

Neutral Citation No: [2018] NIQB 73

Ref: McC10747

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 28/06/2018

No 2018/38492/01

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

IN THE MATTER OF AN APPLICATION BY DEAN BLACKWOOD,
REPRESENTING RIVER FAUGHAN ANGLERS LIMITED
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

DERRY CITY AND STRABANE DISTRICT COUNCIL

McCloskey J

Introduction

[1] The subject matter of this judicial review challenge is the grant of planning permission number A/2014/0495/F by the Respondent Council, on 17 January 2018, whereby the following development was authorised:

“Construction of manager’s dwelling and six No. cottage style apartments in two No. blocks with associated landscape works to provide tourism based ‘fishing end use’ on the site under PPS16 [at a location described as] ... lands opposite 53 Lismacarroil Road/Glenishane Road, Crossballycormick, Londonderry.”

The Applicant

[2] The Applicant, Dean Blackwood, who provides an address in Belfast, describes himself as the chairperson and a director of the River Faughan Anglers Limited (hereinafter “*the association*”), posts which he has occupied, on a voluntary basis, since 2005. He describes the association as “*a cross-community, voluntary run,*

not for profit organisation managing the fishing rights on the River Faughan [benefiting from] .. a lease of the fresh water section of the river from The Honourable The Irish Society and a lease of the tidal section from the Loughs Agency". The Applicant is further self-described as a retired chartered town planner and a personal litigant.

Initial Case Management

[3] In its initial case management order, the Court directed that if the Applicant had been or is in receipt of legal advice or services this must be disclosed fully to the Court, within 14 days, on three grounds. First, in the discharge of the Applicant's duty of candour to the Court. Second, to enable the Court to make a comprehensive evaluation of his standing. Third, to facilitate the Court's management of these proceedings.

[4] The grounds of challenge are, in summary: error of law in taking into account the allegedly unlawful partial implementation of two previous grants of planning permission in 2009; various breaches of the Habitats Regulations; a failure to "conduct" an EIA determination under Regulation 10(3) of the EIA Regulations 2012 and/or failing to require an environmental assessment; failing to consult the Loughs Agency; disregard of material considerations (and/or misinterpretation/misapplication of), being material policies enshrined in the Derry Area Plan 2011 namely policies ENV2, ENV7, ENV8, ENV9, TU1 and TU2; misinterpretation of policy TSM5 within PPS16 ("Tourism") by erroneously treating the impugned permission as authorising a minor or secondary addition to an existing or approved self-catering complex, rather than a free standing new development proposal; and permitting the intrusion of a mistaken (or immaterial) consideration in the misconceived assessment that the holiday chalets approved will "largely" occupy the footprint of the corresponding approval in A/2007/0895/RM; and irrationality.

[5] At the stage when the Applicant's papers were first lodged it was immediately apparent to the court that there was a lack of symmetry between the Applicant's grounds as pleaded and those raised in the PAP correspondence phase. As a result the Respondent Council had not, in its letter of 12 March 2018, addressed certain grounds. The Applicant's further letter of 08 April 2018 refers in this context.

[6] Further to [5], the Applicant was continuing to correspond with the Council. There was an exchange of letters dated 15 and 16 April 2018 respectively relating to the Habitats Risk Assessment ("HRA") and the unavailability of same on the Council's Planning Portal. The correspondence continued with the Applicant's letter of 19 April 2018 to the court, which concerns the same issue. Specifically, the Applicant expressed an intention to challenge the "robustness" of the HRA dated 26 June 2017 on the basis of "scientific uncertainty over the acceptability of the proposed means of sewerage disposal from the impugned permission and the impact of any discharge consent on the River Faughan and Tributaries Special Area of Conservation".

[7] Reflecting the foregoing the court 's initial case management order was in the following terms:

- (a) Compliance with what is directed in [3] above will be affected by **04 May 2018**.
- (b) An amended version of the Order 53 Statement, with the amendments clearly underlined in red, will be provided to the Court and Respondent Council by the same date.
- (c) The Council, by the mechanism of expanding and enlarging its PAP response dated 12 March 2008 with appropriate colouring/highlighting, will provide a comprehensive response to the Applicant's case, to include in particular a rejoinder to the totality of the Applicant's grounds of challenge - as summarised in [4] above - by 21 May 2018. This extended response will in effect substitute the letter of 12 March 2018.
- (d) If the aforementioned enlarged response is to involve any documentary attachments, an indexed and paginated bundle will be provided.
- (e) The Applicant will provide to the Court and the Respondent Council a draft protective costs order by 04 May 2018.
- (f) The Applicant will serve the comprehensive, updated judicial review leave application on the planning applicant by 04 May 2018.
- (g) The Court will conduct an oral *inter-partes* leave hearing, time allocation one hour, on 30 May 2018.
- (h) Liberty to apply.
- (i) Costs reserved.

[8] The above directions generated the following additional steps:

- (a) The Applicant averred that he has at no time been in receipt of legal advice, albeit he averred that he has a qualification in environmental law.
- (b) He served an amended Order 53 Statement.
- (c) He applied for a protective costs order.
- (d) The Council's solicitor provided an augmented PAP response.

- (e) The Court convened an oral *inter-partes* hearing at which Mr Blackwood represented himself and the Council was represented by Mr McEvoy of counsel.
- (f) The Applicant subsequently availed of the facility granted to him of lodging further written submissions and materials.

By this combination of mechanisms the asymmetry noted above was rectified.

The Impugned Decision

[9] This is noted in [1] above. The development authorised is the subject of a series of conditions: the removal of certain extant foundations; vehicular access requirements and visibility splays; maximum access road gradient; approval by the Council of a final Construction Environmental Management Plan prior to commencement of the works; the maintenance of a buffer of 10 metres minimum between the boundary of the River Faughan and the location of the proposed refuelling, storage of oil/fuel, concrete mixing and washing areas, designed to protect the integrity of the River Faughan special area of conservation (“SAC”); testing to establish whether there is any ground gas on the proposed development site, having regard to the closed landfill site which has a shared boundary; non-occupation of any of the proposed units until approval of the sewage disposal scheme; and short term holiday letting accommodation only for the proposed self-catering chalets.

The Grounds Reformulated

[10] Via the amendments of the Order 53 Statement (which do not require the permission of the court at this stage), the Applicant’s grounds have crystallised into the following:

- (i) Taking into account immaterial considerations, namely two lapsed previous grants of planning permission.
- (ii) In the alternative to (i), breach of regulations 45, 46, 50 and 51 of the Habitats Regulations by failing to undertake a review of the previous planning permissions.
- (iii) Breach of Regulations 6(3) and 43(1) of the Habitats Regulations by failing to carry out any (or any adequate) habitats assessment.
- (iv) Breach of Regulations 12 and 34 of the Habitats Regulations by failing to consider the impact of the proposed development on a protected species, namely bats.

- (v) Breach of Regulation 4(1) of the EIA Regulations by failing to require the provision of an “Environmental Statement”.
- (vi) Infringement of sundry policies enshrined in the Derry Area Plan 2011: see [4] above .

The Developer

[11] The planning applicant is Ms Catherine Deery, acting via her agents ASI Architects (and participating in these proceedings as an interested party). The court heard briefly, and received a letter, from Ms Deery at the *inter-partes* hearing noted above. Ms Deery is understandably frustrated by the advent of this legal challenge finding herself, in common with every developer in this litigation context, caught in the cross fire between the challenging litigant and the deciding authority. Ms Deery has expressed herself in commendably moderate terms. Her intervention at this stage, which the court approves, includes an evidential contribution consisting of a report from an engineer (related to her – as declared). This concludes that:

- (a) The “as constructed” foundations are “*substantially constructed within the red line boundary of the sites*”.
- (b) The “as constructed” foundations are “*constructed in accordance with the topographical survey of the lands taken before the first applications*”.

Decision on leave

[12] The test to be applied, well established, is whether the threshold of demonstrating an arguable case has been overcome. The detailed consideration which the Applicant’s grounds and voluminous supporting evidence invite is neither appropriate nor feasible at this preliminary stage of proceedings. Being satisfied that the threshold is overcome in respect of the court’s reformulation of the grounds at [10] above leave to apply for judicial review is granted.

Case management

[13] From the developer’s perspective there is a strong interest in expedition. The directions which follow will, therefore, be rigorously enforced and, further, the substantive hearing date will not be vacated.

- (i) The Council’s affidavit evidence will be provided by **04 August 2018** at latest.
- (ii) Any rejoinder affidavit on behalf of the Applicant will be provided by **28 August 2018** at latest.

- (iii) Skeleton arguments, focusing with discipline on [10] above and not exceeding 6 x A4 pages, will be provided by **04 September 2018** at latest.
- (iv) The Applicant's extant bundle of authorities will be augmented as appropriate so as to create an agreed bundle of authorities, to be filed by **04 September 2018**.
- (v) The substantive hearing will be listed on **12/13 September 2018**.
- (vi) The Applicant will arrange, with revised indexing and pagination, to recompile his extant leave bundle so as to encompass the totality of all materials generated at this stage. This will become **Trial Bundle 1: by 04 July 2018**.
- (vii) If there is any rejoinder by the Applicant, in accordance with the above directions, this will be inserted at the end of **Trial Bundle 1** with revised indexing and pagination.
- (viii) The Council's affidavit evidence *et al* will be assembled in **Trial Bundle 2**.
- (ix) The Council will make its response to the Applicant's protective costs order application by **11 July 2018**.
- (x) Costs reserved.
- (xii) Liberty to apply.