Neutral Citation No. [2013] NICA 18 | *Ref:* **COG8867**

Judgment: approved by the Court for handing down | *Delivered:* **09/05/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Michael Sherrie's Application [2013] NICA 18

In the matter of an application by Michael Sherrie

for leave to apply for judicial review

And in the matter of a decision of

the Commissioner for Complaints for Northern Ireland

Before Higgins LJ, Girvan LJ and Coghlin LJ

Coghlin LJ (delivering the judgment of the court)

[1] This is an appeal from the decision of Mr Justice Treacy taken on the 28th of June 2012 as a consequence of which he rejected the application by Mr Sherrie (the "appellant") for leave to seek judicial review of a decision taken by the Commissioner for Complaints for Northern Ireland (the "Commissioner"). The appellant relies upon two grounds of appeal:

(i) The learned judge erred in not finding that injustice had resulted from the finding of maladministration;
(ii) The learned trial judge erred in not finding that the purchase price offered to the appellant on 3rd March 2005 was unlawful.

[2] The factual background can be summarised reasonably briefly. The appellant in this case previously lived at Flat 12, 37 Cliftonville Road, Belfast, as a tenant of Belfast Improved Housing (BIH) which subsequently became HELM Housing. He was entitled to buy the property under a House Sales Scheme but the rules of that Scheme were changed with effect from 12 October 2004 and the effect of that was to reduce the maximum discount available to tenants wishing to purchase their home under the Scheme to £24,000 whereas the previous discount had been substantially higher at £34,000.

[3] The appellant made an application to purchase his flat under this Scheme on the 11th of November 2004. He originally claimed that he had made a previous application by fax on the 11th of October 2004 which would, had it been received on that date, have attracted the more beneficial discount. Unfortunately, it appears that for a number of reasons, one of which may well have been difficulties he was encountering with his telephone or fax line at the time, that application was never received by the Housing Association. On the 3rd of March 2005 he was offered the opportunity to purchase his flat by BIH under the Scheme but of course, at that time, with a maximum discount of £24,000 and not £34,000. It is difficult to be entirely sure of the appellant's reaction to that but there is an email among the papers from within the Housing Body indicating that he rejected that sum. He may well have done so on the basis that he believed he was still entitled to the more beneficial discount.

[4] In May of 2005 he submitted an application to be rehoused having been subjected to very unpleasant intimidation. He was subsequently rehoused at his current residence at 39 Lancaster Street, Belfast. He then, some five years later, initiated a complaint to the Commissioner. In a statement he expressed his wish that BIH would allow him to purchase 39 Lancaster Street, Belfast and to provide him with an entitlement to the original £34,000 discount.

[5] His case was taken up by the Commissioner and for the purpose of the hearing before Mr Justice Treacy the applicant was represented by a firm of solicitors. In the initial stages of the proceedings and before this court the applicant appeared as a personal litigant

[6] It is important I think to look at the legal background. The Scheme from which he was trying to obtain the benefit was introduced under the provisions of the Housing (Northern Ireland) Order 1983 as amended by subsequent Housing Orders in 1992 and 2003. Those Orders provided for the Department of Social Development to draw up a scheme whereby housing associations could sell a dwelling to the secure tenant by whom it was occupied. The Scheme that was originally applicable to the appellant was one which lasted from the 19th of May until the 11th of October 2004. That came to an end on the 11th of October and it was only in respect of applications made before that date that the more beneficial discount could be obtained.

[7] The appellant subsequently changed his focus somewhat from the type of discount to which he was entitled to the timing of the offer made by the Housing Association in March of 2005. In the complaint that he made to the Commissioner he relied upon paragraph 4.3 of the Scheme annexed to the DSD document which provided that "The secure tenant shall be notified of the purchase price within 12 weeks of making the application to purchase." The same 12 week time limit was referred to in paragraph 7 of the DSD guidance document, which was headed "**Applications to Purchase,**" and provided as follows:

> "7 Those wishing to purchase their homes should apply in writing to the Association. The Association in considering the application will make the necessary checks to ensure that the tenant is eligible to purchase, the tenant will be notified of the purchase price within 12 weeks of making the application."

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[8] In fact the appellant in this case was not notified of the offer made in 2005 until 16 weeks after receipt of his application in November. The Scheme and the DSD guidance document however have to be read a whole and one must bear in mind that it is a scheme and not a piece of legislation. The other important part of the DSD document for the purposes of this application is paragraph 16 which appears under the heading '**Objective Timescales for House Sales Process.'** Paragraph 16, which includes a reference to the 12 week period, provides:

> "The Department expects Housing Associations to process all applications to purchase within a reasonable timeframe. The following timetable is indicative of what is required."

[9] The wording in paragraph 16 is quite different from what appears to be mandatory wording in paragraph 7 and paragraph 4.3 of the Scheme. It is framed much more by way of guidance and is phrased in terms of *expectation*, *reasonableness* and being *indicative*. The appellant contacted the Commissioner for Complaints and there was a considerable period of correspondence between them as to what the appellant felt constituted maladministration leading to injustice.

[10] It is probably helpful to refer to at least one part of the legislation setting up the Commissioner for Complaints. Article 7 of The Commissioner for Complaints (N.I.) Order 1996 sets out the powers of the Commissioner to investigate and Article 7 (5) provides that:

> "(5) Subject to the provisions of this Order the Commissioner may investigate any action taken-
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> (a) by or on behalf of a body to which this article applies and
> (b) in the exercise of the administrative functions of that body."

Sub-paragraph (7) provides that:

> "(7) The Commissioner may investigate any action taken as mentioned in paragraph (5) only if a complaint is made to the Commissioner in accordance with this Order by a person who claims to have sustained injustice in consequence of maladministration in connection with the action so taken with a request to conduct an investigation into it."

[11] It is perfectly understandable that the appellant in this case went to the Commissioner and sought to rely on the powers of the Commissioner. There are two important aspects of the Commissioner's powers. One is that he may find maladministration. Maladministration is not defined in the legislation but clearly refers to some fault, neglect or omission in the course of the discharge of the administrative functions of the body concerned. However maladministration in itself is not enough, the maladministration in question must result in an injustice. The necessity for both of those to coincide lies at the heart of this case. It is not difficult for any court to understand how that may not be easily comprehended by a lay person. A lay person may be under the impression that if he goes to the Commissioner for Complaints as the office responsible for dealing with what appears to be maladministration or injustices to a lay person he will get some form of result. Unfortunately, the powers of the Commissioner are tied to what he can do under the legislation setting up his office and one of the things that the Commissioner does not have power to do is to determine whether or not a provision in a statutory scheme is lawful or unlawful.

[12] In this case it is clear that there was a detailed exchange between the Commissioner and Mr Sherrie. It was productive in so far as the Commissioner, after Mr Sherrie launched his judicial review proceedings, altered his view as to whether or not there had been maladministration and that is something that must go to the credit of Mr Sherrie and his determined approach to what he felt was something that needed to be set right. If the Commissioner had proceeded to also conclude that the maladministration had produced an injustice, Mr Sherrie would then have been entitled to go to the County Court to seek a remedy in damages. The problem for the Commissioner, and indeed, for Mr Justice Treacy and this court is the difficulty in establishing that the maladministration in question, which was a matter of exceeding the timescale for making the offer by 4 weeks, led to any injustice. It is perfectly clear that Mr Sherrie did not know anything about the failure to comply with the 12 weeks until some 5 years later. In those circumstances the failure to comply with the timescale could not have played any part at all in Mr Sherrie's decision as to whether to accept or reject the offer. It is clear that he rejected the offer that was made in March 2005 for other unconnected reasons and it seems likely to this court that one of the reasons for that was probably his belief that he should still have been entitled to the previous more beneficial discount and nothing to do with the failure to observe the timescale.

[13] That really disposes of this case but Mr Sherrie is left with the lingering dissatisfaction that there was a failure to comply with a timescale expressed to be mandatory in the Scheme. In such circumstances he seeks a finding by the Commissioner that the offer made outside the 12 weeks was unlawful and could never have been accepted. That is not a finding that the Commissioner is empowered to make. The Commissioner has endeavoured to point out what is at least a very significant ambiguity in the way that paragraph 7 and paragraph 16 of the DSD guidance document are worded and such a distinction is perhaps a difficult matter for a lay person to appreciate. But if one reads the DSD document and the Scheme as a whole it is perfectly clear, or it would appear to be perfectly clear, that the *aim* is to respond within 12 weeks. That is what is *expected* of the body concerned, that is what is viewed as *reasonable* and that is what is viewed as *indicative* or a target to be reached, not a mandatory timescale breach of which leads to an offer being unlawful. It is in those circumstances that Mr Justice Treacy having heard all of the submissions advanced on behalf Mr Sherrie's lawyers and those representing the Commissioner took the view that there was not an arguable application for judicial review and, accordingly, refused leave.

[11] In the view of this court that was a fully justified and rational decision and accordingly this appeal will be dismissed.