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No 17/095896/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STEWART MILLS, AS REPRESENTATIVE OF RINGHADDY AREA RESIDENTS, FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

NEWRY, MOURNE AND DOWN DISTRICT COUNCIL

McCloskey J

[1] The Applicant brings these proceedings as representative of the "Concerned Ringhaddy Area Residents", an unincorporated association, which challenges the decision of the Respondent dated 30 June 2017 to grant planning permission authorising a change of house type at 24 Ringhaddy Road, Co Down. The effect of the impugned decision is to permit the development of a dwelling house of larger and higher proportions than the extant building.

[2] Following a series of preliminary case management directions, this case was listed for hearing on a so-called "rolled up" basis, on 26 February 2018. On 09 February 2018 the Court was informed by the Respondent's solicitor of her client's intention to concede the judicial review challenge –

> "… on the basis that the decision notice is defective on a ground which is currently not pleaded in the Applicant's amended Order 53 statement."

Following this welcome notification the Court waived any further cost incurring steps by either party. The only issue of substance to be addressed by the parties was that of costs.

[3] What has transpired subsequently is the development of something of a runaway costs train. The parties' representatives have invested quite disproportionate time and resources in a costs battle. I elaborate on this as follows.

[4] On 13 February 2018 Keegan J, in my absence, helpfully dealt with a review hearing directed in the wake of the aforementioned notification from the Respondent's solicitor. The Judge ordered that each party file a "*short*" costs submission, sequentially and within stipulated time limits. I pause at this juncture. As practitioners are well aware, it is the practice of this Court:

(a) To require the parties' representatives to make serious and determined efforts to agree issues of costs;

(b) To confine costs submissions where these are absolutely unavoidable, to a maximum of two A4 pages;

(c) To adjudicate on contentious cost issues on paper; and

(d) To adjudicate on contentious cost issues only as a matter of last resort.

All of the foregoing measures are designed to discourage the development of a costs cottage industry in the Judicial Review Court. In this context it is appropriate to reproduce what was stated very recently by this Court in Re YPK and Others Applications [2018] NIQB 1 at [19]:

> "In the result, the Court of Appeal reversed the costs ruling of the High Court, substituting for it a decision that the respondent should pay 50% of the Appellant's costs in respect of the first of two identifiable periods and 100% of the costs in respect of the period thereafter. The concurring judgment of Stanley Burnton LJ contains three significant passages, at [75] – [77]:
>
> > '75. The consequence of our decision should be a greater willingness on the part of the parties to judicial review proceedings, at first instance and on appeal, to agree not only the substantive provision of the order to be made by the Court, but also the issue of costs. Settlements in which the question of costs is left to be determined by the Court at a later date are common, and

> perhaps too common. Parties can no longer assume that the likely order is no order as to costs, even where one party or another has conceded the whole, or substantially the whole, of the other side's case.
>
> 76. A successful negotiation of costs issues is likely to be cost effective, saving the costs of subsequent written submissions and saving the time of the judge who is required to determine costs. It is in both parties' interests to address the question of comprehensive settlement as early as possible.
>
> 77. Where the parties are unable to agree costs, and they are left to be determined by the Court, it is important that both the work and costs involved in preparing the parties' submissions on costs, and the material the judge is asked to consider, are proportionate to the amount at stake. No order for costs will be the default order when the judge cannot without disproportionate expenditure of judicial time, if at all, fairly and sensibly make an order in favour of either party. This is not to say that there are not cases where the merits can be determined and no order for costs can be seen to be the appropriate order; but in such cases that order is not a default order, but an order made on the merits.'

From these passages I distill a powerful exhortation that in cases where the pursuit of either leave to apply for judicial review or substantive relief becomes academic, the need for the court to adjudicate on costs issues should arise only as a matter of last resort. **Practitioners please take careful note!** This may be viewed through the prism of the overriding objective, which imposes strong duties of co-operation and assistance on all litigants."

[My emphasis]

I refer also to this Court's recent decision in CC v Special Educational Needs and Disability Tribunal [2018] NIQB 4, at [12] especially.

[5] There followed a three page costs skeleton argument on behalf of the Applicant. This yields the following analysis:

(a) It helpfully draws to the attention of the Court the hitherto opaque reason for the Respondent's concession, namely the failure to include in the Decision Notice a condition removing the permitted development rights.

(b) It contains a lengthy recitation of the procedural history of these proceedings, which is totally unnecessary in the context of a discrete costs dispute. This occupies approximately one third of the submission in its entirety.

(c) It also, unnecessarily, addresses considerable space to the PAP phase.

(d) While it refers to the aforementioned decision in YPK in a footnote, it fails to articulate anywhere the specific costs principle which is said to apply. It would appear that the authors were simply too distracted by and pre-occupied with matters of purely peripheral padding.

[6] Worse was to follow. The runaway costs train, having set off at a brisk pace, accelerated rapidly with the advent of the Respondent's costs submission: four pages of dense print consisting of 16 paragraphs and subparagraphs, seasoned by multiple footnotes, augmented by a detailed appendix containing a chronology of events and, for good measure, supplemented by a hefty bundle of authorities! A splendid piece of work – but quite disproportionate. The costs juggernaut had moved into top gear.

[7] The Respondent's costs submission fails to recognise two figurative elephants in the courtroom. The first is that the concession should have been made long ago. The PAP process is designed for the very purpose of exposing legal deficiencies of the kind now acknowledged in a manner and at a stage which obviates the need for legal proceedings. The fact that the Applicant's representatives were not relying on this defect either at the PAP stage or in the several iterations of their Order 53 Statement, in response to directions of the Court, is of no moment. The Respondent, while acknowledging that the legal defect is "*both serious and fundamental*", has put forward no explanation of the extraordinarily late timing of the concession, doubtless because no reasonable justification exists.

[8] Second, the Respondent having been aware of this signal defect for some time, it would have been obliged, in the exercise of its duty of candour to the Court, to acknowledge this in a forthright and unambiguous manner come what may. This would inevitably have given rise to an application on behalf of the Applicant to amend its grounds of challenge which, equally inevitably, would have been granted.

[9] On these elementary grounds the Respondent's submission that "*.. it cannot be said that the Applicant would have succeeded had the claim proceeded to conclusion*" is manifestly untenable.

[10] It is further submitted that the Respondent has acted "*promptly and responsibly*". The second of these epithets is accurate. But the first is unsustainable. I would add that in any case where a putative judicial review claimant does not ventilate a discrete issue in a PAP letter, this cannot operate to absolve the proposed respondent of its duty to conscientiously reconsider all aspects of the impugned decision. This applies with particular force in a context – the present one – where the legal defect ultimately stimulating the Respondent's white flag is both fundamental and readily discernible, giving rise to the irresistible conclusion that the concession is long overdue.

[11] Finally, the Respondent's submissions have the distinct flavour of *inter-partes* private law litigation fencing. They overlook the essential character of judicial review litigation, which does not entail any *lis inter-partes*. Simply and succinctly, the Applicant's challenge has successfully exposed a serious, and indefensible, legal flaw in a public authority's decision. This, fairly and realistically, can only be equated with success for the Applicant. See in this context YPK at [18] (i).

Conclusion

[12] The overarching aim and function of the judicial review jurisdiction of the High Court is to expose the misuse of power by public authorities. This jurisdiction exists for the purpose of bringing to light public law misdemeanours. The Applicant's challenge has fulfilled this overarching purpose. It may be that this fulfilment has not been achieved in the notional, theoretical clean edged and paradigm way. It may further be said that the Applicant has stumbled to an outcome which entails the conclusion that the impugned decision of the Respondent is irredeemably contaminated in law. I consider, however, that none of these factors operates to undermine or dilute the assessment set forth above. Furthermore, any judicial review respondent who – as in this case – makes the submission that the Applicant's challenge was irremediably frail confronts the obstacle that the Court has assessed the grounds of challenge, in their ultimate incarnation, to be sufficiently meritorious to warrant the mechanism of a "rolled up" hearing and

encounters the added difficulty, unmistakable in nature, that the respondent's case is not before the Court. Of course the Court will not shut its eyes to some "knock out" argument or factor in the respondent's favour: but there is none in the present case.

[13] It follows, in my judgment, that the Applicant's entitlement to his costs is clearly established. The present case can only be viewed as one of outright victory for the Applicant. I identify a degree of merit in the Respondent's submission that the Applicant has incurred additional, and avoidable, costs in his conduct of these proceedings, reflected in the Court's repeated attempts in its preliminary orders to bring about coherent and focused grounds of challenge. I reflect this factor by ordering that the Respondent pay 75% of the Applicant's reasonable costs, to be taxed in default of agreement.