtaining legal representation). Mr Duff indicated that securing legal representation for the applicant companies in the remaining 29 cases would not be feasible.

[26] McCloskey LJ carefully considered the issue arising under Order 5 rule 6 in paragraphs [26] to [45] of his judgment. He concluded that there was no evidence that Mr Duff had been authorised by any of the applicant companies to carry on any of the cases on its behalf as an employee under the provisions of rule 6(3). This was consistent with the approach of the Court of Appeal in the first PAC case, at paragraph [12] (as recorded by McCloskey LJ at paragraph [27] of his judgment). The Court of Appeal had taken the view that Mr Duff was not an employee. Even assuming this in his favour, McCloskey LJ considered that there was no appropriate evidence of his authorisation to begin or carry on the proceedings on behalf of the companies as an employee (with the possible exception of the *Clogher Environmental* case: see paragraphs [34]-[35]).

[27] I agree with McCloskey LJ's finding that Mr Duff's argument that the making of an application for leave to apply for judicial review falls *outside* the meaning of the phrase "*begin and carry on proceedings in the High Court*" in Order 5 rule 6 should be rejected. Although I am not formally bound by the decision of a different composition of the High Court on this issue, it is entitled to great respect and I should not depart from it unless persuaded that it is clearly wrong. On the contrary, I consider that McCloskey LJ was right to conclude that a company cannot make an application for leave to apply for judicial review without complying with the requirements of Order 5; nor did Mr Fegan on behalf of the applicant seek to persuade me otherwise.

[28] The result was that McCloskey LJ concluded that each of the 32 cases was manifestly non-compliant with the requirements of Order 5 rule 6. He therefore turned to consider the consequences of this finding and what order the court should make in light of it. In paragraph [43], McCloskey LJ refused leave to apply for judicial review in 29 of the 32 cases. He excluded from this result "*the newly formed sub-group of three cases*" which includes the present case, commenting that he considered "*in light of the most recent developments the applicant companies in those three cases (only) should have one further and final opportunity to demonstrate compliance with Order 5.*" He indicated that this further and final opportunity would "*endure for the finite period of two weeks, ending on 20 March 2020.*" The significance of this in the present case arises because, within that 'further, final opportunity', the applicant engaged solicitors to act for it. A notice of change of solicitors was filed by Phoenix Law, now acting for the applicant, on 19 March 2020.

[29] At paragraph [45] of his ruling McCloskey LJ emphasised that he had given no consideration to a variety of "*new factors of procedure or substance which may materialise in the event of any of the Applicant companies demonstrating an ability to comply with Order 5, Rule 6*", highlighting also that "*the factor of want of prosecution may arise.*" He also issued the following salutary warning: "*In short, belated compliance with Order 5 Rule 6 RCJ does not necessarily betoken in any of the three surviving cases a bed of roses for the Applicant companies thereafter*."

[30] Although in the body of his decision the 29 cases which were brought to an end by this ruling were described as having leave to apply for judicial review refused, in his summary of the court's order at paragraph [46] McCloskey LJ made clear that in addition to the refusal of leave the cases were being struck out on the grounds of non-compliance with Order 5, misuse of the court process and want of prosecution. Returning to the "*three surviving cases*", the court reiterated that the applicant companies were being afforded a further short period to demonstrate compliance.

Conclusion in relation to the present application

[31] The question is where that leaves the present case. In my view, it would be wrong for me to go behind the conclusion reached, and order made, by McCloskey LJ on 6 March 2020. He provided the applicant company in this case with one final opportunity to put its house in order by means of the engagement of legal representatives to conduct the proceedings on its behalf. It did so; and did so within the time prescribed by McCloskey LJ's order for that step to be taken. In those circumstances, it seems to me that it would be unfair to put an end to these proceedings on the basis merely of the non-compliance with Order 5, rule 6 which was considered in the March 2020 ruling. That is not one of the "*new*" or "*additional*" factors referred to by McCloskey LJ which may thereafter need to be grappled with by the applicant company. Those issues include the following: whether the merits of the case disclose an arguable case; whether the applicant company has standing to bring these proceedings; whether leave should be refused on the grounds of delay;

whether the company is entitled to a protective costs order and in what sum; and whether the applicant should be required to provide security for costs. I deal with each of those in turn below.

[32] However, in the same way in which the respondent invited me in the *Clogher Environmental* case not to go behind McCloskey LJ's ruling on the Order 5 rule 6 issue (see my judgment also given today in that case: [2021] NIQB 33), I consider that it would be unfair for me to now dismiss the present applicant's claim on that basis, when it availed itself of the final opportunity provided by McCloskey LJ to correct matters. It has a legitimate expectation that, having done so, *that issue* will not of itself result in its application being dismissed. As explained below, the procedural manoeuvring which gave rise to that issue is relevant to some of the other issues I am now required to address; but they must also be considered on their own merits.

Merits of the challenge

[33] The applicant challenges the grant of planning permission by Fermanagh and Omagh District Council on 21 March 2019 (application LA10/2018/0832/F), whereby the Council authorised the construction of six self-catering holiday cottages, including alterations to existing vehicular access at the junction of the public road, on land immediately surrounding 665 Boa Island Road, Portinode, Kesh.

[34] In summary, the applicant contends that the Council's decision was contrary to the provisions of Planning Policy Statement 16, *Tourism Development* (PPS16); and of Planning Policy Statement 21, *Sustainable Development in the Countryside* (PPS21), insofar as it relates to 'ribbon development'. As presented by Mr Fegan at the leave hearing, the applicant's case is now (commendably) focused on the questions of whether the appropriate planning policies have been correctly understood and applied.

[35] The law in this area is now well settled. I do not propose to rehearse it in this judgment on leave. A pithy summary was provided by McCloskey J in *Re McNamara's Application* [2018] NIQB 22, at paragraph [17]:

> "*The interpretation of any planning policy is a question of law for the Court; exercises of interpretation should not treat planning policies as a statute or contract or any comparable instrument; a similar approach to the reports of planning case officers is to be adopted; and decisions involving predominantly matters of evaluative judgement are vulnerable to challenge on the intrinsically limited ground of Wednesbury irrationality only.*"

[36] I would add simply that, where a planning authority is departing from policy, it should appreciate that it is doing so and provide valid planning reasons as to why

any failure to comply with relevant policy is not to be given determining weight in the circumstances of the case. The first element of this assessment – to acknowledge that there is a breach of policy which would *prima facie* suggest refusal of the application – is part of the authority's legal obligation to correctly understand and take into account material considerations.

[37] The applicant contends that the development for which permission was granted in this case was contrary to relevant policies within PPS16 and PPS21.

[38] As to PPS16, proposals for tourism development in the countryside will be facilitated through the application of Policies TSM2 to TSM7 of PPS16. The Planning Officer Report in this case identifies that Policy TSM5 of PPS16 is material. Policy TSM5 applies to '*Self Catering Accommodation in the Countryside*'. Such development will generally not be permitted in the countryside, save where it complies with the terms of Policy TSM5, which provides the following exceptions:

> *"Planning approval will be granted for self-catering units of tourist accommodation in any of the following circumstances:*
>
> *(a) one or more new units all located within the grounds of an existing or approved hotel, self-catering complex, guest house or holiday park;*
>
> *(b) a cluster of 3 or more new units are to be provided at or close to an existing or approved tourist amenity that is / will be a significant visitor attraction in its own right;*
>
> *(c) the restoration of an existing clachan or close, through conversion and / or replacement of existing buildings, subject to the retention of the original scale and proportions of the buildings and sympathetic treatment of boundaries. Where practicable original materials and finishes should be included.*
>
> *In either circumstance (a) or (b) above, self-catering development is required to be subsidiary in scale and ancillary to the primary tourism use of the site.*
>
> *Where a cluster of self-catering units is proposed in conjunction with a proposed or approved hotel, self-catering complex, guest house or holiday park and / or tourist amenity, a condition will be attached to the permission preventing occupation of the units before the primary tourism use is provided and fully operational."*

[39] The Planning Officer Report which was before the Council when the impugned permission was granted appears to recommend granting the application

on the basis that it was compliant in substance with Policy TSM5, paragraph (a). It states:

> *"Whilst the current proposal is not within the grounds of the existing tourism development, it shares a common boundary and adjoins the self-catering units and Tudor Farm guest house. It will also share the same access as the existing tourism units and it will appear visually as a natural extension to it, subsidiary in scale and ancillary to it. It allows for new development in the countryside and avoids random development throughout the countryside whilst safeguarding the value of the tourism assets. On this basis, the principle of the proposal is acceptable, and it complies with aims, objectives and general thrust of PPS 16 and PPS 21."*

[40] However, the applicant contends that "*it is obvious that the application does not fit within the eligibility criteria*" of Policy TSM5, paragraph (a) (nor indeed paragraphs (b) or (c)). As to paragraph (a), the proposed development is not "*within the grounds of*" the existing guest house or the existing self-catering chalets (one of which is owned by Mr Johnston). The applicant further submits that, if the application does not comply with the policy, this should be clearly recognised. Instead, however, the Planning Officer has glossed over the non-compliance with the policy and impermissibly relied instead on the "*aims, objective and general thrust of PPS16*", giving the impression of policy compliance. It is not clear – the applicant submits – whether the Council wrongly thought Policy TSM5 was complied with or, on the other hand, correctly identified that it was not complied with but failed to address itself properly to whether that non-compliance was outweighed (and by what). In either event, the applicant submits that the relevant policy has not been properly interpreted and applied.

[41] In addition, the applicant contends that, even if the Planning Officer was permitted to move past the policy wording and rely instead on the amplification text related to the policy, or its general thrust, they have nonetheless further misdirected themselves (and the Council) by contending that the development is ancillary to an appropriate "*primary tourism use*" which could or would justify its scale, which is a further policy requirement. The applicant contends that the proposed development is merely close to a guest house and the existing self-catering chalets, the owners of which have objected to the application; and that there is no tourist amenity in the area identified to justify further populating the area with tourism accommodation. Although the question of whether the new development would be "*subsidiary in scale and ancillary*" to the primary tourism use of the site may involve an exercise of planning judgment, the applicant contends that the Council misdirected itself (a) as to whether one of the elements relied upon – the existing self-catering chalets – were properly to be regarded as an existing tourism use; and (b) as to whether the new development could be ancillary to a use of the site when it is unrelated to any existing tourism uses in the area and not on the same site as them.

[42] As to PPS21, Policy CTY8 relates to 'ribbon development.' It provides:

> "*Planning permission will be refused for a building which creates or adds to a ribbon of development.*
>
> *An exception will be permitted for the development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise substantial and continuously built up frontage and provided this respects the existing development pattern along the frontage in terms of size, scale, siting and plot size and meets other planning and environmental requirements. For the purpose of this policy the definition of a substantial and built up frontage includes a line of 3 or more buildings along a road frontage without accompanying development to the rear.*"

[43] The 'Justification and Amplification' text related to the policy offers further guidance as to what constitutes ribbon development at paragraph 5.33:

> "*For the purposes of this policy a road frontage includes a footpath or private lane. A 'ribbon' does not necessarily have to be served by individual accesses nor have a continuous or uniform building line. Buildings sited back, staggered or at angles and with gaps between them can still represent ribbon development, if they have a common frontage or they are visually linked.*"

[44] It also includes a strong statement as to why ribbon development is not permitted, at paragraph 5.32:

> "*Ribbon development is detrimental to the character, appearance and amenity of the countryside. It creates and reinforces a built-up appearance to roads, footpaths and private laneways and can sterilise back-land, often hampering the planned expansion of settlements. It can also make access to farmland difficult and cause road safety problems. Ribbon development has consistently been opposed and will continue to be unacceptable.*"

[45] Paragraph 6.73 of the *Strategic Planning Policy Statement for Northern Ireland* (SPPS) appears to be in terms consistent with Policy CTY8. Policy CTY8 was considered by McCloskey J in the *McNamara* case (*supra*): see, in particular, paragraphs [18]-[24]. The applicant relies on this case as authority that Policy CTY8 can apply to ribbon development arising on a private roadway. McCloskey J considered that the general prohibition on ribbon development, taken together with the exception for small gap sites, required a "*juggling act*" to strike the correct

balance between the need to protect the rural environment and, simultaneously, to sustain a strong and vibrant rural community.

[46] The applicant also relies on the Fermanagh Area Plan 2007 (FAP) to suggest that the protection of the environment should be placed at a premium at this location. That is because the FAP, in Policy T7, divides Lough Erne into 13 zones with strategic guidance on the potential for tourism or recreational development for each. The application site with which these proceedings are concerned relates to land within zone 12 – Boa Island/Kesh – which is classified as a 'sensitive zone'. In relation to sensitive zones, the FAP provides that:

> "*In these zones the character of the landscape, the conservation interest or the existing level of development are such that whilst there may be scope for development, proposals must be sensitive to the particular characteristics of the zone. Sympathetic development, which by its nature and scale would not be damaging to nature conservation interests or the man-made heritage and which is sensitive to the landscape could be acceptable at some locations. The cumulative impact of proposals will be a particular consideration.*"

[47] The applicant contends that, in this case, it is evident that the development permitted by the impugned permission is a ribbon development along the front of a roadway, albeit a private laneway. In terms of the Council's consideration of the application, the applicant observes that Policy CTY8 (and Policy T7 of the FAP) were not mentioned in the Planning Officer report. Accordingly, it is submitted, there was a failure to take material considerations into account or, alternatively, the decision to grant permission in the face of these policies was unreasonable.

[48] The proposed respondent contends that the Planning Officer Report was not such as to materially mislead the Council in respect of Policy TSM5. It further contends that Policy CTY8 is irrelevant. This second submission is made on the basis that the overarching policy within PPS21, namely Policy CTY1, provides that "*planning permission will be granted for non-residential development in the countryside*" in certain cases which include tourism development in accordance with the TOU policies of the *Planning Strategy for Rural Northern Ireland*, which have now been supplanted by the TSM policies within PPS16 for the purposes of PPS21 (see the Preamble to PPS16). Accordingly, it is argued, if the proposed development is permitted as non-residential development under Policy TSM5, it is acceptable under Policy CTY1 and the need for consideration of the remaining CTY policies falls away.

[49] The Planning Officer Report does, in fact, consider Policy T7 of the FAP as relevant, at section 6.0 of the Report. It does not consider Policy CTY8 of PPS21, on the basis, it seems, that "*the proposal represents one of the specified types of development acceptable in the countryside*" so that it complies with Policy CTY1. This may be read

essentially as an indication that Policy TSM5 in PPS16 is complied with (which is what the applicant claims to have been an erroneous consideration). Although Policies CTY13 (Integration and Design of Buildings in the Countryside) and CTY14 (Rural Character) were still considered to be relevant, the question of ribbon development was not addressed.

[50] The test for the grant of leave on the merits in judicial review is a modest one. I consider that the applicant's case – as refined and focused by Mr Fegan in his presentation of the application – surmounts the threshold for the grant of leave.

[51] I do so with some misgiving in relation to the second limb of the challenge, related to the leaving out of account of Policy CTY8. Mr McAteer made the forensically forceful point that this policy is not addressed in the objectors' planning consultant's representations, which are otherwise comprehensive. On balance, however, I consider it arguable that, as well as providing another example of a type of development which is permissible in principle in the countryside (the infill of a small gap site which complies with the exception in Policy CTY8), that policy also addresses design and character considerations which, like Policies CTY13 and CTY14, also require consideration where a use is in principle acceptable at a development site in the countryside.

Standing

[52] The respondent also objects to the *locus standi* of the applicant to bring these proceedings. It is a requirement of Order 53 rule 3(5) of the RsCJ that the court should not grant leave to apply for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[53] In my view, Mr Johnston (the sole shareholder in the applicant company at the time the proceedings were launched) would undoubtedly have had standing to bring the proceedings in his own name. He can plainly make an argument to be personally affected by the proposed development, as one of the owners of the chalets in close proximity to the application site; he participated in the planning process as an objector, along with others; and he personally wrote to the Council shortly after the grant of permission to complain about it "*in the strongest possible terms*" for a variety of reasons. The same applies to his other fellow owners of holiday chalets in the vicinity of the application site. They objected to the application through the engagement of a planning consultancy before Mr Duff was involved.

[54] The question is whether Mr Johnston (and such other chalet owners, if any, as may have been involved) should be deprived of standing by having brought the application through the person of an incorporated company with the involvement of Mr Duff. I do not consider that he should be. Firstly, I do not consider that this is a case which has been brought solely, or even mainly, in the interests of Mr Duff, albeit I recognise that its subject matter is of intense interest to him. There was at least one person in the background directly affected and legitimately aggrieved who

could properly have brought the proceedings himself and has sought to do so through the applicant company. It seems to me that Mr Johnston was poorly advised about a means of bringing the proceedings with limited costs risks which was neither well thought-through, nor well executed – for the reasons discussed above. However, there is no evidence to suggest that Mr Johnston acted in bad faith in this regard and, indeed, the evidence suggests that Mr Duff was introduced to him through the planning consultant whom he, and the other chalet owners, had engaged for advice.

[55] Secondly, case-law establishes, and I understand it to be accepted by the proposed respondent, that there is nothing inherently wrong with the incorporation of a limited company as a means of managing and progressing planning objections on behalf of a collection of local residents; and, indeed, as a vehicle for the bringing of proceedings. The issue here has been the use of a limited company primarily for the purpose of gaining unfair costs protection over and above that offered by the Aarhus Convention regime (and, arguably, for the provision of what amounts to unregulated legal services). In my view, those issues can be dealt with by means of the provision of security for costs (dealt with below) and the requirement that the company now be legally represented in the proceedings (secured by means of the refusal of leave for the company to act by way of an employee). This issue was addressed in *R v Leicestershire County Council and Others, ex parte Blackfordby and Boothorpe Action Group Limited* [2001] Env LR 2. In that case a limited company was incorporated for the purposes of bringing judicial review proceedings. Richards J held (at paragraph [37] of his decision):

> "*In my view the incorporation of a local action group ought not to be a bar to the bringing of an application for judicial review. Technically, it may be said, the company does not have a relevant interest of its own; but in substance it represents the interests of local residents who, or many of whom, do have a relevant interest. Incorporation has a number of advantages, some of which motivated incorporation of the action group in this case. It is true that another advantage is the avoidance of substantial personal liability of members for the costs of unsuccessful legal proceedings. But that should not preclude the use of a corporate vehicle, at least where incorporation is not for the sole purpose of escaping the direct impact of an adverse costs order (and possibly even where it is for that purpose). The costs position can be dealt with adequately by requiring the provision of security for costs in a realistically large sum. In the present case security was ordered in the sum of £15,000. Whether that was sufficient may be open to doubt, given the sheer size of the case (with a large number of documents and a full two-day hearing). It is, however, the right approach in principle.*"

[56] In any event, I accept the submission of Mr Fegan that the issue of standing in a challenge such as this is to be viewed in light of modern authority to the effect that the court will focus on public law wrongs, rather than the identity of the person seeking to raise the matter with the court in the public interest (a factor Richards J also considered at paragraph [38] of his judgment in the case cited above). That does not mean that the standing requirement is redundant; and there will be cases where leave to apply for judicial review can properly be refused, and should be, because of a lack of sufficient interest in the subject matter of the application on the part of those behind the application – the classic 'busybody' case. For the reasons summarised above, however, I do not consider that this case falls into that category – largely on the basis of Mr Johnston's involvement from the start. Accordingly, I reject the proposed respondent's submission that the applicant company does not have *locus standi* to bring these proceedings.

Delay

[57] The proposed respondent then contended that this application should be dismissed on the grounds of delay. It is accepted that, in at least one sense, proceedings were lodged with the court within the three month time limit permitted by Order 53 rule 4 of the RsCJ. The issue of contention arises because the respondent submits that, in light of the applicant company's non-compliance with Order 5 rule 6, the proceedings were not validly brought and that, therefore, they should not be considered to have been commenced properly until the Company's instruction of solicitors on 19 March 2020. If that date is reckoned as the only valid commencement of proceedings, it becomes clear that the application was made almost exactly one year after the grant of planning permission which is the object of the proceedings.

[58] In response, Mr Fegan submits that that is not the correct analysis. He makes the prosaic point that *some* proceedings were lodged on 16 July 2019, within the judicial review time limit. The papers were issued and served and a court fee paid on the *ex parte* docket. He next contends that any failure to comply with the Order 5 requirements does not render the commencement of the proceedings a nullity but, rather, merely an irregularity. In support of that submission he has drawn the court's attention to two factors:

(a) First, he says that the text in Order 5 of the RsCJ to the effect that a body corporate may not "*begin or carry on*" proceedings should be read in a way so that a company may (as in this case) *carry on* proceedings by way of a solicitor even if they were not begun correctly. In the alternative, if this is not the correct construction as a matter of ordinary interpretation, Mr Fegan submits that this construction should be imposed on the rule pursuant to the court's interpretative obligation under section 3 of the Human Rights Act 1998 in order to avoid incompatibility with the applicant's Convention right under Article 6 ECHR of access to the court.

(b) Second, he contends that any non-compliance with Order 5 at the commencement of the proceedings results only in irregularity, rather than the proceedings as a whole being a nullity, as a result of Order 2 rule 1(1) of the RsCJ, which provides as follows:

> "*Where, in beginning or purporting to begin any proceedings… there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.*" [underlined emphasis added]

Where such irregularity has arisen, the court, pursuant to Order 2 rule 1(2), may either set aside the proceedings in which the failure occurred in whole or in part, which requires an order to that effect, *or* sanction the continuation of the proceedings (and exercise its powers under the Rules, if necessary, to cure the irregularity in some way). If the respondent had wished to set aside the proceedings for irregularity, it ought, the applicant submits, to have proceeded under Order 2 rule 2, rather than the provisions relied upon by the Council in its summons of 10 February 2020.

[59] As to Mr Fegan's first submission, I cannot accept the construction of Order 5 rule 6 which he puts forward. It would be to turn the rule on its head. That is because the formulation used is, in my view, designed to emphasise that a company can *neither* begin *nor* carry on proceedings without a solicitor (unless the express exception within rule 6(3) has been validly invoked). It would preclude a company which had validly commenced proceedings by a solicitor dismissing its legal representation and continuing as an unrepresented litigant. The reference to 'carrying on' proceedings is not designed to permit a company which commenced proceedings without representation to carry them on as of right provided that it has instructed a solicitor to act for it at some point during the proceedings. For reasons set out below, I do not need to consider the applicant's fall-back position in reliance on its Convention rights. However, even assuming that these public law proceedings engage the Company's civil rights and obligations, I would have been inclined to hold that any limitation on a company's rights inherent within Order 5 rule 6 pursued a legitimate aim and – at least in the circumstances of this case – were proportionate and not in breach of the applicant's right of access to the court under Article 6, a right which it is well established is not absolute.

[60] I consider there to be much more force in Mr Fegan's second submission, namely that the proceedings commenced within time were irregular but not a nullity (in the absence of an order setting them aside). In *Breslin & Others v McKenna & Others* [2005] NICA 50, the Court of Appeal addressed the question of a writ of summons which was alleged to have been invalid and noted that the effect of Order

2 rule 1 was "*to eliminate the concept of a lack of jurisdiction arising from non-compliance with the Rules*" (see paragraph [25]). The question was whether, in all of the circumstances, the irregular proceedings should be set aside.

[61] I am not sympathetic to the applicant's technical objection that the respondent has not properly pleaded reliance on Order 2 rule 2(1). The respondent's objections are plain, as is the relief which it seeks, even if the correct provision for seeking redress was through that particular provision. The significance of Order 2 rule 2(1) may well be that an application to set aside for irregularity "*shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*" I do not consider that the respondent's summons seeking to have the proceedings struck out can be considered to be such a step; although the applicant relies on a number of other steps which, it asserts, were taken by the respondent before this issue was brought to a head.

[62] Mr McAteer's riposte in relation to applicant's submission that the first phase of the proceedings may have been irregular but was not a nullity is that, whatever the Rules of the Court of Judicature say, as a matter of common law, the company had no power to institute proceedings otherwise than by way of solicitor: see, for instance, the discussion of this issue in the judgment of the Supreme Court of Ireland in *Allied Irish Bank plc v Aqua Fresh Fish Ltd* [2018] IESC 49, at paragraphs [13]-[15] and [31]-[34]. (Indeed, the purpose of Order 5 rule 6 was to codify this common law rule and also, by way of mitigation of it, to provide for the exception contained in rule 6(3)).

[63] In considering whether the proceedings were brought within time for the purposes of Order 53 rule 4 of the RsCJ, I consider that I should *not* treat the issue of the proceedings in July 2019 as a nullity. To do so would be contrary to the clear position set out in Order 2 rule 1(1) of the RsCJ. They are only a nullity in the event that I now conclude they should be set aside. Further, when considering an alleged breach of the Rules, they should be construed in a way which is internally consistent. Accordingly, in considering whether proceedings were brought within time for the purpose of Order 53 rule 4, it would be wrong for me to ignore the issue of proceedings as being a nullity because of the provisions of Order 2 rule 1. That is so whatever the position may be as a matter of private law pursuant to the common law relied upon by Mr McAteer.

[64] My conclusion above is not to say that the question of delay becomes irrelevant. It is still relevant to the exercise of my discretion whether, pursuant to Order 2, to set the proceedings aside entirely. It may well also be relevant to the court's discretion in relation to the grant of relief in the event that the applicant succeeded on any of its grounds of challenge. It simply means that it is not open to the respondent to say that the proceedings were not commenced within time so that the applicant needs to establish a good reason for extension of time under Order 53 rule 4 applying the tests set out by Gillen J in *Re Zhanje* [2007] NIQB 4. Key considerations lying behind the time limits in Order 53 (and the previous

requirement that judicial review proceedings be brought promptly) are that the proposed respondent, and third parties, are informed promptly that there is a legal challenge to a decision and know the grounds on which that challenge has been made so that they can manage their affairs accordingly; and are not, particularly in the case of the beneficiaries of an impugned planning permission, proceeding to rely on the permission in ignorance of a legal question mark hanging over it. The issue of the proceedings in this case in July 2019, albeit irregularly, will have served those purposes.

[65] Taking into account my finding that the grounds of challenge are arguable; that the applicant has standing; that (albeit irregular) proceedings were commenced within time and the notice parties and respondent were therefore on notice at an early stage; that much of the delay in reaching this point was not attributable to the applicant, or the applicant alone, including awaiting the outcome in related litigation before the Court of Appeal and the impact of the Covid-19 pandemic; the general aim of facilitating access to justice in environmental cases within the Aarhus Convention regime; the additional protections which the court can impose as to security for costs; and the remaining opportunity to consider delay at the remedies stage, I conclude, on balance, that it would be wrong to dismiss this case on the grounds of delay under Order 53 rule 4 or to set the proceedings aside entirely on that basis under Order 2 rule 2.

[66] I should mention that there are also interested parties in relation to this application (who would be entitled to be put on notice of the proceedings in the event that leave is granted), namely the beneficiaries of the impugned permission, Hilary and Ian Robinson. I am conscious of the legitimate frustration they feel by reason of the delays which have arisen in these proceedings, as set out in their communication with the court. I do not consider there to have been any significant prejudice caused to either the Council's or the interested parties' ability to oppose the judicial review proceedings which has arisen by delay. I understand that there is more substantive prejudice to the notice parties' plans to develop or sell the development site which have had to be put on hold pending the resolution of the proceedings, at a time when those plans have become more urgent through circumstances unrelated to any actions of the applicant. I can indicate a firm commitment to seeking to move these proceedings forward expeditiously, as the interested parties have invited the court to do, should they be pursued by the applicant.

[67] The issue of want of prosecution also falls to be considered at this point. As will be apparent from the discussion above, I consider that a good deal of the lamentable delay in this case to date arises from the irregular way in which the proceedings were commenced by the applicant. However, not all of the delay is attributable to the applicant or would have been foreseeable by it even if it, or Mr Johnston or Mr Duff, had realised at the start of the case that that mode of proceeding was likely to be problematic. Some of the delay was down to usual case management issues, some due to awaiting the Court of Appeal decision in the *Rural*

Integrity case which went on appeal, and quite some delay was due to disruption to court business due to the pandemic. Although basic responsibility lies with the applicant to progress its case reasonably, the respondent was the moving party in the February 2020 summons and can also be said not to have pressed the summons on for hearing with any great urgency. Bearing in mind again that I leave open the question of delay for any remedies stage (should the case proceed that far), I am not inclined to dismiss the case for want of prosecution.

Protective costs order

[68] I am satisfied that this is a case which comes within the purview of the Aarhus Convention. The applicant is accordingly entitled to a protective costs order (PCO) pursuant to the terms of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (SR 2013/81), as amended ('the Aarhus Costs Protection Regulations'). Regulation 3(2) provides that:

> "*Subject to paragraphs (3) and (7), in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.*"

[69] Regulation 3(7) does not appear to be relevant in this case; but regulation 3(3) provides that, "*The court may decrease the amount specified in paragraph (2) if it is satisfied that no doing so would make the costs of the proceedings prohibitively expensive for the applicant.*" Pursuant to regulation 3(4), the usual approach in such a case is that the costs recoverable from a respondent shall not exceed £35,000.

[70] The applicant has sought an order from the court to limit its potential costs liability in even more generous terms than the standard order applicable in a case such as this under the Regulations. Initially, the applicant sought an order that its liability be limited to the extremely modest sum of £100. Latterly, it has suggested that it should be liable only to an adverse costs order in the sum of £2,000; whilst, in the event of being successful, still being entitled to recover costs from the respondent in the sum of £35,000. I accept the respondent's contention that such an imbalance in the terms of a PCO would be inappropriate, certainly in the absence of some exceptional circumstance. This conclusion is consistent with that reached by McCloskey J in *Re Rural Integrity (Lisburn 01) Ltd's Application (Protected Costs and Security for Costs)* [2019] NIQB 40: see paragraph [31] and following.

[71] An irony in the way in which these proceedings have developed is that, had they been brought personally by an applicant who was a natural person, the costs exposure under the Aarhus Costs Protection Regulations would only have been £5,000, rather than £10,000 which is the applicable sum where a corporate entity is involved. Be that as it may, for the reasons explored above a conscious decision was

taken to bring these proceedings through a limited company and, as a result, there is a greater maximum costs exposure under the Regulations.

[72] I am not satisfied that a failure to decrease the applicant's costs liability would make the proceedings prohibitively expensive. This conclusion is related to my consideration of the Company's potential to give security for costs, discussed below. I have been provided with little or no information about the financial means of Mr Johnston (or any of the other concerned chalet owners, or, indeed, Mr Duff), or of their likely costs, such as to be able to reach a fully informed view that not decreasing the Company's maximum costs liability would render the proceedings prohibitively expensive. Those matters are relevant to any such determination pursuant to regulation 6. I was urged by the applicant simply to postpone consideration of the suggested decrease in the applicant's potential costs exposure until after leave had been granted and further evidence had been filed on these matters. However, I am not prepared to do so given the history of the proceedings and the more than ample opportunity which the applicant has had to address these matters in its earlier affidavit evidence. I see no reason to decrease the sum from the standard amount contained with the Regulations.

Security for costs

[73] This is a case where the proposed respondent has sought an order for security for costs, pursuant to Order 23 rule 1 and/or Order 53 rule 8 of the RsCJ. It does so on the basis that the applicant is a company; that there is reason to believe that it will be unable to pay the respondent's costs if ordered to do so; and that, having regard to all of the circumstances of the case, it is just that the applicant give security for the respondent's costs: see Order 23 rule 1(1)(e) and 1(3). In light of the history described above and the obvious attempt to use a corporate vehicle for the primary, if not sole, purpose of avoiding costs liability, along with the lack of resources presently available to the applicant company evident from the affidavits, I consider that the respondent's concerns in this regard are well founded.

[74] The applicant's skeleton argument accepts that any amount that the court may require to be paid into court should have the sum of £10,000 as the starting point, since that is the potential costs liability under the Aarhus Costs Protection Regulations (assuming correctly that the court, as I have done, declines to reduce that figure in any PCO granted to the applicant). However, it is further submitted that that figure should be "*revisable downwards in light of the financial circumstances of the applicant.*" The applicant's contention is that the maximum liability in a standard order under the Aarhus Costs Protection Regulations should not be the minimum figure required in every security for costs application in an Aarhus case. I accept the correctness of that proposition as a general principle.

[75] Nonetheless, where an applicant benefits from a PCO under the Aarhus costs protection regime and therefore faces only a limited exposure to costs, and where the court considers that the case is one in which it is appropriate to order security for

costs, it will in my view be quite unusual for the court not to order security for costs in the reduced costs sum which the applicant remains liable to pay under the applicable PCO. That sum, in many planning cases, is likely to represent only a small proportion of the total costs which would be payable if the applicant had to meet an adverse costs order in full. Indeed, in Mr Kingston's affidavit of February 2020 it was estimated that, by that stage alone, the Council's costs of defending the application were already in or around £12,500, exclusive of VAT and outlay.

[76] In this case, in light of the history discussed above, I am of the clear view that it is appropriate for the court, if the applicant wishes to proceed with a substantive application for judicial review, to require it to provide security for costs in the sum which represents the respondent's likely entitlement in the event that the application is dismissed and costs follow the event in the usual way; that is to say in the sum of £10,000. Put shortly, the applicant has sought to exploit the use of a limited company as a means of insulating itself from adverse costs, which McCloskey LJ has found to be a misuse of the court's process. For the reasons I have given, the applicant company has raised a case worthy of further consideration but, in light of the sorry history of bringing these proceedings to the present point, including the additional cost occasioned to the proposed respondent and the additional delay which has arisen to the prejudice of the interested parties, the applicant company cannot in my view complain if it is now asked to 'put its money where its mouth is.'

[77] In his affidavit of September 2019, Mr Duff noted that, at that point, the applicant company did not have £2,000 but "*raising capital should be possible if leave is granted and the merits of the application can be presented to others*", adding that "*there are other Portinode residents who objected to the planning application and hopefully will contribute…*" Although, at that stage, it was envisaged that the applicant's outlay would only be Mr Duff's 'wage' and other "*modest costs*", it is clear that there is at least a potential pool of funding. To similar effect, Mr Johnston averred in his affidavit of 30 September 2019 that "*if leave is granted the company might be able to raise some more funds from some of the 10 property owners*" but that no formal approach had yet been made to the other owners as he first wished to see how the case proceeded. He indicated that he was not confident of raising much money, as he knew some of the other owners were cautious about the financial risks involved, but he considered that it may be possible to raise somewhere between £2,000 and £5,000, particularly if the company was granted leave to bring a judicial review. He concluded that he was not willing to fund the litigation all by himself without some contribution from the other property owners.

[78] In Mr Duff's fifth affidavit he went further. He said that:

> "*The directors have now contacted all 10 Portinode holiday chalet owners and the owners of Tudor Farm and have been well received and been promised £1000 from each towards the costs of this judicial review.*"

He went on to say that the applicant expects that it will be raising £11,000 in the form of loans to the company with the promise of prompt repayment (if funds are available) when the judicial review concludes. Although the applicant also made the case at that time that it could not afford to employ a solicitor, and therefore makes the case now that liability for its own legal costs must be taken into account, I do not consider that sufficient to persuade me to reduce the amount which ought to be ordered as security for costs. The mode of proceeding which the applicant has employed has already resulted in increased costs and delay on all sides. Pursuant to the ruling of McCloskey LJ discussed above, it was necessary for the company to instruct solicitors as it has now done. This was a necessary precondition to its continued carrying on of these proceedings in light of the court's unwillingness to grant leave for the proceedings to be carried on by an employee (as signified by 29 of the 32 cases simply being dismissed).

[79] In *Edwards v Environment Agency (No 2)* [2014] 1 WLR 55, the Supreme Court found no incongruity in the use of an order for security for costs in an Aarhus case provided that the overall costs capable of being awarded against the unsuccessful applicant were not prohibitively expensive. I do not consider the sums discussed to be prohibitively expensive in this case and will accordingly order that the applicant give security for costs in the sum of £10,000, to be lodged in court. I consider that I may do so under Order 23 rule 1 or alternatively, or in conjunction with that provision, under Order 53 rule 3(8) which provides that, "*If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*" I propose to make the grant of leave conditional upon the giving of security within 14 days.

[80] By virtue of regulation 3(10) of the Aarhus Costs Protection Regulations, the figure of £10,000 which will be specified in the PCO granted in this case does not include VAT. I heard no argument or evidence as to the Council's liability to pay or reclaim VAT, nor indeed that of the applicant company, and do not intend to adjust the figure to be ordered as security for costs to reflect any additional potential VAT charge.

Conclusion

[81] In summary, therefore:

(a) I dismiss the proposed respondent's application to stay and/or strike out the application for leave to apply for judicial review. I make no order for costs between the parties in respect of that application. Although the respondent has been unsuccessful in its application, it was raising issues which were proper to be raised and which were brought on the applicant's head by its own means of commencing these proceedings.

(b) I grant the applicant leave to apply for judicial review on the two grounds advanced in Mr Fegan's skeleton argument dated 5 January 2021 and summarised at paragraphs [34]-[51] above, namely failure to correctly

interpret and apply Policy TSM5 of PPS16 and Policy CTY8 of PPS21. If the application is to be pursued, I direct that a draft amended Order 53 statement is provided by the applicant's representatives refining the relief sought and pleading appropriately only those grounds on which leave has been granted. The most recent proposed amended Order 53 statement (dated 24 February 2020 and seemingly drafted by Mr Duff to be signed by him in his capacity as a director of the applicant) requires radical revision. The new proposed amended Order 53 statement is to be served alongside the notice of motion for consideration and approval by the court.

(c) Pursuant to regulation 3 of the Aarhus Costs Protection Regulations, I order that any costs recoverable from the applicant shall not exceed £10,000 and that any costs recoverable from the respondent shall not exceed £35,000 (both sums exclusive of VAT).

(d) Crucially, leave is granted *only on condition that* the applicant lodge the sum of £10,000 in court as security for the respondent's costs within 14 days of the date of this judgment. In the event that this condition is not complied with, the grant of leave will lapse.

(e) If the case is to be pursued, the applicant's notice of motion is to be issued and served within 14 days of the grant of leave pursuant to Order 53 rule 5(5) of the RsCJ; and should be served on the Robinsons pursuant to rule 5(3).

(f) The case will be treated as requiring expedition from this point and a (remote) case management review hearing will be arranged, as necessary, shortly after the giving of security for costs and service of the notice of motion for the purpose of further timetabling the proceedings to a prompt hearing.