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

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Delivered: 17/12/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY MAY ANDERSON
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

MAY ANDERSON

Applicant

and

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent

**Mr McQuitty (instructed by Campbell & Caher Solicitors) for the Applicant
Mr Anthony (instructed by the Charity Commission for Northern Ireland) for the
Respondent**

McBRIDE J

Introduction

[1] The applicant seeks leave to apply for judicial review of a decision made by the Charity Commission of Northern Ireland ("CCNI") dated 15 January 2021 and maintained by them in a review decision dated on or about 21 July 2021 which was communicated to the applicant on 27 July 2021 ("the impugned decision").

[2] The CCNI's impugned decision granted retrospective authorisation to the Ballymena Family and Addicts Support Group aka the Hope Centre, Ballymena, ("the Charity"), Mr Mitchell and Ms Baird to bring legal proceedings in the Chancery Division seeking injunctive relief and damages against the applicant and another person.

[3] The applicant's grounds of challenge set out in the Order 53 Statement can be broadly classified as:

- Procedural unfairness
- Illegality/vires
- Irrationality

[4] The applicant seeks the following relief:

- An Order of Certiorari quashing the impugned decision.
- A declaration that the impugned decision was unlawful, ultra vires and of no force or effect.
- An Order of Mandamus to require that the NICC publish adequate guidance on the exercise of their discretion under section 54 of the Charities (Northern Ireland) Act 2008.

[5] By email dated 16 November 2021 the proposed respondent advised the applicant as follows:

“Subject to the court, the Charity Commission would wish to make submissions on only the question of whether this matter ought to be heard in the Chancery Division as per its position paper of 5 November 2021. Having considered the applicant's further evidence and her skeleton argument – and bearing in mind the threshold for leave – the Commission is of the view that her proposed grounds for judicial review are arguable. It also considers that it would need to place its own evidence before the court before it could respond fully to her application.”

[6] Accordingly, the court only heard submissions in respect of the question whether the matter ought to be heard in the Chancery Division rather than by way of judicial review.

[7] Mr Potter, of counsel, who acts on behalf of the plaintiffs in the chancery proceedings attended and applied for the plaintiffs to be joined as interested parties in the judicial review proceedings. After hearing submissions from the applicant and respondent, Mr Potter advised the court that he no longer intended to pursue his application at this stage but indicated that he would renew his application in the event leave was granted. All parties were in agreement with this course of action.

[8] Mr McQuitty, of counsel, appeared on behalf of the applicant and Mr Anthony appeared on behalf of the proposed respondent. I am grateful to both

counsel for their well-researched, clear and concise written and oral submissions which were of much assistance to the court.

Background

[10] The applicant was a founding member of the Charity which was set up in or around 2000 to provide support for families of drug addicts and eventually to addicts themselves.

[11] Since its inception the Charity's operations grew and it moved to larger premises and employed a number of workers. The Charity was funded by the local council, Public Health Agency, Big Lottery and other private funders.

[12] In 2005 the Charity decided to incorporate and formed a company limited by guarantee and a Board of Directors were appointed. The applicant was initially a member of the Board and was then appointed Chair of the Board in 2016.

[13] On 19 June 2020 at a Board meeting, called by the Chair it was decided to close the Charity's premises, end all its activities and wind up the company.

[14] On 24 July 2020 the Charity, Mr Mitchell and Ms Baird ("the plaintiffs") issued proceedings in the chancery court against the applicant and another person ("the defendants") seeking declaratory and injunctive relief together with damages on the grounds the defendants had acted unlawfully and in breach of the Charities Act (Northern Ireland) 2008 when they decided to close the premises; cease the activities of the charity and wind up the company ("the chancery proceedings").

[15] During the course of the chancery proceedings it emerged that the plaintiffs had not obtained the necessary authorisation from the CCNI to bring legal proceedings in the High Court.

[16] The plaintiffs therefore sought authorisation retrospectively from the CCNI to bring the proceedings pursuant to section 54(2) of the Charities Act (Northern Ireland) 2008.

[17] On 15 January 2021 the CCNI granted authorisation for the chancery proceedings.

Relevant Legislation

[18] Section 54 of the Charities Act (Northern Ireland) 2008 provides as follows:

"Proceedings by other persons

54—(1) Charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity

trustees, or by any person interested in the charity, but not by any other person.

(2) Subject to the following provisions of this section, no charity proceedings relating to a charity shall be entertained or proceeded with in any court unless the taking of the proceedings is authorised by order of the Commission.

(3) The Commission shall not, without special reasons, authorise the taking of charity proceedings where in its opinion the case can be dealt with by the Commission under the powers of this Act other than those conferred by section 53.

(4) This section shall not require any order for the taking of proceedings in a pending cause or matter or for the bringing of any appeal.

(5) Where the foregoing provisions of this section require the taking of charity proceedings to be authorised by an order of the Commission, the proceedings may nevertheless be entertained or proceeded with if, after the order had been applied for and refused, leave to take the proceedings was obtained from one of the judges of the High Court attached to the Chancery Division.

...

(8) In this section “charity proceedings” means proceedings in any court in Northern Ireland brought under the court’s jurisdiction with respect to charities, or brought under the court’s jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.”

Submission of the parties

[19] The applicant submitted that the matter ought to proceed by way of judicial review rather than in the chancery proceedings for following reasons:

- (a) The decision under challenge was a decision of a public authority exercising statutory powers and the normal and natural means of challenge is by way of judicial review.

- (b) The issue in dispute is whether the chancery proceedings ought to have been authorised and therefore it would be wrong in principle to say that the proceedings, which the applicant averred were unlawfully authorised should be considered to be the appropriate vehicle to provide an alternative remedy.
- (c) The proposed alternative remedy consisted of an abuse of process application in the chancery proceedings. Mr McQuitty submitted that such an application would be difficult to make in circumstances where the proceedings had been authorised by the CCNI, a public body. Secondly he submitted that such an application would not be coterminous with the bounds of public law as it would not provide an effective remedy. At most it would lead to the quashing of the CCNI's decision but the chancery court would be unable to grant an order of *mandamus* to compel production of guidance by the CCNI on the exercise of its powers under section 54 of the Charities Act (Northern Ireland) 2008.
- (d) Mr McQuitty further submitted that the real issue in dispute was whether the CCNI had acted lawfully in giving authorisation for the issuing of chancery proceedings. Such a question he submitted could only be answered in a properly focussed way was in a judicial review application.

The Respondent's Submissions

[20] The respondent submitted that leave ought to be refused as the applicant had an alternative remedy in the chancery proceedings.

[21] It submitted that the applicant's primary objective was to end the civil proceedings and in accordance with the principle in *Lumba* [2011] UKSC 12, paragraph 70 she could use her judicial review arguments as a defence to the civil claim brought in the chancery proceedings. In particular, Mr Anthony submitted that she could bring an abuse of process application in which she could argue that the chancery proceedings were vitiated by illegality, that is the unlawful decision of the CCNI to authorise the chancery proceedings and in this application she could rely on all her judicial review arguments. The chancery court would then have the power to strike out the proceedings if it was satisfied those proceedings were vitiated by illegality.

[22] Secondly, he submitted that the dispute involved matters of public law and charity law and all of these matters could be considered in the chancery proceedings. In accordance with the overriding objective this ensured there would not be a multiplicity of proceedings and represented efficiency in terms of time and money.

Consideration

[23] The decision under challenge is a decision of a public authority, namely the CCNI, exercising statutory powers, namely powers conferred by the Charities Act

(Northern Ireland) 2008. The normal means of challenging such decisions is by way of judicial review. There are however exceptions to this general rule.

[24] At paragraph 3.118 of De Smith's Judicial Review 8th Edition, it notes as follows:

"O'Reilly v Mackman represented something of a high watermark in the courts insistence on procedural exclusivity. In a series of subsequent cases, encouraged by Lord Scarman's dicta, the courts identified exceptions to the rule, allowing arguments based on grounds of judicial review to be advanced outside the RSC Order 53 procedure. The exceptions included: where public and private law decisions were not separate and distinct; where the public law aspect of the claim was collateral to an issue which was the proper subject matter of private law proceedings; where private law aspects of the claim dominated the proceedings; where a person sought to challenge the validity of a public authority's decision as a defence in a civil claim; and where the parties did not contest the appropriateness of the chosen procedure. The court stressed the general need for flexibility and pragmatism."

[25] I consider that the applicant, on the basis of *Lumba*, can challenge the legality of the CCNI's impugned decision by way of a defence to the claim made in the chancery proceedings. The applicant can in particular bring an abuse of process application. In such an application she can argue that the proceedings are vitiated by illegality as they were authorised by an unlawful decision of the CCNI and in making such an application she can advance all the judicial review arguments set out in her judicial review application. The chancery court if satisfied the proceedings are an abuse of court can strike them out and consequently the applicant can obtain the ultimate result she is seeking namely that the dispute is not considered by the courts but is rather determined by the CCNI.

[26] The fact the CCNI is not a party to the chancery proceedings is not a bar to the application of the principles set out in *Lumba* - see in particular *Dwr Cymru Cyfyngedig v Corus Ltd* [2016] EWHC 1183 Ch in which it was stated:

"The principles set out in *Lumba* apply even where the litigation is between two private parties."

[27] Further, even though the CCNI is not a party to the chancery proceedings the CCNI has indicated that it would not be averse to consenting to an application to be joined as a party to the proceedings and has indicated a willingness to provide such affidavit evidence as is necessary to deal with the issues which an abuse of process

application may raise. Accordingly I am satisfied that the challenge to the validity of the CCNI's decision can be brought by way of a defence to the claim made in the chancery proceedings.

[28] Mr McQuitty submitted that an abuse of process application would not be an effective remedy as the chancery court could not grant various remedies sought in the judicial review application including an order of *mandamus*.

[29] The applicant's reason for bringing the present proceedings is set at paragraph 31 of her skeleton argument as follows:

"Because she does not think that the civil proceedings she faces should ever 'have been taken against her' and should certainly not been authorised by the Commission (and not in the way that they have done). She believes the dispute could and should have been resolved by (and within the Commission) under their extensive statutory powers. She believes that this would have ultimately served the interests of the charity far better than High Court litigation by writ action."

[30] This submission demonstrates that the main thrust of the applicant's case is that the CCNI acted unlawfully in authorising the chancery proceedings because the CCNI had itself the necessary jurisdiction under the Charities (NI) Act 2008 to determine the dispute and the CCNI rather than the chancery court provides a better forum for the determination of such disputes when regard is had to the size of the charity and the costs of litigation. Therefore, although the applicant seeks various remedies including an order of *mandamus* in her judicial review application, her main interest is in having the impugned decision quashed for the purpose of bringing the chancery proceedings to an end. I consider that if the impugned decision of the CCNI was quashed the other matters currently pursued in the judicial review application would become of academic interest only.

[31] I further consider that the applicant's case raises questions of both a public and private law nature. To determine the legality of the impugned decision the court will have to determine whether the charity dispute falls within the statutory powers granted to CCNI under the Charities (NI) Act 2008. This is a question of charity law as it involves a consideration of the powers granted to the CCNI by the Charities Act (Northern Ireland) 2008 and in particular whether the present dispute comes within the definition of "charity proceedings." It further involves a consideration of charity law case law. The determination of the issue of jurisdiction will therefore involve a detailed consideration, not only of the Charities Act (Northern Ireland) 2008 but also the relevant charity case law. I therefore consider the public and private law aspects of the case are not separate and distinct. Indeed in some ways the public law aspect of the claim may be considered to be collateral to the charity law issue which will dominate the proceedings and therefore the issues

in dispute are more properly the subject of private law proceedings. Accordingly I consider that the chancery court is the proper forum for the determination of this dispute as it can deal with both the public and private law aspects of the present dispute.

[32] For the reasons set out I consider this matter can and ought to be heard in the extant chancery proceedings. In particular, I consider the chancery court has the ability to hear and to determine all of the issues – both public and private law issues and I further consider that disposing of these matters in the chancery proceedings avoids a multiplicity of other proceedings.

[33] The court is enjoined to act flexibly and pragmatically and, in particular, to act with the overriding objective in mind to ensure the efficient and sensible use of court resources. For this reason the court will seek to avoid a multiplicity of proceedings and, in particular, seek to avoid the commencement of satellite litigation. If this judicial review was to proceed and the decision of the CCNI was ultimately quashed that would not be the end of the matter as under section 54(5) the charity could then apply for leave from the Chancery High Court judge to bring proceedings notwithstanding the CCNI's refusal to authorise same. At the leave application in proposed charity proceedings the court is exercising an original and not an appellate jurisdiction and as set out in *Rai* [2012] EWHC 111 Ch paragraph [26] it takes into consideration a large number of factors. At such a leave hearing, whilst the chancery court will have regard to the decision of the judicial review court about the legality of the CCNI's decision, this would not be determinative of the outcome of the application for leave to bring charity proceedings. Accordingly I consider that granting leave in respect of a judicial review of the CCNI's decision would not bring finality to the litigation but would rather create satellite litigation whereas the chancery court can hear and determine all of the issues.

[34] I therefore refuse leave to apply for judicial review of the decision by the CCNI granting authorisation to the plaintiffs to bring chancery proceedings against the defendants.

[35] I will hear the parties in respect of costs.