Neutral Citation No: [2019] NIQB 40	*Ref:* McC10936
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 10/04/2019 WITH APPENDICES

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RURAL INTEGRITY (LISBURN 01) LIMITED FOR JUDICIAL REVIEW

-v-

PLANNING APPEALS COMMISSION

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<u>PROTECTED COSTS AND SECURITY FOR COSTS</u>

<u>MCCLOSKEY J</u>

[1] By its Order dated 09 March 2019, distributed electronically in the wake of an *inter – partes* hearing, the court determined the Applicant's application for a protective costs order and the Respondent's application for security for costs as follows:

(a) In the event of the Applicant having to pay costs, the amount recoverable will not exceed £10,000.

(b) The Applicant will make security for the Respondent's legal costs and outlays in the same amount, ie £10,000, including VAT, and shall do so in accordance with the applicable procedural requirements and mechanisms by **<u>19 March 2019</u>**.

Costs were reserved. This is the reasoned judgment of the court.

[2] The Applicant is a registered limited company with a share capital of £100 and a single director, one Gordon Duff, who represents this litigant, together with other comparable and related limited companies, in a total of 33 judicial review challenges filed with the court during a six month period beginning on 05 March 2018 and ending on 17 September 2018. There has been a multiplicity of challenges, listings and orders in the court's unrelenting attempts to devise fair, proportionate, practical and efficient case management mechanisms and arrangements for this unprecedented group of cases.

[3] The Respondent in these proceedings is the Planning Appeals Commission for Northern Ireland (the "PAC"). The Applicant challenges the decision of the PAC dated 11 December 2017 allowing an appeal against a refusal of planning permission and, thereby, authorising the development of two dwellings and detached garages at an "infill site" at 50/52 Ballee Road West, Ballymena. The successful planning applicant has been represented by solicitor and counsel in these proceedings.

[4] The application for leave to apply for judicial review proceeded *inter-partes* on 07 June 2018, before Sir Ronald Weatherup. The judge reserved his decision and, the following day, promulgated an oral ruling whereby leave to apply for judicial review was granted.

[5] The available evidence includes a full transcript of the judge's leave decision. It is abundantly clear from this that leave was granted subject to no restrictions or conditions applicable to either the Applicant or the PAC. The court rejects any argument to the contrary.

[6] By a summons, with supporting affidavit, issued on 15 October 2018, the PAC applied to the court for an order compelling the Applicant to make security for the costs of the PAC under Order 23 Rule 1 and Order 53 Rule 8 of the Rules of the Court of Judicature. Attached to the summons was a schedule indicating that the PAC's estimated costs of defending these proceedings total £36,000 plus VAT. The accompanying affidavit contains particulars of the heavy case management which these proceedings have entailed to date. This affidavit posits the substantially smaller sum of £20,000 plus VAT in respect of legal costs.

[7] All of the registered companies in question are, in non-technical legal terms, established, owned, managed and operated by Mr Duff. The only expenditure which they have incurred is the court fees involved in initiating each of the judicial review applications and any subsequent ancillary or incidental fees. Mr Duff asserts that this is effected by the mechanism of directors' loans to the companies, of which there is no supporting evidence. He estimates that each judicial review case generates fees of this *genre* of some £260/£270. In two of the 33 cases Mr Duff instructed solicitors to act on behalf of the relevant applicant company. The court's understanding of the evidence is that this retainer has been terminated.

[8] There is a <u>second</u> interlocutory application requiring adjudication. By this application the Applicant seeks a protective costs order under the (in shorthand) Aarhus Convention Regulations. It would appear from the pertinent affidavit sworn by Mr Duff (21 May 2018) that the order sought was initially one whereby any legal costs recoverable from the Applicant would not exceed £10,000 plus VAT. The court construes Mr Duff's more recent stance, however, to be that a protective costs order should be made conferring on the Applicant an outright costs indemnity or exemption or, at worst, limiting its costs exposure to its share capital of £100. See regulations 3(3) and 6 of the Aarhus Convention Regulations.

[9] The evidence/submissions emanating from Mr Duff include assertions that (a) he is owed some £5,000 by the companies, representing court costs incurred in the various judicial reviews and (b) he estimates that his total costs in these proceedings will be of the order of £5,000/£6,000, a sum which he will seek to recover from the PAC in the event of

the legal challenge succeeding. There is no evidence whatsoever of Mr Duff's personal means or resources. Nor is there any evidence of the Applicant, the other companies or the collective legal proceedings being financed, partly or otherwise, by sources other than Mr Duff.

[10] The topic of security for costs is governed by Order 23 of the Rules of the Court of Judicature. Rule 1 provides:

> "1. - (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-
>
> (a) subject to paragraph (4), that the plaintiff is ordinarily resident out of the jurisdiction, or
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or,
>
> (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, or
>
> (e) that the plaintiff is a company or other body (whether incorporated inside or outside Northern Ireland) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so,
>
> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
>
> (2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.
>
> (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in

> the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim."

By rule 2:

> *"Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such times and on such terms (if any) as the Court may direct."*

The Order 23 regime applies to judicial review proceedings by virtue of Order 53, Rule 8:

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

[11] Article 674 of the Companies (NI) Order 1986 provides:

> *"Where a limited company is Plaintiff in an action or other legal proceeding, the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the Defendant's costs if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."*

Article 674 is an illustration of the import of Order 23, Rule 3 which provides that the Order is without prejudice to any statutory provision of this nature, a reflection of the supremacy of legislation. It also explains the analysis of Carswell LCJ in Re SOS (NI) Limited [2002] NIJB 252 at [8]:

> "[8] RSC (NI) Ord 59, r 10(5), in accordance with the authority conferred by s 38(1)(h) of the Judicature (Northern Ireland) Act 1978, provides:
>
> > 'The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.'
>
> It has long been the practice of the Court of Appeal to order that security for costs be furnished if the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal: see, eg, *Hall v Snowden, Hubbard & Co* [1899] 1 QB 593 at 594, per AL

> Smith LJ. The jurisdiction is in this respect wider than that exercised under Ord 23, when impecuniosity alone will not generally suffice to ground an order for security (except in the case of a limited company, which is governed by art 674 of the Companies (Northern Ireland) Order 1986)."

At the time when Re SOS was decided, Order 23, Rule 1 was confined to paragraphs (a) – (d). Paragraph (e) was added with effect from 12th October 2009 by SR 2009 No 345. It adopts the terminology of Article 674.

[12] Commenting on the (then) identical equivalent provision in England and Wales, the authors of The Supreme Court Practice 1999 state, at paragraph 23/3/3:

> *"Rule 1(1) provides that the court* ***may*** *order security for costs 'if, having regard to all the circumstances of the case, the Court thinks it just to do so.' These words have the effect of conferring upon the court a real discretion and indeed the court is bound, by virtue thereof, to consider the circumstances of each case and in the light thereof to determine whether and to what extent or for what amount a Plaintiff (or the Defendant as the case may be) may be ordered to provide security for costs."*

The commentary continues:

> *"A major matter for consideration is the likelihood of the Plaintiff succeeding. That is not to say that every application for security for costs should be made the occasion for a detailed examination of the merits of the case. …*
>
> *If there is a strong prima facie presumption that the Defendant will fail in his defence to the action, the court may refuse him any security for costs (see per Collins J in Crozat v Brogden [1894] 2 QB 30 at 33) …"*

In a later passage it is stated that the court "*… must take account of the Plaintiff's prospects of success …*".

[13] The English statutory equivalent of Article 674 is section 726(1) of the Companies Act 1985. This is in substantially the same terms as its Northern Ireland equivalent. The court is required to have regard to all the circumstances of the case: Sir Lindsay Parkinson v Triplan [1973] QB 609. There is no exhaustive or mechanistic list of relevant factors. These may include the apparent merits of the plaintiff's case, the timing of the application and whether the application is brought oppressively, for example for the purpose of stifling a meritorious claim. The exercise of this discretion is illustration in Aquila Design v Cornhill Insurance [1988] BCLC 134.

[14] It has also been held that a plaintiff is not required to demonstrate with certainty that it will be unable to pursue its claim if ordered to make security for costs, a probability sufficing: Trident International Freight Services v Manchester Ship Canal Company [1990] BCLC 263. Where this is demonstrated, it will rank as a factor to be reckoned, to be

allocated such weight as the court considers appropriate in the particular litigation context.

[15] An additional noteworthy feature of the decision in Trident is the Court of Appeal's deprecation of "*the elaborate and unnecessary investigation of the plaintiff's prospects of success which took place in the court below* ", adopting and approving the similar condemnation of the learned Vice – Chancellor in Porzelack v Porlezack [1987] 1 WLR 420, at 423.

[16] I take into account the citizen's right of access to a court, which has been recognised as constitutional in stature: R v Lord Chancellor, ex parte Witham [1998] QB 575, at 586 especially, per Laws LJ. This right is also enshrined in Article 6 ECHR and the court is subject to the duty imposed by section 6 of the Human Rights Act 1998 not to act incompatibly with a protected Convention right. This right is not, however, absolute. It may be the subject of proportionate conditions and limitations, such as limitation periods and the payment of court fees.

[17] This is illustrated in R (Unison) v Lord Chancellor [2015] EWCA Civ 935, which involved a challenge to subordinate legislation introducing fees in employment tribunals for the first time. I have also been assisted by the careful examination of the Article 6 considerations by Girvan J in McAteer v Lismore (No 2) [2000] 477 at 481 – 483, which I gratefully adopt. There, as in the present case, the matrix was one in which any order for costs against the plaintiff would be of no value. Security for costs in the amount of £7,500 was ordered

[18] This unprecedented cohort of interrelated judicial review cases has generated a multiplicity of case management and interim hearings and associated Orders. I have made clear, on more than one occasion, that it would be of enormous benefit if Mr Duff were to identify either a single case or a small number of cases the determination whereof could (not would) resolve other cases in the group. I also made clear that a positive response to this invitation would be a factor to which the court would probably attribute considerable weight in determining the Respondent's security for costs application. I stated that the court would view this as a factor of substance weighing against an order requiring the Applicant to make security for costs. Initially Mr Duff appeared to respond positively to this suggestion. However, this quickly faded, leaving an ocean of uncertainty for multiple respondents and successful planning applicants in consequence.. In determining the present applications I consider it legitimate to take this consideration into account.

[19] Since the determination of these applications involves the exercise of powers enshrined in the Rules of the Court of Judicature, the court is duty bound to seek to give effect to the overriding objective, per Order 1, Rule 1A(3). Thus I must seek *inter alia* to manage both the present case and all of the others belonging to the cohort, in excess of 30, in a manner proportionate to the importance of the case and the financial position of each party, to deal with these cases expeditiously and fairly and to allocate to them an appropriate share of the court's finite resources, while taking into account the demands of other cases in the court system. It has long been recognised that the exercise of case management powers entails a significant measure of discretion on the part of the court: see Prince Abdulaziz v Apex Global Management [2014] UKSC 64, at [13] per Lord

Neuberger, approving the statement of Lewison LJ in Broughton v Kop Football [2012] EWCA Civ 1743 at [51]:

> *"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."*

[20] At the instigation of Mr Duff several of the earlier hearings have been transcribed. Reference to the following provides enlightened insight into how the present case and the other members of the group have evolved:

(a) **Appendix 1**: Chronology of material dates and events.

(b) **Appendix 2**: Transcript of the decision of the deputy judge granting leave to apply for judicial review on 07 June 2018.

(c) **Appendix 3**: Transcript of the case management hearing conducted by me on 18 December 2018.

(d) **Appendix 4**: This court's *ex tempore* ruling at the conclusion of the aforementioned hearing.

[21] The leave decision (**Appendix 2**) is revealing. As appears from [12] of the transcript, the judge clearly envisaged that only one of the 30 plus cases would have to proceed in order to determine the planning policy issues raised. Mr Duff did not demur. Mr Duff's resistance to a "lead case/s" approach did not emerge until the case management hearing on 18 December 2018. In this context I refer to the (unedited) transcript (**Appendix 3**) and the court's ensuing ruling (**Appendix 4**).

[22] I must also take into account that the Applicant has been granted leave to apply for judicial review. While this is a relevant factor, what it actually means is that the modest threshold engaged, namely the demonstrating of an arguable case, betokening no assurance of ultimate success, was surmounted.

[23] I further take into account the character of this litigation. These are public law proceedings, involving no *lis inter-partes* and having a clear public interest element. In weighing this factor I accept that in pursuing this case – and all of the others – Mr Duff seeks no gain or benefit either for the Applicant or personal to him. These are genuine public interest proceedings.

[24] I turn to consider the protective costs rules and principles. These have their origins in an instrument of international law, the Convention on Access to Information, public participation in decision making and access to justice in environmental matters (the "*Aarhus Convention*"). The domestic instrument in this jurisdiction is the Costs Protection (Aarhus Convention) Regulations (NI) 2013 (the "*Aarhus Regulations*") as amended by the Costs Protection (Aarhus Convention) (Amendment) Regulations (NI) 2017. The Aarhus Convention is, per its recitals, designed to advance the causes of "*the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development*" and "*adequate protection of the environment*". Its self-proclaimed objective is, per Article 1:

> "*… the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing.*"

The three so-called "pillars" of the Convention are identifiable in its title (*supra*). The third of these pillars, namely access to justice in environmental matters, is engaged in every protective costs application in legal proceedings concerning environmental protection and preservation issues.

[25] The Aarhus Convention regime has the following main elements:

(a) First, **Article 3(8):**

> "*Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement.* ***This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.***"
>
> [My emphasis.]

(b) **Article 9(2)**:

> "*Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*
>
> *(a) Having a sufficient interest or, alternatively,*
>
> *(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a pre-condition,*
>
> *have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6.*"

(c) **Article 9(4)**:

> "*… the procedures referred to … above shall provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely* ***and not prohibitively expensive****.*"

(d) **Article 6:** this must be considered in conjunction with Annexe 1 in order to identify the "*activities*" giving rise to a decision, act or omission falling within Article 9(2). States Parties have the option of extending the Annexe 1 list of activities. Annexe 1 contains a list of 19 particularised activities, followed by:

> "*20. Any activity not covered by paragraphs 1 – 19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.*"

[26] The regime established by the corresponding domestic law measure, the Aarhus Regulations, establishes three financial caps in "*an Aarhus Convention case*". Per **Regulation 3(2)**:

> "*Subject to paragraph (4), 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 incorporated association.*"

As regards the respondent's costs, **Regulation 3(3)** provides:

> "*In an Aarhus Convention case, the court shall order that the costs recoverable from a respondent shall not exceed £35,000 subject to regulation 4(3).*"

Clearly these two instruments of international and municipal law fall to be considered together.

[27] In Edwards v Environment Agency (No 2) [2013] UKSC 78, the claimant, via judicial review proceedings, challenged the Agency's decision permitting a cement works to alter its authorised fuel from coal and petroleum coke to shredded tyres. The case was dismissed. An appeal ensued and another claimant was joined, giving rise to a "costs capping" order of £2,000 which, following dismissal of the appeal, was awarded. The second claimant appealed, unsuccessfully, to the Supreme Court which made cost orders in favour of the two respondents, whose bills of costs totalled some £90,000.

[28] The Supreme Court made a reference to the CJEU seeking guidance on the Aarhus Convention phraseology of "*not prohibitively expensive*". The CJEU decided: the test is not purely subjective; the cost of proceedings must not exceed the financial resources of the person concerned nor appear to be objectively unreasonable; the court could take into account the merits of the case, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages; where the claimant has

not been actually deterred from carrying on the proceedings, this is not determinative *per se*; and, finally, the same criteria are to be applied both at first instance and on appeal.

[29] The Supreme Court, in its final disposal of the case following the CJEU's preliminary ruling, noted that the Luxembourg Court had not given exhaustive guidance as to how to assess what is objectively unreasonable. By this stage the two respondents had agreed to limit their claim for costs to £25,000, which equated to the amount of security paid by the second claimant as a condition for bringing the appeal. The Supreme Court was satisfied that a costs order in this amount would be subjectively reasonable. It considered the more difficult question to be that of whether there should be some objectively determined lower limit. Giving effect to the various factors identified by the CJEU (*supra*), the court considered it impossible to characterise the sum of £25,000, viewed objectively, as unreasonably high, either on its own or in conjunction with the £2,000 awarded in the Court of Appeal.

[30] Notably the CJEU, in its judgment, reiterated what it had previously held in Case C-427/07 (Commission v Ireland) that the "*prohibitively expensive* [provisionof the Aarhus Convention] *does not prevent the national courts from making an order for costs*": see [25]. The court added at [35]:

> "*Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must be satisfy itself that that requirement has been complied with, taking into account both the interests of the person wishing to defend his rights and the public interest in the protection of the environment.*"

In the following passages, the CJEU acknowledged, in substance, the latitude available to national legislatures and the significance of "*all the relevant provisions of national law*": see [38]. At [40] the court made clear that factors other than "*the financial situation of the person concerned*" can properly be reckoned, repeating this at [46].

[31] The acutely one sided and unbalanced nature of the accommodation which the Applicant/Mr Duff is seeking from the court is unmistakable. It has three central components: his contention that the court should not order security for costs in any amount against the Applicant, his quest to secure a protective costs order for the Applicant restricting its potential costs exposure to £100 maximum and his intention to seek to recover some £6,000 from the PAC in the event of the judicial review succeeding. This arrangement, if sanctioned by the court, would result in the PAC being unable to recover any costs if the challenge fails, in a context where its estimated costs are at least £20,000 plus VAT or, alternatively, having to pay some £6,000 costs in the event of the Applicant's challenge succeeding.

[32] It falls to the court to strike a balance which is harmonious with the applicable legal rules and principles and the principle of proportionality. In so doing the court takes

into account all of the facts and factors noted at paragraphs 2 – 4, 6 – 7, 9, 18 – 19 21 – 23 and 31 above.

[33] The importance of environmental protection is acknowledged by the court, unreservedly so. However it is clear from Edwards that the court can properly consider the nature and extent of any possible environmental detriment arising out of the authorised development. In this case, the impugned grant of planning permission authorises the construction of a dwelling house and garage on a site which is bounded on each side by existing dwellings, in a rural area. The site consists of 0.308 hectares. If the development proceeds there will of course be resulting environmental damage and disturbance. However, this development contrasts starkly with the list of "*activities*" in Annex 1 to the Aarhus Convention (mineral, oil and gas refineries, the production and processing of metals, waste management, waste water treatment plants, industrial plants *et al*). I consider that the imperative of environmental protection must be evaluated according to the specific context. The public interest, which belongs to a notional spectrum of some breadth, is to be calibrated accordingly.

[34] The public interest is, moreover, multi-faceted. It is not confined to protection of the environment and the prohibition of inappropriate land use. Rather it extends to encompass *inter alia* the factor of taxpayers' contributions and the associated funding of public authorities such as the PAC. It further encompasses the consideration that in any form of litigation one party should not have an unfair and/or unreasonable advantage at the expense – financial or otherwise – of another. The court recognises that one effect of the policy underlying the Aarhus Convention Regulations is that, in pursuit of the public interest of environmental protection, the notional "playing field" may be uneven. It is considered, however, that the kind of acute distortion, or skewing, which the Applicant's stance demands is not necessarily dictated by this legislative measure and must be balanced by other reasonable access to court mechanisms, which include in appropriate cases a requirement that a limited, but proportionate, payment of security for costs be made.

[35] Furthermore, It seems undeniable that Mr Duff has established certain registered companies, including the Applicant in these proceedings, with a view to engaging in extensive litigation activities, which I have described as of unprecedented volume and, simultaneously, has by this mechanism effectively protected the promoters and operators of the companies from personal costs liability. The assets and resources of every limited company are confined to what its promoters, owners and investors are prepared to provide. Mr Duff has made a series of conscious decisions in this regard. The court must be alert to any possible manipulation of its process in every case. This clearly exposed costs avoidance mechanism is not harmonious with the proper invocation of the court's process and is a factor of significance which the court must reckon.

Conclusion

[36] Giving effect to all of the foregoing, I have determined to exercise the discretion of the court in the following manner:

(a) In the event of the Applicant having to pay costs, the amount recoverable will not exceed £10,000 including VAT.

(b) The Applicant will make security for the Respondent's legal costs and outlays in the same amount, ie £10,000 including VAT, and shall do so in accordance with the applicable procedural requirements and mechanisms by **19 March 2019**.

The costs of these applications are reserved.

Appendix 1

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RURAL INTEGRITY (LISBURN 01) LTD (ACTING IN PERSON) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE PLANNING APPEALS COMMISSION
DATED 11TH DECEMBER 2017

CHRONOLOGY OF MATERIAL DATES AND EVENTS

DATE	PARTY	EVENTS
9/3/18	Applicant	Lodged Application for leave/ served on Respondent
10/3/18	Applicant	Served copy papers on developer at home address
14/3/18	Court	Case Management Direction Order (1)
22/3/18	Applicant	Lodged indexed and paginated Leave documents with the Court Forwarded Pre Action Protocol Letter to Respondent
23/3/18	Applicant	Served paginated/indexed Application bundle on Respondent

24/4/18	Court	Ordered standing submissions
1/5/18	Applicant	Lodged Standing submission, affidavit GD2 and exhibits
11/5/18	Respondent	Submitted Leave skeletal argument
20/5/18	Court	Case management Direction Order (2) to confirm full compliance
22/5/18	Applicant	Lodged and served Affidavit GD3 and exhibit
29/5/18	Court	Case Management Directions (3) - Leave submissions and Hearing
4/6/18	Respondent	PAP Reply and Leave Bundle
6/6/18		LEAVE HEARING
7/6/18	Court	Court Order requiring various action by the Parties
21/6/18	Applicant	Submitted Notice of Motion, Order 53, Affidavit GD4 and exhibit
5/7/18	Applicant	Submitted Costs Protection Application
23/7/18	Applicant	Submitted Affidavit re service of Notice of Motion
21/8/18	Respondent	Submitted Application to extend time
4/9/18		HEARING TO EXTEND TIME
5/9/18	Court	Order requiring further cost submissions and setting Hearing Date
6/9/18	Respondent	Submitted Affidavit of Pamela O'Donnell and exhibits
24/9/18	Applicant	Submitted amended Costs Protection application
15/10/18	Respondent	Submitted skeletal argument on costs and bundle
26/10/18	Applicant	Reply to Respondents costs submission and affidavit GD5/ exhibits
19/11/18	Applicant	Submitted skeletal argument for Main Hearing
27 11/18		Application for Hearing
30/11/18		Hearing Scheduled

Appendix 2

AUSCRIPT
FAST PRECISE SECURE

ICOS NO 2018/026370/01

THE ROYAL COURTS OF JUSTICE OF NORTHERN IRELAND

RURAL INTEGRITY (LISBURN 01) LIMITED

-V-

PLANNING APPEALS COMMISSION

JUDICIAL REVIEW

HEARD BEFORE

LORD JUSTICE WEATHERUP

ON

7th June 2018

APPEARANCES

MR DUFF appeared on behalf of the Applicant Rural Integrity (Lisburn 01)

MR MCATEER appeared on behalf of the Respondent PAC

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LORD JUSTICE WEATHERUP: Yes, thank you. This is an application by Rural Integrity (Lisburn) Ltd for leave to apply for judicial review of a decision of the Planning Appeals Commission of the 11th December 2017, by which it allowed an appeal against the refusal of planning permission by Mid and East Antrim Borough Council for an infill site at 50 and 52 Ballee Road West in Ballymena.

The Applicant has filed an amended Order 53 statement, and by that Order 53 statement it raises a series of issues in relation to the grant of a planning permission. I draw attention, I think for present purposes, simply to two of the matters that arise. First of all, at paragraph 28 of the amended Order 53 statement it said that the central argument by the Applicant is that the SPPS states the guidance in building on tradition issued to clarify PPS21 must be followed, and it appears that the Respondents failed to consider this, both by lack of reference to it or by noticeable lack of reasons why it is not appropriate to follow the guidance.

At paragraph 61 under the heading Definition of Buildings Drawn from PPS 21 and Building on Tradition Combined, it stated that there are 10 pages of literary and diagrammatic explanation, and on reading them it is clear that buildings are treated in a similar way in the various policies, and that these plots contain existing buildings and that ancillary buildings are not granted any status.

These two particular points claim to feature large in this application which, in essence, indicates that the authorities, both in the local councils and in Planning Appeals Commission have been misapplying planning guidelines according to the plaintiff - according to the Applicant. We are, however, at a preliminary issue stage and the issue stage is to whether or not the Applicant, in this case the limited company, has standing.

The grounding affidavit in the case explains the status of the Applicant as a company, which has been established according to the grounding affidavit of Gordon Duff, who is the company director and a director of Rural Integrity (Lisburn) Ltd, which has been set

up to challenge planning decisions in the rural areas of Lisburn and Castlereagh Borough Council. He there avers that this is one of over a dozen such infill applications approved by the council over the last three months that the Applicant is concerned about. He explains at that time what his issue was, which was to do with the interaction between two planning documents. The first one was PPS21, Sustainable Development in the Countryside issued in June 2010. The second one was Strategic Planning Policy Statement, Development in the Countryside, of 2015. Mr Duff's point was that these documents had been misunderstood.

Now, that argument has been refined and expanded to the extent that I have referred to the two particular issues in the amended Order 53 statement, and by particular reference to a further guideline document issued in 2012 entitled Building on Tradition, which the present emphasis is on by which Mr Duff indicates that attention has not been paid to this document in making infill decisions.

Also, since the matter was originally developed, attention has been drawn to a decision by Mr Justice McCloskey of 9th March 2018, which is McNamara v Lisburn and Castlereagh Council, which was dealing with the effect of the two planning documents to which I've referred. As I have said, the Applicant's argument has been that those two documents were not properly applied.

The amended Order 53 statement to which I've referred was a result of further consideration of the guidelines and of the McNamara case by Mr Duff. So, as is usual with these judicial review applications, it has become somewhat refined since it originated.

The relevance of all this for the purpose of this application is that in the 2012 document, there is a planning policy which is called CTY8 on ribbon development. It states that: "Planning permission can be refused which creates or adds to a ribbon of development". Then it says: "An exception will be permitted for development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise

1 substantial or continuously built-up frontage". A substantial and built-up frontage is
2 defined as "including a line of three or more buildings along a road frontage without
3 accompanying development to the rear".
4
5 The 2015 document to which I have referred includes at paragraph 6.73 under the
6 heading Residential Developments a number of bullet points. The fourth one is infill
7 ribbon development which states, "Provision should be made for the development of a
8 small gap site in the otherwise substantial and continuously built-up frontage.
9 Planning permission will be refused for a building which creates or adds to a ribbon of
10 development". So, it is differently stated to the 2012 document but the 2012 document
11 is reserved and still applies.
12
13 Further, at paragraph 6.78 of the 2015 document, "Supplementary planning guidance
14 contained within Building on Tradition, a sustainable design guide for the Northern
15 Ireland countryside, must be taken into account when assessing all development
16 proposals in the countryside". That then takes us to the 2012 document which provides
17 the guidelines. Again, I'm not going to go through the details of that but, for example,
18 on page 70 it refers to CTY8 ribbon development, which sets out the circumstances in
19 which a small gap site can in certain circumstances be developed. So, it qualifies the
20 circumstances in which a small gap site may be developed. For example, at page 71 it
21 says, "Sometimes a ribbon development does not have a consistent building set back.
22 Where this occurs, the creation of a new site in the front garden of an existing property
23 is not acceptable under CTY8 if this extends the extremities of the ribbon".
24
25 Then on page 73, "What is not a gap site?" At 4.50: "There will also be some
26 circumstances where it may not be considered appropriate under the policy to fill these
27 gap sites as they are judged to offer an important visual break in the developed
28 appearance of the local area".
29
30 What this application comes down to is that the planning authorities have not been
31 giving consideration to this guidance, and the provision that there may be cases where

there is a gap but the visual break may be paramount rather than the infill. That is the character of the guidance which it is said has been disregarded by the planning authorities.

There is the second point to which I have already referred, namely "what is a building" for the purposes of ribbon development and infill; and are what are called ancillary buildings such as garages and garden sheds buildings for the purposes of such infill?

Now, I return to the point of this hearing, which is standing. On the Respondent's case of standing, the Applicant in this case is limited in its objects to addressing planning issues in the Lisburn and Castlereagh district, whereas this is a challenge to premises in Ballymena. Further, it said that the company has no assets. More than that, Mr McAteer on behalf of the proposed Respondent, really sees this application by the limited company as an exercise in effect avoiding costs, although he didn't put it quite as strongly as that, because the company having no assets won't find itself liable or won't able to meet any costs should it be unsuccessful. This is a point which is really alleging abuse of process, I think.

Further, it is said that the Respondent in this case is the Planning Appeals Commission, and that there are a series of other cases here in which it is the councils which are making the planning decisions, and two of the other cases concern the Lisburn Council making the decisions. If this is indeed a challenge to be made, says the Respondent, it ought to be directed against a case that involves a decision, a planning decision by the Council, and preferably one involving Lisburn Council if it is to be this Applicant because its objects are so limited.

On the other side, the Applicant says that the proper respondent in this case is the Planning Appeals Commission because it makes the decisions on appeal from the councils, and its rulings apply to all the councils. And further, this applies - this therefore includes the Lisburn and Castlereagh Council where the Applicant operates.

Now, for the purposes of determining standing, the provision in the 1978 Judicature Act and in Order 53 provides that the Applicant on a judicial review must have sufficient interest. So, the issue becomes what is sufficient interest for this purpose. It is recognised that there may be those who are not directly involved in a particular decision, such as lobby groups or pressure groups, who may be included as people with sufficient interest. It is clear to me anyway that Rural Integrity is what you might call a lobby group; it has been set up by Mr Duff to be a lobby group or a pressure group. That is not in itself a grounds for exclusion if they are sufficiently representative. I have heard a case myself involving Friends of the Earth, which is also a lobby pressure group. That decision is reported in 2007 NI 33.

Also the Court of Appeal in this jurisdiction has looked at pressure groups and lobby groups in D's application which is reported in 2003 NI 295. The provisions of that - the requirements of that are summarised in Gordon Anthony's book on judicial review. I refer to that at paragraph 3.68 where he says, "There are four generally valid propositions about the current judicial abuse to standing". And they are one, that standing is a relative concept to be deployed according to the potency of the public interest content in the case. Two, that the greater the amount of public importance that is involved in the issue before the court, the more readily the court should be to hold that the applicant has the necessary standing. Three, that the focus of the courts is more upon the existence of the fault or abuse on the public authority than the involvement of personal right or interest in the part of the applicant. Four, that the absence of another responsible challenger is frequently a significant factor so the matter of public interest or concern is not left unexamined.

So, the whole focus there is on identifying whether there is a public interest issue that requires to be addressed. Then there are various ancillary matters. So, is there a public interest issue here that needs to be addressed? Well, it is contended that there is a public interest, which is that the Planning Appeals Commission and the councils do not appear to take into account the guidance provided in Building on Tradition in assessing infill requirements on planning for ribbon development instances. The Respondent

says simply that it is not referred to, as it hasn't been raised in any particular case and therefore it is not necessary to address it.

In this case it is said that it is not a reason for the decision that was taken by the Council on the particular infill. That is correct, it is not one of the reasons given. There are two reasons given, which are to do with the interaction of the planning policy documents to which I have referred, and I will not repeat that. It is necessary to point out, as Mr Duff has done, that the local authority decision does make a reference to the issue of visual break, although it is not specifically identified in the reasons for the decision. So, this issue about visual break, which is an issue that arises out of the guidance, is a matter relied on by the Council in its reasoning, if not its reasons, for the outcome.

The Planning Appeals Commission discusses the two reasons that are given. It does not address the issue of visual break, and it is not apparent in looking at the decision that it addresses the issues raised by the guidance, namely that having identified a gap, it is not sufficient to ask is the proposal appropriate to fill the gap. There is a preliminary question: Should the gap be filled at all and, if so, the second question becomes is the proposal appropriate to fill the gap?

It seems to me that there is a public interest issue here which is not being addressed, or at least arguably so there is a public interest that is not being addressed. Therefore, the question arises as to whether the applicant company should be permitted to make that challenge.

Now as I have said, the Applicant is a pressure group/lobby group. It is noted that its objects are limited to the Lisburn Castlereagh area. It is said, however, that the decisions of the Planning Appeals Commission affect all, or have a bearing on and set a precedent for all planning decisions involving infill. That affects all within the Lisburn Castlereagh area. So, I am satisfied for the purposes of this exercise that the Applicant is affected in that its objects of overseeing, as it sees itself doing, planning permissions in the Lisburn and Castlereagh area is affected by the approach of the Planning Appeals

1 Commission to the various policies statements in guideline documents.
2
3 I am satisfied that there is a public interest issue here because on both grounds relied
4 on - visual impacts and buildings - it is necessary to have a proper approach to the infill
5 issue. Nobody else is taking up this public interest issue, it seems. There are a number
6 of cases where the issue has arisen. It is an issue that ought to be examined. All of
7 those factors combined seem to me to raise a question that requires examination. In the
8 absence of anyone else and there being a public interest issue, I am satisfied that the
9 Applicant should be permitted to raise the issue.
10
11 Now, there is an ancillary question that arises, that is raised by the Respondent and that
12 is the issue of costs. The first element of that is that this is one of a number of cases
13 which, as I understand it, raise the same issues, the same two issues; one about visual
14 effect and the other about buildings. There are two more pending cases. Now, in the
15 interests of costs, it is only necessary to have this looked at in one case and therefore
16 only necessary for one case to go forward. This case against the Planning Appeals
17 Commission seems to me to be an appropriate case to go forward, and that the others
18 should stand back while this matter is considered. That is a management issue in
19 relation to costs so as not to incur unnecessary costs in all the other cases.
20
21 The second issue that Mr McAteer raises is really to do with the costs in this particular
22 case then, because he says that the Respondent has no assets and therefore if
23 unsuccessful, there will be no recovery. He raises the issue of security for costs but isn't
24 proposing, and accepts that he cannot make an order against the Applicant for security
25 for costs. It is a factor that I have taken into account in determining whether or not the
26 case should proceed but I'm not satisfied, given that there is a public interest issue that I
27 feel ought to be addressed, that it is a ground for refusing the matter against the PAC to
28 proceed.
29
30 However, I reserve the position as to how costs are going to be dealt with in the
31 particular case because I accept that there is an issue. It is potentially a matter in some

1 cases, and I'm not saying it is this case, where an abuse of process could arise where
2 parties form a company with no assets and thereby render themselves not liable to meet
3 costs that might be incurred. That is an issue that is going to have to be addressed. I
4 reserve how it is going to be addressed. But on the issue of standing, I am satisfied that
5 the case should proceed.
6
7 Now, at the same time, Mr McAteer, should I give leave or do you think that there is
8 another step that is required between the grant of standing and the grant of leave, or
9 should we move straight to that point?
10 MR MCATEER: No. I think in light of comments that my Lord has made, it may seem
11 pointless to have a separate hearing when my Lord has considered the question of
12 arguability as part of it.
13 LORD JUSTICE WEATHERUP: Well, I think that is probably best, so I grant standing
14 and leave.
15 MR MCATEER: Yes. If I could raise one issue for the avoidance of doubt. The point
16 was made that there is a question mark over whether we can apply for security for costs
17 and I particularly drew the court's attention to Order 53 rule A, and indicated that I
18 wasn't - yesterday I think it was, or two days ago - making an application for security of
19 costs. My Lord is entirely correct on that basis. But I hadn't said that we would not
20 make an application for security of costs.
21 LORD JUSTICE WEATHERUP: Yes.
22 MR MCATEER: It well be that we do and ask the court to rule on the issue on whether
23 the application for security for costs can be made and that it be made.
24 LORD JUSTICE WEATHERUP: Well, as I said, I have reserved this whole issue about
25 costs, whether it is done by way of security for costs or in some other manner.
26 MR MCATEER: Yes.
27 LORD JUSTICE WEATHERUP: I think the question as to costs is live not just to this
28 case. I can see the bigger picture here about people coming in and the impact on public
29 authorities of them having to incur costs.
30 MR MCATEER: Yes, my Lord. I am simply flagging up that ...
31 LORD JUSTICE WEATHERUP: Yes.

1 MR MCATEER: ... it could well be that we bring an application for security for costs
2 order.
3 LORD JUSTICE WEATHERUP: I think the step on costs is to leave it for you to decide
4 what your next move will be ...
5 MR MCATEER: Yes.
6 LORD JUSTICE WEATHERUP: ... in relation to that. Mr Duff is alert now to the fact
7 that this is a real point.
8 MR MCATEER: Yes, my Lord.
9 LORD JUSTICE WEATHERUP: And that it will at some point have to be addressed.
10 That being so, then I have granted standing, I have granted leave, we are reserving how
11 the question of costs should be reserved - should be dealt with. What else?
12 MR MCATEER: My Lord, with respect to the question of standing, can I just confirm
13 whether my Lord is - my Lord has ruled for the purpose of leave on the issue of
14 standing. Are we free to revisit that at the final hearing?
15 LORD JUSTICE WEATHERUP: Yes.
16 MR MCATEER: Thank you, my Lord. Then, my Lord, I suppose we are into
17 timetabling. If we could be allowed - I am trying to think of the summer vacation.
18 LORD JUSTICE WEATHERUP: Well, is the developer here? The developer was on a
19 notice party, I think to the matter.
20 MR MCATEER: They are not here, my Lord, no.
21 LORD JUSTICE WEATHERUP: Has the developer contributed anything to the ---
22 MR MCATEER: He wrote in complaining that they had been served with limited
23 papers in the matter.
24 LORD JUSTICE WEATHERUP: Well, I saw that.
25 MR MCATEER: Other than that, no, they haven't.
26 LORD JUSTICE WEATHERUP: This is for the development of developing houses, is it,
27 two dwelling houses?
28 MR MCATEER: Yes.
29 LORD JUSTICE WEATHERUP: So, there is no practical urgency about it other than
30 their personal desire to get on with it, I expect.
31 MR MCATEER: Yes, my Lord. We're not sure what they have or haven't done ---

1 LORD JUSTICE WEATHERUP: They haven't signalled any financial problems or
2 anything that would arise?
3 MR MCATEER: No, my Lord. Of course, if there is anything of that nature, they are
4 free to make an application and bring the matter back to court.
5 LORD JUSTICE WEATHERUP: Yes. So, they haven't said that.
6 MR MCATEER: I think the first thing would be to ensure that Mr Duff serves all of the
7 papers on the third party. They would be entitled as a properly interested party to have
8 the papers served on them.
9 LORD JUSTICE WEATHERUP: Yes.
10 MR MCATEER: And to then apply to be here and be heard in the case, if they wished
11 to do so.
12
13 I suppose then we are into issues of housekeeping and timetabling. If I could ask my
14 Lord if we could have two weeks within which to make any applications in respect of
15 costs that has been left open. Then, my Lord, I am conscious of time ---
16 LORD JUSTICE WEATHERUP: This case isn't going to be dealt with until September.
17 MR MCATEER: It isn't, my Lord. I am conscious of two things ---
18 LORD JUSTICE WEATHERUP: And I think it should be dealt with by Mr Justice
19 McCloskey, who has written the judgment on the existing case. It needs to be qualified
20 now by points that are being raised.
21 MR MCATEER: Yes, my Lord.
22 LORD JUSTICE WEATHERUP: I think it would be appropriate that he should develop
23 that.
24 MR MCATEER: Yes, my Lord.
25 LORD JUSTICE WEATHERUP: In other words, I am putting it back into his court.
26 MR MCATEER: No, I understand that. There were two issues. I was going to raise the
27 issue of timetabling and then the issue of the Order 53 statement. At the moment it
28 runs to, I think, almost if not over 100 paragraphs. I think there has been two identified
29 grounds in the middle of it. It might be that Mr Duff could properly revisit that and
30 provide a more coherent document. I leave that in my Lord's hands but it would
31 certainly make it more manageable. When he spoke yesterday, it seemed to be at least a

1 much more refined attack.
2 LORD JUSTICE WEATHERUP: Did he give leave - well, he doesn't need leave to
3 amend?
4 MR MCATEER: Well, he does need leave after the grant of leave; he doesn't need leave
5 before the grant of leave.
6 LORD JUSTICE WEATHERUP: So, he doesn't need leave.
7 MR MCATEER: But we've no objection to it. I mean, we are inviting the court to give
8 him ---
9 LORD JUSTICE WEATHERUP: The present amended one doesn't really count.
10 MR MCATEER: No, sir the present amended one does count because you don't need
11 leave prior to the grant of leave.
12 LORD JUSTICE WEATHERUP: I see.
13 MR MCATEER: But now that leave has been granted, he will require leave to make a
14 further amendment. We would invite the court to direct that he provides a
15 substantially reduced and more focussed Order 53 statement any further affidavit if he
16 wishes if he feels there is material within that is properly set out. I'm not inviting a
17 further elaboration, if you like, but if there is material he thinks in removing from the
18 Order 53 needs to be placed on an evidential footing, he can do that at the same time. If
19 he needs two weeks; whatever he needs, I have no real objection to that, my Lord.
20 LORD JUSTICE WEATHERUP: This is for him to draw all his papers together? Now, I
21 am not going into enter into whether he should delete this or delete that.
22 MR MCATEER: No, no, I am not asking my Lord to parse the grounds, I am simply
23 asking that he himself focuses.
24 LORD JUSTICE WEATHERUP: That he should present it. Very well. Well, he's going
25 to have to serve a notice now that the case has been granted leave, and you can tell him
26 what that requires.
27 MR MCATEER: My Lord, it is a notice of motion.
28 LORD JUSTICE WEATHERUP: A notice of motion, yes. If you can tell him that what
29 that is, if he doesn't already know.
30 MR MCATEER: Yes.
31 LORD JUSTICE WEATHERUP: He can put together a notice and an Order 53

1 statement with it if he wants to change that in some way.
2 MR MCATEER: I am sure Mr Duff has been round the block enough to draft his own
3 notice of motion.
4 LORD JUSTICE WEATHERUP: No, I am not suggesting you draft it for him, only to
5 tell him what it is.
6 MR MCATEER: Yes, my Lord.
7 LORD JUSTICE WEATHERUP: Or show him one, if you happen to have one there, so
8 that he knows what he is doing. I think we should be assisting him as he is on
9 unassisted.
10 MR MCATEER: Yes, my Lord.
11 LORD JUSTICE WEATHERUP: It only requires him to see what this notice look like.
12 MR MCATEER: Sorry, my Lord, I am not being flippant. I should say we will do that,
13 my Lord. He has brought an application in the last couple of months in which he
14 served his own notice of motion.
15 LORD JUSTICE WEATHERUP: Well then, no, he doesn't need it.
16 MR MCATEER: He is well familiar with it.
17 LORD JUSTICE WEATHERUP: Right. This notice and any amended Order 53, then
18 two weeks to do that and in the affidavit, if there is to be one. I will explain it to
19 Mr Duff in a moment. If we do that, then what is required then?
20 MR MCATEER: Any application in respect of security for costs within, say, two weeks
21 thereafter, my Lord. And then subject.
22 LORD JUSTICE WEATHERUP: Well, not two weeks after because that is not going to
23 be heard. Two weeks from now.
24 MR MCATEER: Okay. Two weeks from now, my Lord, yes.
25 LORD JUSTICE WEATHERUP: Get it on.
26 MR MCATEER: Yes, my Lord. My Lord, affidavit wise, I am conscious that ordinarily I
27 would ask for four weeks but that is taking us into July at that stage. It may be that
28 there is not very much affidavit evidence required when we have a written decision,
29 but there may be some material, for example relating to what arguments were
30 advanced before the ---
31 LORD JUSTICE WEATHERUP: Affidavit by 31 July then?

1 MR MCATEER: Yes, my Lord, thank you.
2 LORD JUSTICE WEATHERUP: Then that's it. Then we'll have...
3 MR MCATEER: Again, a rejoinder from Mr Duff. He is entitled to a rejoinder.
4 LORD JUSTICE WEATHERUP: Yes, very well. 15th of August.
5 MR MCATEER: And perhaps review early in the new term before Mr Justice
6 McCloskey.
7 LORD JUSTICE WEATHERUP: Yes. I'm going to list it for review on the 5th of
8 September and provisional hearing date on the 24th of September.
9 MR MCATEER: Sorry, my Lord. (Pause) Yes, my Lord.
10 LORD JUSTICE WEATHERUP: Mr Duff, I'm going to list the matter for review before
11 Mr Justice McCloskey on the 5th of September, and provisionally list it for hearing on
12 the 24th of September. Do those dates suit you?
13 MR DUFF: They do, my Lord.
14 LORD JUSTICE WEATHERUP: Then the position - is there anything else you want to
15 raise?
16 MR DUFF: Yes, my Lord.
17 LORD JUSTICE WEATHERUP: Yes.
18 MR DUFF: In my Order 53 in my relief, I have raised the issue of cost protection.
19 LORD JUSTICE WEATHERUP: Yes.
20 MR DUFF: And I submitted an affidavit, a statement of means on the company.
21 LORD JUSTICE WEATHERUP: Yes.
22 MR DUFF: At what stage would I ---
23 LORD JUSTICE WEATHERUP: Mr McAteer, cost protection?
24 MR MCATEER: I don't think he needs to respond to that until we put in our
25 application, my Lord, and then he can.
26 LORD JUSTICE WEATHERUP: But he wants cost protection.
27 MR MCATEER: Sorry, cost protection. Perhaps that can be dealt with at the same time.
28 LORD JUSTICE WEATHERUP: Yes. You'd better do it at the same time as the security
29 for costs issue.
30 MR DUFF: Yes, my Lord.
31 LORD JUSTICE WEATHERUP: And deal with them both together.

1 MR DUFF: Yes.
2 MR MCATEER: If no issue of proceeding with security for costs, we will confirm our
3 position in writing to Mr Duff and allow it to be dealt with administratively, but in the
4 meantime if we can reserve to have it dealt with at the same time as security for costs.
5 LORD JUSTICE WEATHERUP: Is there anything you require him to do? He has put in
6 something about his means. Has he done what you require, or do you want anything
7 else done?
8 MR MCATEER: I don't think there is any else we need done from him in respect of ---
9 LORD JUSTICE WEATHERUP: So, security for costs and protective costs order will be
10 dealt with together.
11 MR MCATEER: Yes, my Lord. I mean, Mr Duff has made the assertion in his pleadings
12 that it is an Aarhus Convention case. If that is correct, there would be no need to delve
13 into means et cetera.
14 LORD JUSTICE WEATHERUP: Yes, very well then. Mr Duff, that will be dealt with at
15 the same time as security for costs, so you will hear within two weeks from them what
16 they're going to do about costs.
17 MR DUFF: I have one other issue, my Lord, which is very minor. The developer, I
18 believe, didn't become a notice party.
19 LORD JUSTICE WEATHERUP: Sorry, the what?
20 MR DUFF: I believe the developer didn't become a notice party.
21 LORD JUSTICE WEATHERUP: He is a notice party.
22 MR DUFF: Yes. I inquired at the court office and I submitted all the original papers on
23 the developer. I didn't see therefore any need - as they didn't become a notice party - to
24 keep on serving all the papers.
25 LORD JUSTICE WEATHERUP: Well, I think they want to be on notice.
26 MR DUFF: I will do this if you require it. I am happy doing it.
27 LORD JUSTICE WEATHERUP: I think we should keep them informed. Whether they
28 want to come in to do anything, that is up to them.
29 MR DUFF: Okay, my Lord.
30 LORD JUSTICE WEATHERUP: In summary, Mr Duff and Mr McAteer, the position is
31 this: I am granting standing to this Applicant, and that will be revisited at the final

1 hearing as Mr McAteer has requested. I grant leave to apply for judicial review.

2 The Applicant then is to provide a notice of motion, and an Order 53 statement which

3 Mr McAteer is inviting you to edit.

4 MR DUFF: Yes.

5 LORD JUSTICE WEATHERUP: And you might consider doing that. Any affidavit that

6 you want to - any new affidavit, if you want to put one in. All of those matters are to be

7 dealt with and sent to them within two weeks. That bunch of papers is also to be sent

8 to the developer.

9

10 The costs issue in the case is being reserved. That is on two fronts; one, the Applicant is

11 looking at security for costs and will move on that within two weeks. Mr Duff's

12 application for protective costs will be dealt with at the same time whenever that is

13 dealt with. Outside both the protective costs order and the security for costs matter,

14 there is the more general costs issue about whether companies with no assets - how

15 companies with no assets are going to be dealt with if they bring these kinds of

16 applications repeatedly, which Mr Duff is proposing to do on some scale, it would

17 seem. That whole issue is reserved as well as the security for costs and the protective

18 costs issue.

19

20 Next, any affidavit that has to be filed by the Respondent will be by the 31st of July.

21 Any rejoinder to that from the Applicant by the 15th August. Review on the 5th

22 September and the provision date for hearing is the 24th of September. Anything

23 arising?

24 MR DUFF: No, thank you, my Lord.

25 LORD JUSTICE WEATHERUP: Anything arising? No. Thank you.

26

27

28 *We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*

Appendix 3

ICOS NO 2018/026370

THE ROYAL COURTS OF JUSTICE OF NORTHERN IRELAND

RURAL INTEGRITY (LISBURN 01) LIMITED

-V-

PLANNING APPEALS COMMISSION

JUDICIAL REVIEW

HEARD BEFORE

LORD JUSTICE MCCLOSKEY

ON

18th December 2018

INDEX

MR DUFF appeared on behalf of the Applicant Rural Integrity (Lisburn 01)

MR GILLEN appeared on behalf of the Applicant Rural Integrity (Lisburn 04)

MR MCATEER appeared on behalf of the Respondent PAC

MR BEATTIE appeared on behalf of the Respondent Lisburn Castlereagh city council

MR BEATTIE appeared on behalf of the Respondent Mid and East Antrim borough council

MR BEATTIE appeared on behalf of the Respondent Antrim and Newtownabbey borough council

MR COMPTON appeared on behalf of Mr and Mrs McCombe

1 MR JUSTICE MCCLOSKEY: Well, I have the appearances from the previous listings,
2 thank you. Can I just ask, is there anybody in attendance this morning who was not
3 here on a previous occasion?
4 MR BEATTIE: Just me, my Lord.
5 MR JUSTICE MCCLOSKEY: Now, just think about that, is everyone here for the
6 second or more time? Very good. Thank you. Now, I just want to note what I've
7 received. Some of the materials that I've been given this morning I haven't read yet, so I
8 can see that there's a submission from Mr Beattie, on behalf of Lisburn and Castlereagh
9 city council. There's a submission on behalf of Mr McAteer. There's a submission from
10 Mr Duff, entitled 'Submission on financing and costs', et cetera. And then, Mr Duff,
11 would you tell us, please, in how many cases have you provided a draft protected cost
12 order?
13 MR DUFF: The ones that you've directed, my Lord.
14 MR JUSTICE MCCLOSKEY: I didn't.
15 MR DUFF: I'm not sure how many others, may be about ten.
16 MR JUSTICE MCCLOSKEY: I don't think I went through an exercise of picking out
17 individual cases.
18 MR DUFF: No.
19 MR JUSTICE MCCLOSKEY: And directing you to provide a draft order in those
20 cases, so I don't understand the word 'directed' there, really. You - you've picked them,
21 haven't you?
22 MR DUFF: No, my Lord. I - I was subject to directions from the court in relation to
23 various things and some of them, there were directions given to submit - to make
24 submissions.
25 MR JUSTICE MCCLOSKEY: Well, I haven't been able to go through these draft
26 protected costs orders, and I haven't counted them, and that's the kind of luxury that I
27 don't have just at the moment.
28 MR DUFF: Yes.
29 MR JUSTICE MCCLOSKEY: So, can you tell me in how many of these cases you've
30 provided a draft order of that kind?
31 MR DUFF: There's one document that will help, and that is where I list all my cases.

1 MR JUSTICE MCCLOSKEY: It would be quite simple if you'd done it in all the cases
2 but you seem to be saying you haven't done it in all the cases. Is it better to ask you, is
3 it simpler to ask you in which cases have you not taken this step? If that's not simpler
4 then we'll stick with the first approach.
5 MR DUFF: I have informed the court of a lack of protocol letters, I wouldn't have
6 submitted anything if there hasn't been a protocol letter.
7 MR JUSTICE MCCLOSKEY: Well, let's try and stick to the straight and narrow,
8 Mr Duff.
9 MR DUFF: OK.
10 MR JUSTICE MCCLOSKEY: Is there a way of answering my question?
11 MR DUFF: Yes, it took me a bit of time just to find the document where I have referred
12 to all the cases and there is a column where I've …
13 MR JUSTICE MCCLOSKEY: You've got a column of some sort then. Well, you look
14 at your column, right, if that helps. Well, I'll tell you what we'll do, Mr Duff. I'll just
15 ask you to email the office during the course of today with an answer to my question.
16 MR DUFF: I've found the list, my Lord.
17 MR JUSTICE MCCLOSKEY: Well I'm not going to note it, I think you'd better do it
18 in writing anyway.
19 MR DUFF: Yes, OK.
20 MR JUSTICE MCCLOSKEY: That will be much better. So that will then be
21 forwarded to me and I can put it on to the general file I'm trying to keep here. Now,
22 come back to the question of selecting a suitable case which we can call in rough and
23 ready terms a lead case. What is your position on that, Mr Duff? It hasn't been clear
24 yet.
25 MR DUFF: Yes.
26 MR JUSTICE MCCLOSKEY: I know you say one case is better than all the others,
27 and we all know which one that is, but you haven't yet been clear on where you would
28 stand on the two scenarios, one is if you win that case, and the other is you lose it, and
29 how those two scenarios reverberate for all your other 30 odd cases, so would you just
30 …
31 MR DUFF: Yes.

1 MR JUSTICE MCCLOSKEY: … give me your up-to-date position on that.
2 MR DUFF: My up-to-date position had to be held, my Lord, until I got a response from
3 the other parties.
4 MR JUSTICE MCCLOSKEY: Yes.
5 MR DUFF: Which I would like to mention was meant to be on Friday, so I only got it
6 yesterday afternoon, my Lord.
7 MR JUSTICE MCCLOSKEY: Yes.
8 MR DUFF: So I've had very limited time.
9 MR JUSTICE MCCLOSKEY: Yes.
10 MR DUFF: But it's been enough time, and I've considered it carefully, and I actually
11 believe that there is merit to the position of the other parties, my Lord, but it's not
12 complete in itself, and my suggestion is that the two test cases need to be run, which
13 overlap the issues to give a bigger spread of this.
14 MR JUSTICE MCCLOSKEY: So just give me the numbers of those two cases.
15 MR DUFF: The ones that I recommend are 2018 26370.
16 MR JUSTICE MCCLOSKEY: Yes.
17 MR DUFF: That's the one …
18 MR JUSTICE MCCLOSKEY: That's been the one that's been in the frame all along,
19 yes.
20 MR DUFF: Yes, it is and one - one of the two that the - the Lisburn council recommend.
21 So either 2018 56857.
22 MR JUSTICE MCCLOSKEY: Just a moment, 56857 or?
23 MR DUFF: Or the alternative one adjacent to it.
24 MR JUSTICE MCCLOSKEY: Which is?
25 MR DUFF: 2018 26370.
26 MR JUSTICE MCCLOSKEY: 26370.
27 MR DUFF: Yes. Now, my Lord, the reasoning for that is yesterday evening, when I …
28 MR JUSTICE MCCLOSKEY: Don't worry, Mr Duff.
29 MR DUFF: OK.
30 MR JUSTICE MCCLOSKEY: Forgive me for interrupting you but don't worry
31 about the reasoning at this moment.

1 MR DUFF: OK.
2 MR JUSTICE MCCLOSKEY: Now, just tell me then, Mr Duff, let's think of the two
3 scenarios once again. So just say that the court agrees with the suggestion that 26370,
4 plus one of the other two, are selected to proceed in advance of all the others. Now,
5 you have to go back to my two scenarios.
6 MR DUFF: Yes.
7 MR JUSTICE MCCLOSKEY: If you succeeded in those two cases how would that
8 reverberate for all the others?
9 MR DUFF: My Lord, my position is that the main - there is a central challenge which
10 has come into all the cases Rural Integrity has put in. I think there's 26 live cases that
11 deal with ribbon development. If the core issue is successful, if Rural Integrity is
12 successful in the core issue all those cases will fall, because it will prove that ribbon
13 development is not - creation of ribbon development or addition to is never allowed.
14 MR JUSTICE MCCLOSKEY: Well, if I was to rephrase that slightly, you would argue
15 that if you succeed in the two cases you would expect the respondents in the other 25,
16 30, whatever it is, to raise a white flag, or else to …
17 MR DUFF: In all cases …
18 MR JUSTICE MCCLOSKEY: Or else to appeal.
19 MR DUFF: Yes, I do, my Lord.
20 MR JUSTICE MCCLOSKEY: Or else to appeal to the Court of Appeal.
21 MR DUFF: Yes, my Lord, of course.
22 MR JUSTICE MCCLOSKEY: Right, this is the sort of progress we just need to make.
23 Now, let's look at the other scenario.
24 MR DUFF: Yes.
25 MR JUSTICE MCCLOSKEY: If the court found against you …
26 MR DUFF: Yes.
27 MR JUSTICE MCCLOSKEY: … in the two cases, what - what would you do with the
28 other 30 odd?
29 MR DUFF: Well, they run in two cases, we've covered nearly all the issues, may be not
30 them all but nearly them all. So provided I lost and the issues were all covered, rather
31 than just lost on one point or whatever - provided all the issues were properly covered,

1 which they will be in a test case, then it's quite likely that some of the other cases will
2 not be tenable. For instance, I suggested that we run one of the two that's suggested by
3 Lisburn council, I would concede the other one immediately, so that would be no point
4 in running both of them, if I lost I would concede the other. Now, because I'm running
5 …
6 MR JUSTICE MCCLOSKEY: Just a moment, Mr Duff, if you lost you would?
7 MR GILLEN: Sorry, my Lord, can I just …
8 MR JUSTICE MCCLOSKEY: Yes.
9 MR GILLEN: I appear I think in one of the cases Mr Duff's referring to.
10 MR JUSTICE MCCLOSKEY: You do, that's correct.
11 MR GILLEN: If your Lordship would just allow me one moment.
12 MR JUSTICE MCCLOSKEY: By all means, by all means. Yes.
13 MR GILLEN: I think, my Lord, if we just clarify, my Lord.
14 MR JUSTICE MCCLOSKEY: Yes.
15 MR GILLEN: Mr Duff had provided me with …
16 MR JUSTICE MCCLOSKEY: Mr Gillen, isn't it?
17 MR GILLEN: It is, yes, yes, my Lord. The second set of cases that Mr Duff is referring
18 to, which bears the ICOS 2018 56857, and I think the second ICOS …
19 MR JUSTICE MCCLOSKEY: 26370.
20 MR GILLEN: Yes.
21 MR JUSTICE MCCLOSKEY: Sorry, have I got - I've made a mistake somewhere,
22 sorry.
23 MR DUFF: No, I made a mistake.
24 MR GILLEN: No, I think - yes, I think, my Lord, what Mr Duff was referring to was
25 that there's a second ICOS number in which I'm instructed in, which is 56858, I think,
26 my Lord.
27 MR JUSTICE MCCLOSKEY: So Mr Duff gave me the wrong number?
28 MR GILLEN: Yes, I think so.
29 MR JUSTICE MCCLOSKEY: So that's all right. It's 56?
30 MR GILLEN: It's 56857 would be …
31 MR JUSTICE MCCLOSKEY: Just a moment, please, 56857. I do have that number.

1 MR GILLEN: Yes, and then 56858, my Lord.
2 MR JUSTICE MCCLOSKEY: Sorry, 56858. Are you instructed in both those cases,
3 Mr Gillen?
4 MR GILLEN: Yes, the significance of that, my Lord, is that …
5 MR JUSTICE MCCLOSKEY: Sorry, you're instructed in both of those? Yes.
6 MR GILLEN: Yes, that's Rural Integrity number 4.
7 MR JUSTICE MCCLOSKEY: Yes.
8 MR GILLEN: And the significance, my Lord, is that both of those cases are essentially
9 identical and we had raised that in our previous note to the court.
10 MR JUSTICE MCCLOSKEY: Yes.
11 MR GILLEN: So Mr Duff's quite right, there would be no merit really, my Lord, in
12 running both of those cases. We could run one of those cases.
13 MR JUSTICE MCCLOSKEY: No, no one is saying you should, because Mr Duff has
14 construed the council's submission as being that one of them ought to be picked,
15 together with 26370.
16 MR GILLEN: Indeed.
17 MR JUSTICE MCCLOSKEY: Now, Mr Duff, you've just said - sorry, Mr Gillen, you
18 can continue your conversation with Mr Duff if you wish.
19 MR GILLEN: No, no, my Lord, I just wanted to …
20 MR JUSTICE MCCLOSKEY: That's fine.
21 MR GILLEN: … double check the number because the 26370, my Lord, I think relates
22 to the PAC case.
23 MR JUSTICE MCCLOSKEY: Now, that's the one that's been in the frame from day
24 one …
25 MR GILLEN: Yes.
26 MR JUSTICE MCCLOSKEY: … as a first case to be heard.
27 MR GILLEN: Yes, so I think in order to just develop what Mr Duff was saying, my
28 Lord, it's certainly our position in respect of the cases in which I am instructed, that the
29 PAC case would be a case to go forward for no more reason than it's been granted
30 leave.
31 MR JUSTICE MCCLOSKEY: Well, what's that labelling you're giving it? The what

1 case?
2 MR GILLEN: The PAC case, the Planning Appeals Commission case, as we would
3 describe it.
4 MR JUSTICE MCCLOSKEY: PAC, sorry, PAC?
5 MR GILLEN: Yes.
6 MR JUSTICE MCCLOSKEY: You mean either of the other two that are mentioned?
7 MR GILLEN: Yes, so there's the two, the 26370 which would deal with a variety of
8 issues, which is the case which has been granted leave, and I think was previously listed
9 for hearing in November, and then there would be one of our two cases, the two cases
10 that I'm instructed in, which would deal with I think five separate issues, and it's really
11 on the basis of those two cases …
12 MR JUSTICE MCCLOSKEY: Yes.
13 MR GILLEN: … that we feel that we could deal with a large variety of this.
14 MR JUSTICE MCCLOSKEY: Now, if I list one of those two cases, Mr Gillen, would
15 you be representing the applicant?
16 MR GILLEN: Yes, the situation we have at the minute, my Lord, I know, I think it was
17 Mr McAteer raised it on the last occasion, in respect of the funding in respect of our
18 case, and really the position in respect of our case, my Lord, is that we came into the
19 case, if your Lordship remembers, just before the summer recess, and at that stage there
20 were already directions in place which have now been shared with each of the parties,
21 in all of these cases. We applied for an extension of time, my Lord, in order to comply
22 with your Lordship's directions.
23 MR JUSTICE MCCLOSKEY: Yes.
24 MR GILLEN: And we filed those on the 2nd of …
25 MR JUSTICE MCCLOSKEY: Well, your two cases are ten and 11, aren't they?
26 MR GILLEN: Yes, my Lord.
27 MR JUSTICE MCCLOSKEY: In the overall list, yes.
28 MR GILLEN: We complied with those directions, they were filed on the 2nd of August.
29 Now, based on the mathematics of your Lordship's directions, we were expecting a
30 response on the 24th of August to those directions, and to date, my Lord, we've received
31 nothing, and so our position really is where we were previously. Until such times as

1 we receive a response to either the protocol letter or your Lordship's directions, we
2 couldn't have a proper conversation with the applicant in this case in the usual way, in
3 respect of the merits of their case going forward and then potential costs, my Lord.
4 MR JUSTICE MCCLOSKEY: Well, then, just a moment, Mr Gillen, and I want to see
5 if I understand that, just give me one second, please. In each of those two cases, that's
6 056857, which is number 11, and - sorry, they're not exactly the same order.
7 MR GILLEN: They're identical, my Lord, both orders were identical.
8 MR JUSTICE MCCLOSKEY: But then have you received the order with the same
9 number? There's a problem there, that can be corrected.
10 MR GILLEN: No, I think it was just the same order, with a different number, my Lord.
11 MR JUSTICE MCCLOSKEY: It should be 56858. My file, I think due to an
12 administrative slip, has given me order in 56857 in both the cases, that's wrong. There
13 should be a 56857 order of 19th of June, and the 56858 order of 19th of June. If my own
14 draft is there, it should be the same. So then that's a problem for me, not for you.
15 MR GILLEN: Certainly, my Lord, the orders that I received are correct, the 58 does
16 appear on the second order, my Lord.
17 MR JUSTICE MCCLOSKEY: 58 is correct, that's all right, we'll work that out
18 ourselves here, don't worry. Just give me a moment, if you don't mind. Now, are those
19 two orders identical?
20 MR GILLEN: Yes, my Lord.
21 MR JUSTICE MCCLOSKEY: They are? Just give me a moment, please.
22 MR GILLEN: Save for the - sorry, my Lord, save for the references to the actual
23 planning application.
24 MR JUSTICE MCCLOSKEY: Oh, yes. No, but I mean in terms of directions.
25 MR GILLEN: Yes.
26 MR JUSTICE MCCLOSKEY: And I haven't made that clear. Yes. So, in each of those
27 orders you have a paragraph which I think is number 5 in both, which says the
28 respondent council shall reply in writing to the applicants compliant with the foregoing
29 directions by 23rd of July 2018, is that what you're referring to?
30 MR GILLEN: Yes, and that was the mathematics based on us having our submission in
31 by the 29th of June.

1 MR JUSTICE MCCLOSKEY: And did you make that time limit?
2 MR GILLEN: We didn't, we came on record I think about two days before that, my
3 Lord, and your Lordship …
4 MR JUSTICE MCCLOSKEY: Anyway, what - what was your time late for
5 compliance?
6 MR GILLEN: We submitted ours then by the 2nd of August.
7 MR JUSTICE MCCLOSKEY: Just a moment, sorry, just a moment. I have read it, but
8 I just want to make a little note of this sub plot, and then I extended time for the
9 respondent, did I?
10 MR GILLEN: I don't know that there was ever any application made, we certainly
11 weren't making any issue with an extended period of time at that stage.
12 MR JUSTICE MCCLOSKEY: Well, let's just look at this very briefly. That's 32, that's
13 34 days, so I add 34 days to 23rd of July, I get 26th of August.
14 MR GILLEN: 26th, sorry, my Lord, I thought it was 24th, I apologise.
15 MR JUSTICE MCCLOSKEY: Don't worry. So we just assume for the moment that
16 ought to have been the date. Now, I don't know whether we were asked to extend time
17 or not. Your point is that there has been no compliance with that direction?
18 MR GILLEN: Indeed.
19 MR JUSTICE MCCLOSKEY: Is that the only direction you say is the subject of
20 non-compliance?
21 MR GILLEN: Well, apart from the usual response to a protocol, a pre action protocol
22 letter.
23 MR JUSTICE MCCLOSKEY: Well, I didn't make a direction about that.
24 MR GILLEN: No, there's no - there's no direction but in terms of the issue …
25 MR JUSTICE MCCLOSKEY: I have done that in certain other cases …
26 MR GILLEN: Indeed.
27 MR JUSTICE MCCLOSKEY: … but I haven't done it in this case.
28 MR GILLEN: Indeed, and I think that feeds into the argument, because we are
29 obviously appearing today, my Lord, and the issues that are before the court in terms of
30 listing are one, but there's also this second issue in terms of funding, and there's been
31 various questions raised about that, and we had submitted, in our note to the court in

1 August, that the funding arrangements were such that we would come back to the
2 applicant essentially, my Lord, when we've received a response in the usual way and
3 we can then have a proper conversation with them, but obviously, my Lord, we don't
4 know what the respondent's case is, and this is a case where we're saying, setting the
5 planning issues aside, certainly the issue in respect of perceived bias we say is almost
6 unanswerable, my Lord.
7 MR JUSTICE MCCLOSKEY: Now just a moment. Now, Mr Gillen, have you had
8 any role in the latest submission from Mr Duff, which I think I gave you the title of it a
9 few minutes ago and now I can't find it. Yes, 'submission of financing and costs', have
10 you …
11 MR GILLEN: No, no, my Lord.
12 MR JUSTICE MCCLOSKEY: No?
13 MR GILLEN: No.
14 MR JUSTICE MCCLOSKEY: He's doing that himself?
15 MR GILLEN: Yes, that was filed with me in the same manner as it was filed with
16 everyone else, my Lord.
17 MR JUSTICE MCCLOSKEY: Good. Anything else you want to raise then?
18 MR GILLEN: No, my Lord.
19 MR JUSTICE MCCLOSKEY: Right, thank you. So, Mr Duff, if I just come back
20 to you for one final moment. You say that if you were to fail in two lead cases, and I
21 just made a note of what you said, it's quite likely that some of the other cases will not
22 be tenable?
23 MR DUFF: Yes.
24 MR JUSTICE MCCLOSKEY: But that doesn't really tell anybody anything. We need
25 some certainty here, Mr Duff. You're perfectly entitled to say, in extremis, I'm running
26 everything, and then you'll be at the hands of the court on case management, and
27 overriding objective, and the court might not agree with that at all, but you need to tell
28 us something a little more clearly, please. There's a lot of people in the court room here,
29 there are a lot of bank accounts and loans, and contracts, and developments floating
30 around here.
31 MR DUFF: My Lord, my approach to this has been to assist the court in terms of speed

1 and completeness.
2 MR JUSTICE MCCLOSKEY: Well, I'm going to come back to this sentence, so you
3 complete the sentence for me. If you succeed in both of the cases the following will be
4 the implications for all the others, you say they should be conceded?
5 MR DUFF: Yes, my Lord.
6 MR JUSTICE MCCLOSKEY: Let's come back to defeat. If you fail in both cases
7 what's going to happen to all the others?
8 MR DUFF: Well, I would concede immediately in the mirror case of one of them, the
9 two that are identical, the other one then would be conceded, obviously, because
10 they're identical.
11 MR JUSTICE MCCLOSKEY: So that's one out of 30 odd, what about the other 29, or
12 whatever it is?
13 MR DUFF: My Lord, I can't - I can't say anything different than I've already said.
14 You're looking for certainty, until I see the reasons …
15 MR JUSTICE MCCLOSKEY: Until you see what?
16 MR DUFF: Until I see the reasons that I lost, I can't answer that.
17 MR JUSTICE MCCLOSKEY: Well, I've been told by you more than once that these
18 30 odd cases all raise essentially the same issues of law relating to the construction
19 and the application of one or two planning policies governing development in the
20 countryside. Now, if they don't all raise essentially the same issues of law then we're
21 going backwards, and we're stagnating and going backwards.
22 MR DUFF: My Lord, can you permit me just enough time to make my point? I looked
23 at the two cases last night and I wrote down a list of the issues raised in each. There's
24 18 issues raised in each of these two cases.
25 MR JUSTICE MCCLOSKEY: Well, do I have any of this in writing from you?
26 MR DUFF: I've got a submission, I do a graph of the two cases and where they overlap.
27 And this here, I show the issues and how it takes the two cases to cover enough issues,
28 and - but there's 18 issues. The applicant only needs to succeed on one issue, my Lord.
29 MR JUSTICE MCCLOSKEY: Well, that's technical, and this court will try to manage
30 these cases in a way which is fair and reasonable to a very large number of people.
31 Now, are all the issues covered by the two cases you say should be heard first?

1 MR DUFF: My Lord, these are planning cases and every planning case is different. You
2 cannot run a test case for planning cases.
3 MR JUSTICE MCCLOSKEY: The facts are completely different. I'm sorry, Mr Duff,
4 you're entirely wrong in your latter assertion.
5 MR DUFF: Well, you know more about it than me, my Lord, but on the ground the
6 buildings, the space …
7 MR JUSTICE MCCLOSKEY: Exactly.
8 MR DUFF: Everything is different.
9 MR JUSTICE MCCLOSKEY: The facts are all different.
10 MR DUFF: Yes.
11 MR JUSTICE MCCLOSKEY: You're quite right.
12 MR DUFF: So one case will never - you'll be, otherwise the planners - you wouldn't
13 need planners, you would - it would just be automatic.
14 MR JUSTICE MCCLOSKEY: Well, your contention is that the planning authority has
15 misconstrued the relevant planning policies in all of these cases.
16 MR DUFF: My Lord …
17 MR JUSTICE MCCLOSKEY: That's your first and main contention, if I've got that
18 wrong then we're not just going backwards, we're accelerating backwards.
19 MR DUFF: My Lord, can I make one example. In the case against the PAC, the
20 planners already are using the garden shed as a building. They have located it in the
21 wrong place, it's a factual mistake, and they have submitted an affidavit saying it's in
22 the wrong place. That is - that is a key issue which will not be replicated.
23 MR JUSTICE MCCLOSKEY: So that's a hopeless test case then.
24 MR DUFF: Yes, my Lord.
25 MR JUSTICE MCCLOSKEY: That's an utterly hopeless test case, well, that's one of
26 your candidates. I'm just running the debate with you at the moment.
27 MR DUFF: Yes, my Lord, this could …
28 MR JUSTICE MCCLOSKEY: So how - how have you put that up as candidate
29 number one for a test case?
30 MR DUFF: The test case, I believe all the issues can be covered one by one, it's not just
31 sufficient to say this wins. If it's a test case we need to try and draw out hopefully all

1 the issues. Otherwise - because I have 18 issues in both these cases, my Lord. If I was
2 to win on one issue it would prove nothing. So really we need to address all the issues.
3 The other cases will all have unique things that aren't in these cases, well, some of them
4 will, my Lord.
5 MR JUSTICE MCCLOSKEY: Mr Duff, I really just need a little bit of clarity here. Are
6 you representing to the court, and to all of these planning authorities, and to all of these
7 successful planning applicants, that all 30 odd cases have got to be run?
8 MR DUFF: No, my Lord.
9 MR JUSTICE MCCLOSKEY: I'm getting - I'm sure it's my fault, Mr Duff, but I'm
10 getting absolutely nowhere on this.
11 MR DUFF: My Lord, I think it's an unfair question, because I'm being asked to make a
12 decision when the case is up and running.
13 MR JUSTICE MCCLOSKEY: Well, then, you could have told us this weeks and
14 months ago. This has been the question for months, and now you're telling me it's the
15 wrong question.
16 MR DUFF: My Lord …
17 MR JUSTICE MCCLOSKEY: An unfair question.
18 MR DUFF: My Lord, in my defence I was ready - I was ready to run a case on the 30th
19 of November
20 MR JUSTICE MCCLOSKEY: Well, that wasn't running a case, that was resisting an
21 application for what we call security for costs. That's what that - unless my memory
22 has gone totally.
23 MR DUFF: My Lord, I can read the court direction if you wish. I can meet the court
24 directions immediately.
25 MR GILLEN: My Lord, we've been through this before, and my Lord is entirely right, it
26 was listed for an application for security for costs, not for full hearing.
27 MR JUSTICE MCCLOSKEY: That wasn't listed for a hearing for the judicial review
28 challenge, Mr Duff.
29 MR MARTIN: I think Mr Duff has previously made the point he read the court order
30 when we went through everybody's notes on a previous occasion and clarified that, it
31 was abundantly clear to everybody.

1 MR JUSTICE MCCLOSKEY: That case, Mr Duff, ever since as long ago as
2 September, was on a security for costs application track, and no other track. That's
3 26370, isn't it?
4 MR DUFF: Yes.
5 MR JUSTICE MCCLOSKEY: Well, Mr Duff, I'm emphasising the word 'assist', is
6 there anything better that you can do to assist the court, or assist the other litigants, or
7 assist this large number of people who are coming up and down to the court now on
8 every occasion and wondering about their bank accounts and their loans and their
9 future plans, and organising their lives?
10 MR DUFF: My Lord, I have submitted - the applicants have submitted these cases from
11 the various marks, I'm frustrated that they haven't progressed, it's not my fault, my
12 Lord. If these are issues …
13 MR JUSTICE MCCLOSKEY: I'm not saying that.
14 MR DUFF: If these are issues that need heard, the court needs to hear them, and I - in
15 my submission I have said that these are so numerous that they are significant to the
16 whole of Northern Ireland and represent perhaps hundreds of millions of pounds over
17 a period of time. It cannot be just diminished, it has to be heard, my Lord.
18 MR JUSTICE MCCLOSKEY: Sorry, is that benefit to the economy or loss to the
19 economy? It's got to be one or the other.
20 MR DUFF: My Lord, that is the extent of it, and I have also said in my cost submission
21 that is unwelcome competition to good development. This is putting houses in the
22 wrong place, and …
23 MR JUSTICE MCCLOSKEY: As the policies say you can do if you make the right
24 planning judgment.
25 MR DUFF: Yes, of course, my Lord.
26 MR JUSTICE MCCLOSKEY: And you don't - and you don't misunderstand them.
27 MR DUFF: Yes.
28 MR JUSTICE MCCLOSKEY: If you want to go to the relevant department, and ask
29 them to bring in new policies and scratch these, that's another story, Mr Duff, it's not for
30 this court.
31 MR DUFF: It is for the court to say if policy is applied properly, my Lord, and the

1 applicants all contend it isn't. If the applicants are right it is - it is a very, very large
2 amount of money which has been invested in the wrong place. And if that money
3 didn't go there it would fund developments, more worthy developments in settlements,
4 and that's what planning policy suggests should happen.
5 MR JUSTICE MCCLOSKEY: Exactly, your point is these policies shouldn't exist.
6 MR DUFF: No, my Lord, I think - I think the policies, if we interpret them properly, are
7 not …
8 MR JUSTICE MCCLOSKEY: You can build - you can build houses in the countryside
9 then, is that what you're saying?
10 MR DUFF: Yes, my Lord, of course you can, but according to policy, and the policy is
11 not in dispute.
12 MR JUSTICE MCCLOSKEY: Very good, well, that's very helpful, Mr Duff, you can
13 resume your seat then, thank you very much indeed. Now, I just hear briefly then from
14 the other represented parties. Before I forget this question, Mr Martin?
15 MR MARTIN: Yes, my Lord.
16 MR JUSTICE MCCLOSKEY: Have you made any progress on the issue that I've
17 been raising with you in previous occasions?
18 MR MARTIN: I did send through a schedule yesterday.
19 MR JUSTICE MCCLOSKEY: Yesterday?
20 MR MARTIN: And I do have hard copies.
21 MR JUSTICE MCCLOSKEY: Well, that's very good of you, can I just see one hard
22 copy for a moment, if you don't mind. Now, thank you very much. So, the first
23 response of the court is thank you very much for all that hard work and for being so
24 cooperative, and so helpful to the court, and everyone else, Mr Martin. I'm just going to
25 assume that we'd be able to work it out for ourselves, is that right?
26 MR GILLEN: Yes. My Lord, Mr Martin provided me with a copy, in fact the general
27 utility of the document is, for example, in respect of the period with the protected costs
28 order, Mr Duff …
29 MR JUSTICE MCCLOSKEY: Well, I just come back - Mr Martin, sorry, before I just
30 finish on this one, if you don't mind, have you sent that to Mr Duff?
31 MR MARTIN: I haven't actually.

1 MR JUSTICE MCCLOSKEY: Not yet?
2 MR MARTIN: No, no, my Lord. I can give a copy, I said I anticipated this, I had hard
3 copies made and available for the hearing.
4 MR JUSTICE MCCLOSKEY: No, that's perfectly all right, and in fact you didn't have
5 to bring a large number of hard copies, a couple is more than enough, thank you, but,
6 Mr Martin, are you going to email that to everyone then?
7 MR MARTIN: Yes, my Lord, I can email that. Well, I think what we said on the last
8 time, my Lord, was that I would initially coordinate that with the respondents as the
9 first material that were …
10 MR JUSTICE MCCLOSKEY: That's right, and I think you were going to have a
11 meeting with the respondents' representatives, at my suggestion.
12 MR MARTIN: I think at this stage, my Lord, the way it has sort of filtered through is
13 that I'm now instructed in respect of, or on behalf of Lisburn and Castlereagh city
14 council and also Antrim borough council.
15 MR JUSTICE MCCLOSKEY: Yes, so you're briefing Mr Beattie then, are you?
16 MR MARTIN: Correct.
17 MR JUSTICE MCCLOSKEY: Yes.
18 MR MARTIN: I know that Mid and East Antrim is also Mr Beattie as well, so on that
19 basis Mr Beattie represents all three of the respondent councils and Mr McAteer has …
20 MR JUSTICE MCCLOSKEY: Very good. Well, thank you very much for that. Now,
21 Mr Beattie, yes.
22 MR BEATTIE: So it occurred, my Lord, just looking at the spreadsheet, for example,
23 your Lordship's query about the protected - the draft protected cost order. We can, if
24 necessary, add a separate column to the end, and if Mr Duff provides his list we can -
25 we can populate that so that there's a clear spreadsheet across the board of the
26 document, my Lord. My Lord, can I just say two things in respect of the test case that
27 we have suggested coming forward involving Mr Gillen. First of all, my Lord, I can
28 only apologise for the failure to comply with a court order. It got caught, my Lord, in
29 the volume of …
30 MR JUSTICE MCCLOSKEY: Don't worry.
31 MR BEATTIE: … of cases.

1 MR JUSTICE MCCLOSKEY: I'm not at all concerned …
2 MR BEATTIE: But the reason for suggesting it come forward is of course because, a)
3 there's legal representation, and it does raise a discrete issue. I'll not advocate it or deal
4 with it now, my Lord, but Mr Gillen says there's no answer to it, but in one sense that's
5 not the point. It raises a discrete issue that is not in the other cases, that we think ought
6 to be before the court for an adjudication, so it's to try and bring as much as we can into
7 the mix. It also means that there is legal representation in respect of some of the more
8 discrete issues that your Lordship wishes to deal with. Whether it's one or the other,
9 my Lord, we're - in one sense we don't mind, we've suggested both, but they are very
10 close in terms of their relevance, and the issues can probably be dealt with fairly
11 succinctly without any duplication. So, my Lord, that's why we'd commended that
12 particular case. In respect of the rest of them, my Lord, Mr Duff said he would have to
13 wait for the decision of the court. We can look at them and see if there's any way of
14 subdividing them, my Lord, in an incoherent way, but really that task probably refers
15 back to Mr Duff at first instance. So it seemed to us that this was at least the most
16 efficient way. I see Mr Duff's Venn diagram, but it seemed to me the most efficient way
17 to get the most issues that we could possibly get before the court in terms of the general
18 application. If your Lordship would allow us to extend the time we comply with
19 whatever direction your Lordship gives to bring Mr Gillen's cases up to speed as
20 quickly as possible.
21 MR JUSTICE MCCLOSKEY: Yes, so that's just responding to that submission that he
22 provided?
23 MR BEATTIE: Yes, indeed.
24 MR JUSTICE MCCLOSKEY: Well, I'll come back to that, Mr Beattie, but then,
25 Mr Beattie, are you at idem with the suggestion that the court should list 26370 plus one
26 of the other two identified cases this morning?
27 MR BEATTIE: Yes, my Lord.
28 MR JUSTICE MCCLOSKEY: Or sequentially together, any views?
29 MR BEATTIE: Together, my Lord.
30 MR JUSTICE MCCLOSKEY: Would a judgment in the first be beneficial for the
31 second? I mean, I'm struggling, because this is the busiest court in the jurisdiction, and

1 I have drawn up orders, I've read the papers in about 20 of these cases and I had to
2 stop.
3 MR BEATTIE: Yes, my Lord.
4 MR JUSTICE MCCLOSKEY: I just couldn't devote any further time to them.
5 MR BEATTIE: It would appear to me, my Lord, there may be two separate judgments
6 but there's no reason, because they're two obviously PAC and the council are two
7 separate, as it were two separate respondents, but there's no reason why the two cases
8 cannot be heard together to avoid any unnecessary duplication.
9 MR JUSTICE MCCLOSKEY: And your diagnosis at the moment is that they don't
10 raise the same issues, which means they're good candidates because they raise different
11 issues?
12 MR BEATTIE: Precisely, my Lord, and to that extent …
13 MR JUSTICE MCCLOSKEY: And then you cannot say - you could not possibly say
14 whether they deal with all the issues, because nobody in the court room can answer that
15 question at the moment.
16 MR BEATTIE: Because I'm not clear, precisely, my Lord, but in terms of broad policy,
17 the approach to policy, the issue of the security for costs, the issue of the companies, the
18 issue of apparent bias raised discreetly in one of the cases, it seems to cover as much as
19 we think can be reasonably covered for your Lordship to efficiently provide two
20 judgments that cover - and may be some, obviously some cut and paste in the sense of
21 the same principles apply, which means that the two respondents can try and ensure
22 the most efficient hearing of those issues, my Lord, without again unnecessary
23 duplication of points before the court. I think we will be at idem in terms of the policy
24 approach, clearly we'll have careful regard to the Planning Appeals Commission, but
25 it's an important independent tribunal. So to that extent that is of general utility, both
26 to the court, my Lord, and I think to the decisions your Lordship will make.
27 MR JUSTICE MCCLOSKEY: Yes. Yes, thank you. Now, Mr McAteer.
28 MR MCATEER: My Lord has the written submission that we've made. In essence, my
29 Lord, we're content to comply with whatever way the court sees going forward. The
30 written submission that I've made, my Lord may not have had a chance to read it.
31 MR JUSTICE MCCLOSKEY: Well, I just had cast my eye over it, Mr McAteer, thank

1 you.
2 MR MCATEER: It's supported by what Mr Duff has said this morning, and that was a
3 concern that on the one hand he says that if he wins any test case he should win
4 everything else but won't really make any concession about the substantial number of
5 the others. As such, he's not really seeking …
6 MR JUSTICE MCCLOSKEY: Sometimes called having your cake and eating it.
7 MR MCATEER: Well, that's exactly the phrase I've used in the submission, my Lord.
8 And he similarly wants to have his cake and eat it when it comes to costs. He wants the
9 costs capped, the Aarhus convention protected cost order to be lowered to I think it's
10 £100 should he lose, but he wants to pursue an hourly rate for 250 hours against the
11 respondent in my case, never mind any of the others, if he should win along with all of
12 his outlays.
13 MR JUSTICE MCCLOSKEY: Well, there a preliminary stop on the road on the
14 protected costs issue and that is, is this Aarhus convention territory at all?
15 MR MCATEER: Yes, my Lord.
16 MR JUSTICE MCCLOSKEY: And may be you haven't given that full thought yet,
17 Mr McAteer. I certainly haven't.
18 MR MCATEER: Yes, my Lord. Well, certainly that's something that could be revisited.
19 It wasn't resisted at an earlier stage.
20 MR JUSTICE MCCLOSKEY: Yes.
21 MR MCATEER: But it's obviously a matter for the court …
22 MR JUSTICE MCCLOSKEY: Yes.
23 MR MCATEER: … as opposed to the parties, regardless of the position previously
24 adopted by the parties.
25 MR JUSTICE MCCLOSKEY: Yes, because the protected cost order regime under the
26 domestic laws, which transpose the Aarhusconvention mechanisms, only apply to
27 certain cases.
28 MR MCATEER: Yes, my Lord.
29 MR JUSTICE MCCLOSKEY: And they exclude all the others.
30 MR MCATEER: Yes, my Lord. So my Lord's identified one.
31 MR JUSTICE MCCLOSKEY: If they - if you're in that big excluded category, then

1 you're driven to invoking the court's inherent jurisdiction, which you can do in any
2 case.
3 MR MCATEER: Yes, my Lord, yes, my Lord, and in any event we then have the
4 overlapping question of security for costs, and in any event, under the Aarhus
5 convention I think there was a cap of £10,000 for companies making applications, which
6 is what Mr Duff invites the court to exercise its discretion to reduce to £100. But the
7 point again, my Lord, I made briefly in the submission is effectively Mr Duff has no
8 sensible way forward to suggest to the court that means the court can confidently run a
9 few cases knowing that that will dispose of them all, and the court was previously, in
10 an attempt to assist Mr Duff, I think very much indicating to the respondent that it
11 might view his costs applications favourably if that were to resolve all of the cases. But
12 we're now in the opposite position where that's not going to be the case, in which
13 circumstances it might focus minds if the cost orders are dealt with, and Mr Duff
14 realises that he cannot put all of these parties and all of the individual notice parties to
15 the expense and trouble and cost, both in time and money, of dealing with these cases,
16 and yet expect to be completely shielded himself from any consequences, but expects
17 everyone else to bear all of the consequences and risk. And that may at least focus his
18 mind on a better case management suggestion. So, my Lord, that's really where we
19 were coming from in those respects. I think Mr Beattie wanted to add something.
20 MR JUSTICE MCCLOSKEY: Yes, Mr Beattie, please do.
21 MR BEATTIE: My Lord, I had only addressed the issue your Lordship raised with me.
22 On the issue of costs, given, my Lord, I act for now three local planning authorities who
23 have finite budgets, and clearly that issue is live in terms of how the particularly
24 Lisburn matters are managed, but can I just say in respect of costs, your Lordship, there
25 was a case of McNamara …
26 MR JUSTICE MCCLOSKEY: Yes.
27 MR BEATTIE: Where originally your Lordship felt that it didn't engage Aarhus and
28 then felt that perhaps it did, the council took a pragmatic view.
29 MR JUSTICE MCCLOSKEY: It was very borderline.
30 MR BEATTIE: It was, my Lord.
31 MR JUSTICE MCCLOSKEY: It wasn't an easy ruling at all.

1 MR BEATTIE: But if I may say, there was a case of Nesbitt …
2 MR JUSTICE MCCLOSKEY: Oh, yes, yes.
3 MR BEATTIE: … where Madam Justice Keegan in fact refused Aarhus protection, and
4 …
5 MR JUSTICE MCCLOSKEY: Well, that - I wonder, was that the second refusal,
6 because I think I refused it also before that. Anyway.
7 MR BEATTIE: I think you did, my Lord, I think he renewed …
8 MR JUSTICE MCCLOSKEY: Maybe he renewed it.
9 MR BEATTIE: He renewed his application but it was refused again. In fact he went to
10 the Court of Appeal, where, regrettably …
11 MR JUSTICE MCCLOSKEY: And he was refused there also.
12 MR BEATTIE: He was, my Lord, and now regrettably there was no written judgment,
13 but in fact Lord Justice Stephens and Lord Justice Deeny did look at the issues, and in
14 particular looked at the schedule.
15 MR JUSTICE MCCLOSKEY: Yes.
16 MR BEATTIE: If I may respectfully say, my Lord, the - certainly on behalf of my clients,
17 we would certainly welcome that as an issue to be raised before the court in these test
18 cases. I think it is an important matter, and in fact I think it pays to revisit the schedule
19 just to see the matrix through which - the prism through which the Aarhus convention
20 engages environmental issues. So we would certainly welcome that as an issue to be
21 considered by the court.
22 MR JUSTICE MCCLOSKEY: I can see that, yes, yes. Now, would anybody else
23 in the court room like to come forward and say something, or like to not come forward
24 but still say something? Anybody? Please feel free. You've all gone to the trouble of
25 coming here today, and I'm here to listen to anything you want to ask me. Mr Duff …
26 MR DUFF: Yes, that's what I was wondering, yes.
27 MR JUSTICE MCCLOSKEY: … you've had the stage for most of the morning.
28 Anybody at all?
29 MR COMPTON: My Lord, I appear on behalf of Mr and Mrs McCombe, my Lord, who
30 are the notice parties in the PAC case.
31 MR JUSTICE MCCLOSKEY: Yes, that's 26370.

1 MR COMPTON: That's right, my Lord, I think it's number 6 on Mr Duff's list.
2 MR JUSTICE MCCLOSKEY: Yes.
3 MR COMPTON: Your Lordship did direct written submissions be filed on or before
4 Friday, and, my Lord, a written submission was prepared. Unfortunately my
5 instructing solicitors and myself had some difficulty in having it approved, but can I
6 simply indicated from the Bar, my Lord …
7 MR JUSTICE MCCLOSKEY: You mean having it approved by the clients?
8 MR COMPTON: By the client. Can I simply indicate, my Lord, that we very much fall
9 in behind what my learned friend Mr Beattie and my learned friend Mr McAteer have
10 said today.
11 MR JUSTICE MCCLOSKEY: Well, you will forgive me for asking, am I right in
12 saying that he realised that he would have to contact the court and ask for an extension,
13 and now you're going to tell me, well, he didn't do that.
14 MR COMPTON: Yes, that wasn't done, and, my Lord, bearing in mind we're here
15 today, shouldn't wish to raise it late because we don't want to be in a position where
16 we're filing it in afterwards and then we end up going over old ground.
17 MR JUSTICE MCCLOSKEY: Well, when am I going to receive it? Some time today?
18 MR COMPTON: Pardon?
19 MR JUSTICE MCCLOSKEY: Will I receive that today?
20 MR COMPTON: Yes, well, if your Lordship would like to see it, certainly it can be
21 done today.
22 MR JUSTICE MCCLOSKEY: Well, I can't see it privately, it has to be sent to
23 everyone.
24 MR COMPTON: Yes, yes, quite right, and certainly I can - I can indicate, my Lord, that
25 will be done. Certainly, as I say, we very much fall behind what's been said, but from
26 Mr and Mrs McCombe's perspective, my Lord, they are very much in the position
27 where they want an answer. So not withstanding the issues about whether it's a test
28 case to the extent that, will it resolve all the issues, they are developers and they wish to
29 have a response, one way or the other, my Lord. But, my Lord, I'll speak with my
30 instructing solicitor and we'll have that circulated.
31 MR JUSTICE MCCLOSKEY: Thank you.

1 MR COMPTON: Thank you.
2 MR JUSTICE MCCLOSKEY: Anybody else in the court room?
3 UNIDENTIFIED COUNSEL: My Lord, I appear for Mr Bamber, who is an interested
4 party in number 28 on the list, which is …
5 MR JUSTICE MCCLOSKEY: Yes, you were here the last time, and we …
6 UNIDENTIFIED COUNSEL: I was here on the last occasion.
7 MR JUSTICE MCCLOSKEY: … registered your involvement, I think, didn't we?
8 UNIDENTIFIED COUNSEL: We did, yes.
9 MR JUSTICE MCCLOSKEY: Yes.
10 UNIDENTIFIED COUNSEL: Indeed, my Lord. I would concur with what Mr Martin,
11 Mr McAteer and Mr Beattie have put forward, we received the submission yesterday
12 afternoon, and again if we require to file that it would be later today.
13 MR JUSTICE MCCLOSKEY: Yes, I didn't direct you to file anything, isn't that right,
14 on the last occasion?
15 UNIDENTIFIED COUNSEL: No, there was nothing.
16 MR JUSTICE MCCLOSKEY: No, that's all right.
17 UNIDENTIFIED COUNSEL: Just to say that we have had discussions in the interim, in
18 relation to it, and we agree with the course of action hopefully to be adopted.
19 MR JUSTICE MCCLOSKEY: Mr Duff, I'll give you another minute or two, but that's
20 all I have. I'm already late to begin a list of cases, that's my priority today.
21 MR DUFF: Only one thing, my Lord, can I have permission to circulate the document
22 that I've prepared? It shows that the issues in the two cases and how they overlap.
23 MR JUSTICE MCCLOSKEY: I'm going to come to directions in a minute.
24 MR DUFF: OK.
25 MR GILLEN: Can I just say, my Lord, I apologise, I know your Lordship's under time
26 pressure.
27 MR JUSTICE MCCLOSKEY: That's alright.
28 MR GILLEN: In relation to Mr Martin, I'm grateful to Mr Martin, it appears to be a very
29 thorough document that's been provided. Can I just say, my Lord, in relation to the
30 matters on the A3 spreadsheet, at number 12 and 13, which would be Mr Duff's
31 number of ten and 11, in which I appear, it notes on the response to the pre action

1 correspondence that it was sent on the 27th of April. That's not a document that …
2 MR JUSTICE MCCLOSKEY: 12 and 13 are ten and 11?
3 MR GILLEN: Yes, that's not a document, my Lord, that I am familiar with, and indeed,
4 when we filed our submission in August we were saying that no pre action
5 correspondence had been received.
6 MR JUSTICE MCCLOSKEY: Well, I'll have to ask you to raise that with him at this
7 stage, Mr Gillen.
8 MR GILLEN: Indeed, but I just seek to raise it in terms of …
9 MR JUSTICE MCCLOSKEY: Because if you've something you want to pursue of that
10 nature, then it shouldn't come before me unless and until it has to.
11 MR GILLEN: Indeed.
12 MR JUSTICE MCCLOSKEY: Very good.
13 MR GILLEN: I just simply flag it up in case there is a flaw in the document that your
14 Lordship is working off.
15 MR JUSTICE MCCLOSKEY: Very good. Yes. The word rut stands out in this
16 morass. Progress has been very disappointing indeed, for the reasons which have been
17 ventilated this morning. The court is gravely concerned about the position of a large
18 number of third parties who have organised their lives and their finances in a certain
19 way, and have placed their trust in the planning system, and have submitted their
20 applications and have been granted planning permission, and now find themselves not
21 knowing what to do in the midst of an unprecedented tsunami of planning judicial
22 review challenges. The court is still striving desperately to find a solution to this quite
23 unprecedented situation, and no simple solution has emerged to date. The successful
24 planning applicants will make their own decision about what to do with their planning
25 permission and they will do that with or without the advice of lawyers or other
26 professional people. This court is most definitely not permitting - prohibiting the
27 initiation of any of the works of development which are authorised under what are in
28 law presumptively valid and legal grants of planning permission. That is all that I can
29 say to the planning applicants, I can't say anything more than that.
30

1 You're going to be asking yourselves and you haven't asked me, but the question is
2 bound to be at the forefront of your minds, how long is all of this going to take. It's
3 going to take quite some time, it's going to be months and not weeks. I'm going to
4 come to the question of timetable in just a moment. This court may not be the only
5 court involved, in some of these judicial reviews there could be appeals to the Court of
6 Appeal, and the Court of Appeal lists cases six, eight months ahead. These cases are
7 nowhere near ready to be heard in this court yet, so just do your basic arithmetic and
8 you realise that there is a long period of uncertainty ahead for everyone involved in
9 these cases, directly or indirectly.
10
11 I'm just going to pause there, does anyone in the court room who doesn't have a lawyer
12 today wish to ask me any questions arising out of what I've just said? Don't be bashful.
13 Very good. Well, if you have questions, you can send a letter, or an email, and it will
14 come to my desk and we'll try and answer whatever questions you might still have. So
15 that's facility is available to you. You all had the status of what we call interested
16 parties, and interested parties have certain rights in the proceedings, so just bear that in
17 mind. And none of you is under any obligation to instruct a lawyer. That is not an
18 obligation.
19
20 Now, the order of the court today has the following components. First of all, Mr Duff
21 will provide to the court and to everyone else by email the illustrative graphics
22 document which we've discovered this morning exists. That will be done by the 21st of
23 December at latest. Two, Mr Duff will provide to the court and everyone else a list of
24 the cases in which he has lodged with the court draft protected costs orders. Three, in
25 2018 056857 and 2018 056858, the proposed respondents will comply with paragraph 5
26 of the court's order, which I believe was 19th of June 2018 in each case. And they will do
27 so by the 7th of January. Four, the legally represented parties in the three cases which
28 have emerged as candidates to be heard before all the other cases, I'm not calling them
29 test cases, we can forget about that terminology, will prepare for the court's benefit a
30 draft case management order incorporating a litigation timetable, and substantive
31 hearing dates. And that would be most usefully done by the 21st of December. If that's

1 not feasible, you needn't ask for an extension because the fall back for that will be the 7th
2 of January. I leave that in the hands of the legally represented parties, and those draft
3 orders, which will incorporate the litigation timetable, will be provided to the interested
4 parties in those cases, if possible to all interested parties, if there are contact details, and
5 also to the applicant in person, and to the applicant's solicitors in the two cases in which
6 he has instructed he has instructed solicitors.
7
8 Now, pausing at that point in time, on the applicant's side, Mr Duff, is there anything
9 else you suggest should be incorporated in today's order of the court?
10 MR DUFF: Yes, my Lord. In regard to the timing, the applicant, on behalf of the
11 various applicants in the two cases, they should be heard separately because they're at
12 different stages, and if one can progress more quickly …
13 MR JUSTICE MCCLOSKEY: Sorry.
14 MR DUFF: … than the other …
15 MR JUSTICE MCCLOSKEY: What are you asking me about now?
16 MR DUFF: In an order, perhaps - perhaps this isn't relevant, but in your order I'm
17 assuming that you may order that the two cases be combined on the same day.
18 MR JUSTICE MCCLOSKEY: No.
19 MR DUFF: No?
20 MR JUSTICE MCCLOSKEY: No, I haven't done that yet, no.
21 MR DUFF: OK, OK.
22 MR JUSTICE MCCLOSKEY: I'm just inviting everyone to listen extremely carefully
23 to what I'm saying in very carefully selected words, that has not been said. Now, on the
24 respondent side, I'm coming to that totally separately. On the respondent side, is there
25 anything else that ought to go in to today's order?
26 MR MCATEER: No, my Lord.
27 MR GILLEN: No, my Lord.
28 MR JUSTICE MCCLOSKEY: Well, thank you for that. Now, homework for the
29 court. The court will have to make a ruling on which case or cases should be heard in
30 advance of the others, and I will now digest all of the additional material which
31 has been provided and I will make that ruling. That ruling I think is going to be

1 essential, an essential prerequisite for the draft case management orders with

2 timetables, and therefore I will make that date, the concrete date of the 7th of January,

3 and I'll endeavour to have my ruling available this side of Christmas. Now, is there

4 anything else the court needs to do in the view of any party, represented or

5 unrepresented?

6 MR GILLEN: I think, my Lord, I just would wish to draw the distinction that there is -

7 there is a difference at this stage in the Planning Appeals Commission case and the case

8 that I'm instructed in, in the sense that the Planning Appeals Commission was

9 previously granted leave, as I understand, and there's no leave decision in respect of

10 our case.

11 MR JUSTICE MCCLOSKEY: Don't worry, I'm conscious of the fact, Mr Gillen, that

12 in some of these cases leave has not been granted.

13 MR GILLEN: Indeed.

14 MR JUSTICE MCCLOSKEY: The draft orders that I've asked to be drawn up

15 will deal with that.

16 MR GILLEN: Indeed, thank you, my Lord.

17 MR JUSTICE MCCLOSKEY: And then in that way I won't overlook that leave has

18 not been granted in a certain case or cases. The final two clauses then in today's

19 directions order will be costs reserved and liberty to apply. Thank you all for attending

20 this morning.

21

22 Court adjourned.

23

24

25 *We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*

Appendix 4

Neutral Citation No: *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* McC10820 *Delivered:* Ex tempore 18/12/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

IN THE MATTER OF AN APPLICATION BY RURAL INTEGRITY
FOR JUDICIAL REVIEW

____

McCLOSKEY J

[1] The word 'rut' stands out in this morass, progress having been very disappointing indeed for the reasons which have been ventilated this morning. The court is gravely concerned about the position of a large number of third parties who have organised their lives, their future plans and their finances in a certain way and have placed their trust in the planning system, submitting their applications, paying the required fees, incurring other financial outlay, securing grants of planning permission and now finding themselves not knowing what to do in the midst of an unprecedented tsunami of planning judicial review challenges [33] brought by a single litigant in the space of some months. The court is still striving energetically to find a solution to this quite unprecedented situation and no simple solution has emerged to date.

[2] The successful planning applicants will make their own decision about what to do with their planning permission and they will do that with or without the advice of lawyers or other professional people. This court is emphatically not prohibiting the initiation of any of the works of development which are authorised under what are in law presumptively lawful grants of planning permission. That is all that I can say to the planning applicants

[3] One question which is bound to be at the forefront of your minds is: how long is all of this going to take? It is going to take quite some time, many months and not weeks. I am going to come to the question of timetable in just a moment. This court may not be the only court involved in these judicial reviews. There could be appeals to the Court of Appeal and the Court of Appeal lists cases months ahead. These cases are nowhere near ready to be heard in this court yet. So if you do the basic arithmetic you will realise that there is a long period of uncertainty ahead for everyone involved in these cases, directly or indirectly.

[4] I am just going to pause there. Does anyone in the courtroom who does not have a lawyer today wish to ask me any questions arising out of what I have just said? If you

have questions you can, if you prefer, send a letter or an email to the JR Office and it will come to my desk and we will try and answer whatever questions you have. That facility is available to all of you. Each of you has the status of what we call "interested parties", thereby enjoying certain rights in the proceedings. So just bear that in mind. Finally, none of you is under any obligation to instruct a lawyer, though all should reflect carefully on this course.

[5] The order of the court today has the following components:

(i) Mr Duff will provide to the court and to everyone else by email the illustrative graphics document which we discovered this morning exists. That will be done by 21 December at the latest.

(ii) Mr Duff will provide to the court and everyone else a list of the cases in which he has lodged with the court draft protective costs orders.

(iii) In 2018 056857 and 2018 056858 the proposed respondents will comply with paragraph 5 of the court's order of June 2018 in each case and they will do so by 7 January 2019.

(iv) Three cases are slowly emerging as candidates to be heard before all the others. I am not calling them "test" cases, preferring to eschew such terminology at this stage. I shall follow today's proceedings with a formal ruling on this issue. [*Now see Appendix*]** The parties will then provide an agreed proposed case management order, incorporating timetables, in the selected lead cases, by 07 January 2019.

[6] I shall leave that mainly in the hands of the legally represented parties. The draft orders will be provided to the interested parties in those cases, if possible to all interested parties if there are contact details and also to the applicant in person and to the applicant's solicitors in the few cases in which he has instructed solicitors.

[7] I am pausing at that point in time on the applicant's side Mr Duff is there anything else you suggest should be incorporated in today's order of the court? On the Respondents' side is there anything else that ought to go into today's order?

**APPENDIX

[1] I have considered all parties' representations regarding the selection of suitable cases to progress ahead of others to the stage of substantive determination.

[2] The intention is to provide the maximum clarity and certainty to the large number of primary parties and interested parties in a context of 30+ JRs raising comparable issues of law, by the promulgation of judgments pre - Easter 2019.

[3] The real litigant in all 33 cases is one Gordon Duff, director and sole shareholder in the companies concerned. The court had been hopeful of receiving considerably greater cooperation and assistance from the Applicants in pursuing the aforementioned quest. The Applicants' duties under the overriding objective, express and implied, have not been discharged satisfactorily.

[4] The issue of ordering that the Applicants provide security for costs is live in all cases. In 2018/26370 there is an undetermined application by the Respondent, the PAC (see [9] below)

[5] The court's assessment at this stage is that the central thread linking all cases is whether the impugned grants of planning permission are unlawful on account of incompatibility with the applicable policies concerning the development of small gap sites in an otherwise substantial and continuously built up frontage in the countryside . (See Re McNamara's Application [2018] NIQB 22).

[6] Applications for protective costs orders, currently undetermined, have been lodged in many cases.

[7] The court has not yet ruled on whether to grant leave in most (perhaps all?) cases.

[8] The majority of the successful planning applicants/developers are unrepresented. The court has taken steps attempting to ensure that all are on notice of these cases. Some have attended the most recent CMD hearings, on 30/11/18 and 18/12/18 and some have addressed the court.

[9] The court has considered all submissions/representations received. An intensely pragmatic solution in furtherance of [2] above is required. To this end the court accedes to the consensus that which has emerged, namely that leave to apply for judicial review be granted AND that the 'pre-Easter judgment' aspiration be pursued in the following three cases: 2018/26370, 2018/56857 and 2018/56858. This does not preclude the Respondent [the PAC] in 2018/26370 seeking an early relisting of its security for costs application*

[10] By its separate Order of even date the court has directed that JRPD compliant agreed litigation timetables be provided by 07/01/19.

[11] This will be followed by the listing of A's PCO applications in any of the three listed cases and, if appropriate, the SFC application

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEENS BENCH DIVISION (JUDICIAL REVIEW)

BEFORE THE HONOURABLE MR JUSTICE MCCLOSKEY

on Tuesday the 18th day of December 2018

IN THE MATTER OF AN APPLICATION BY RURAL INTEGRITY (LISBURN 01) LTD
FOR JUDICIAL REVIEW

UPON THE MATTER having been in the list this day for Review,

AND UPON READING the documents recorded on the Court file as having been read,

AND UPON HEARING the Applicant, a litigant in person, and Counsel for the Respondent and Notice Party,

IT IS ORDERED that:

1. The Applicant shall provide its illustrative graphics document by email on or before 21 December 2018.

2. The Applicant shall provide a list of all cases in which he has lodged draft protected costs orders by 28 December 2018.

3. In relation to cases 18/56857/01 and 18/56858/01 [Cases 10 & 11], which the court has identified as lead cases, the proposed Respondent will comply with paragraph 5 of the Court order dated 19 June 2018 by 7 January 2019.

4. The court has received, and partially approves, the timetable proposed in the O'Reilly Stewart email of 7 January2019, as modified below:

   (a) All costs related submissions shall be completed by **28 January 2019**.

   (b) The protective costs applications and any security for costs applications in the two lead cases and 18/26370 will be listed on **1 February 2019**.

(c) The Respondent's solicitors shall provide the necessary interlocutory hearing bundles by **29 January 2019**.

(d) The two lead cases are provisionally listed for substantive hearing on **20 & 21 March 2019**.

(e) Further directions will be informed by the outcome of the listings on 1 February 2019 and will follow same.

5. The other 30 related cases shall be stayed until further order.

6. Costs reserved.

7. Liberty to apply.

Martyn Corbett
Proper Officer

Time Occupied: 18 December 2018 55 mins

Filed Date 21 January 2019