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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GORDON DUFF FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF LISBURN AND CASTLEREAGH CITY COUNCIL

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The applicant appeared in person
Stewart Beattie KC and Philip McEvoy (instructed by Cleaver Fulton Rankin) for the Respondent
Denise Kiley KC (instructed by WG Maginness & Son, Solicitors) for the Notice Party

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SCOFFIELD J

Introduction

[1] This is a ruling made in the above proceedings on an application advanced by the applicant, Mr Duff, that I should recuse myself from the hearing of the matter.

[2] Mr Duff appeared in person. Mr Beattie KC appeared with Mr McEvoy for the respondent, Lisburn and Castlereagh City Council (LCCC) ("the Council"); and Ms Kiley KC appeared for the notice party (the Cottney family), a family unit which is the beneficiary of the planning permission which is under challenge in these proceedings. I am grateful to each of them for their submissions.

History of the proceedings

[3] The background to these proceedings is a little convoluted and is described only in brief detail below. The course of these proceedings themselves is also somewhat complicated and is also set out, in somewhat more detail, below. That is because a central thrust of the applicant's present application relates to the case management of the proceedings.

The original permission and the earlier proceedings

[4] The notice party was originally granted planning permission for a replacement dwelling beside 29 Old Coach Road, Hillsborough on 21 September 2021 ("the original permission"). This was an application for what is known as a 'replacement dwelling' in the countryside, where a previous dwelling is demolished and replaced by a new dwelling for which planning permission is granted. At the time of the original permission, the relevant planning policy was contained within Planning Policy Statement 21 (PPS21), particularly Policy CTY3. (Since adoption of the Council's Local Development Plan, the equivalent policy is now Policy COU3.)

[5] The applicant, Mr Duff, wished to challenge the grant of this permission and wrote a pre-action protocol letter to this end on 23 November 2021. It set out a number of potential grounds of challenge. These included that there were "various bits of evidence" from the site planning history which represented "proof that the derelict house on the application site has been replaced previously." A further ground was that the planning advice note (PAN) issued by the Department for Infrastructure (DfI) on 2 August 2021 entitled 'Implementation of Strategic Planning Police on Development in the Countryside' was a material consideration but had not been considered by the respondent when making the decision. The pre-action letter indicated in this regard that:

> "The proposed Respondent must now show consistency with other cases in which it had unlawfully failed to consider the PAN [Planning Advice Note] and accept that the impugned decision was unlawfully made as well as contrary to the policies outlined above."

[6] The pre-action correspondence gave a number of reasons why the impugned decision should be quashed, in the applicant's view. These included that the original house had been replaced before; that the PAN had not been taken into account; and a range of other matters in respect of alleged environmental harm, exercises of planning judgment and alleged failure to comply with various planning policies (Policies CTY3, CTY8, CTY14 and the SPPS). The Council was invited to concede that the impugned decision was unlawful and to submit to the judgment of the court. Mr Duff followed up on the pre-action correspondence by lodging proceedings challenging the original permission on 17 December 2021.

[7] At that time, Mr Duff had issued, or indicated an intention to issue, a wide range of applications against LCCC challenging the grant of planning permissions in the countryside on a variety of grounds. Around the same time, the Chief Executive of the Council, Mr David Burns, then applied to the court, acting on behalf of the Council, to quash the Council's own decisions in many of these cases on the ground that the PAN had (the Council accepted) *not* been properly taken into account when it should have been. The Council's position was that, if the resulting permissions

were quashed on this basis, Mr Duff's position would not be prejudiced because the planning applications would have to be re-determined and he could object again at that stage. Indeed, it was agreed that the points which he had raised in his proceedings or pre-action correspondence in each case would be taken into account in the redetermination of the relevant planning application and treated as an objection.

[8] Mr Duff did not want all of the decisions to be quashed on Mr Burns' application but wanted his judicial review cases to proceed, although I think it is fair to say that there were some cases where he felt this was more important than in others. One of the permissions which Mr Burns applied to quash was the original permission granted to the notice party in this case. Mr Burns issued proceedings in that regard on 20 December 2021, a few days after Mr Duff's own application was issued.

[9] The question of how this situation was to be addressed was considered by the court and determined in my judgment in *Re David Burns' and Gordon Duff's Applications* [2022] NIQB 10, given on 11 February 2022 ("the February 2022 judgment"), dealing with 18 applications on the part of Mr Burns and 17 applications on the part of Mr Duff. For the reasons set out in that judgment, the court quashed the planning permission in all but one case on Mr Burns' application. Mr Duff's applications relating to the same planning permissions were then dismissed on the basis that they were academic (because the target of the proceedings had in each case been quashed in any event).

[10] The notice party's original permission was one of those quashed at that time. The Cottney family had been put on notice of the two applications and raised no objection to their planning permission being quashed on Mr Burns' application. That is recorded in the annex to the February 2022 judgment. As a result of this the matter fell for reconsideration by the Council.

The further permission and the issue of these proceedings

[11] The evidence in this case principally relates to what happened in the period between the original permission being quashed in February 2022 and a further planning permission (which is the subject of these proceedings) being granted on 15 August 2023. In extremely brief summary, the Council took some steps to look into the question which had been raised by Mr Duff of whether the original dwelling had previously been replaced before but concluded that there was no evidence conclusively showing this. It now accepts that the original dwelling *had* previously been replaced before and had not been demolished at that time when it ought to have been. In those circumstances, planning permission ought not to have been granted under the relevant policy.

[12] The primary issues which remain in contention for the moment relate to how the documents which had been obtained by the Council in relation to this issue,

before its decision in August 2023, were dealt with and considered within the Council. Mr Duff essentially contends that the position was crystal clear and was wilfully ignored by Council officials who had a pre-determined view that planning permission should be granted again to the notice party. He also contends that the notice party or their agent must have known more about the original dwelling having previously been replaced than they will accept (i.e. that they were aware that the replacement opportunity had already been used and that they were not entitled to a further grant of planning permission on this basis). The tenor of the Council's evidence is that important documentation was not fully or properly taken into account by reason of a series of administrative mishaps; and the tenor of the notice party's evidence is that neither the family nor their agent were aware of the previous replacement application and were wholly reliant upon the Council to properly investigate this issue. The assessment of all of the evidence in this regard will be a matter for the court at full hearing.

[13] At the time these proceedings were commenced, the Council had not responded fully to the pre-action correspondence which had been sent by Mr Duff. The Council had issued a partial response taking issue with the applicant's standing and all aspects of his proposed challenge *except* for the question of whether the relevant building had previously been replaced. The Council later replied separately, on 7 December 2023, on this outstanding point. In this correspondence the Council accepted that the building to be replaced under the impugned decision *had* been replaced before; and that the conclusion within the planning officers' report that the building had not been replaced before was erroneous, so that the impugned decision had been reached on the basis of a material error of fact. The Council therefore conceded that the impugned decision had been an unlawful one.

[14] By this time, however, the old farmhouse had been demolished and a new dwelling house had been built, occupied by Mr Peter Cottney and his wife Ms Gibson. The building had commenced after the grant of the original permission – and before Mr Duff had threatened judicial review of that decision – but had also continued after the original permission had been quashed. Notwithstanding the Council's concession, the notice party denied having been aware that the dwelling had been replaced before. The Cottney family made clear at an early stage that they would be submitting, based upon a number of factors including health issues, that the grant of relief by way of a quashing order would be opposed in the case. Their position was set out in a response to pre-action correspondence of 13 November 2023 outlining a number of serious health issues (which I need not set out for present purposes) on the part of Mr David Cottney, Mrs Frances Cottney, and Ms Gibson's parents (particularly her father).

The grant of leave and the original hearing date of 4 June 2024

[15] In light of the position which had arisen the case was listed for case management review in January 2024. There was further correspondence to clarify the Council's position (and, in particular, when it had received information which

was relevant to the question of whether the dwelling to be replaced had been replaced before). The matter was then listed on 27 February 2024 in order to determine how best to proceed. By that time, the Council accepted, contrary to what it had suggested at a previous stage, that evidence which pointed towards the dwelling having been replaced before *was* within the Council at the time of the impugned decision. The applicant lodged an amended Order 53 statement on 26 February, the main purpose of which appears to have been to introduce new pleading in relation to improper motive or bad faith on the part of the Council at the time of granting the impugned permission. In an accompanying position paper, he urged the court to quash the permission and indicated that the matter of the correct relief to be granted "must remain simple." As appears further below, unfortunately the progress of the case since then has been far from simple.

[16] At the hearing on 27 February 2024, Mr Beattie indicated that leave would be opposed on a variety of other grounds, other than that which it had conceded in correspondence. In particular, he opposed the ground related to alleged breach of the Environmental Impact Assessment (EIA) Regulations. In the course of the hearing, he submitted that granting leave on the conceded ground but reserving the position in relation to the other grounds ("without prejudice" to those issues, which would remain at large) may be the most efficient way to proceed. Ms Kiley indicated that the notice party would wish a remedies hearing to be held in relation to relief. Significantly, Mr Duff did not oppose the course suggested by Mr Beattie (although it was clear from his position paper of the day before that he considered the EIA point to be important). He indicated that replying affidavit evidence from the Council would be useful.

[17] At that hearing, I indicated that I would grant leave to apply for judicial review on some grounds, in light of the Council's position, and stay the rest of the grounds for the time being. The grounds upon which leave was to be granted was to be considered further in chambers. The other grounds were to be stayed because, at that point, there had not been a full leave hearing dealing with them. The proposal was to deal with the conceded ground and the issue of relief, after evidence in relation to this had been filed, since it was inevitable that the key issue remaining in the case would be what relief should be granted. I also indicated that I would consider whether to grant leave on the EIA ground in order to 'grasp the nettle', lest that issue become relevant if the planning permission was quashed, and the Council had to reconsider the matter again. However, after the hearing, in an email the following day, Mr Duff abandoned reliance on the EIA ground in the following terms:

> "Further to my email below and the mention in Court yesterday in this matter; and, given the concession by the Respondent and the Court's primary focus at this stage on relief, I have decided to remove my EIA ground to simplify this case for all involved.

> In the next few days, I will, all being well, be bringing a new case which I propose to be a more suitable lead case to obtain a legal ruling on the EIA issue."

[18] There were two further significant exchanges at the hearing on 27 February 2024. First, I granted a protective costs order in the case in order to protect Mr Duff's position on costs. Second, I referred to the duty of candour in judicial review proceedings indicating that, in light of the unusual circumstances of the case which had been clarified in the recent correspondence, I would expect this duty to be discharged in full. I had already made clear in the course of the hearing that the duty of candour also applied to the notice party. This was, therefore, an indication that the evidential issues giving rise to Mr Duff's concerns about bad faith had to be addressed on affidavit by the respondent and notice party.

[19] By order dated 12 March 2024 the applicant was granted leave to apply for judicial review on three of his pleaded grounds. These related to the Council's misapplication of Policy COU3 (the conceded ground); and also, improper motive and bad faith, in light of the suggestion that the Council had in its possession at the time of its decision sufficient information to show that planning permission should not be granted but maintained, in the teeth of that evidence, that there was insufficient evidence in this regard. As foreshadowed in the earlier hearing, the remaining grounds in Mr Duff's amended Order 53 statement were "stayed until further order of the court." As agreed at the hearing, a timetable was set for the provision of replying evidence from the respondent and the notice party. The case was listed for hearing upon the grounds on which leave had been granted, and to consider the issue of relief on those grounds, on 4 June 2024. Leave was not granted on the EIA ground in view of the fact that Mr Duff had abandoned it in this case.

[20] On the same date, 12 March 2024, the applicant corresponded with the court office indicating that he would not be in a position to submit his notice of motion until he had seen the replying affidavits filed by the other parties. He therefore asked for an extension of time for submission of the notice of motion. He explained that he may very well have to amend his Order 53 statement before the notice of motion was lodged "as that is my final opportunity to do so." The Judicial Review Office replied on the same day indicating that it was rare for time to be extended for service of the notice of motion (see *Re Diver's Application* [2021] NIQB 83); but that, in any event, it was perfectly possible for an applicant's Order 53 statement to be amended after service of the notice of motion. Once the notice of motion is served, the grounding document in the case remains the Order 53 statement (see RCJ Order 53, rule 5(2)). For those reasons, it was indicated that I was not minded to extend time at that point for service of the notice of motion. Rather, the better course would be for the notice of motion to be served in the usual way, with any applications for amendment to be pursued at a later stage, as necessary, once respondent's evidence had been filed.

Interlocutory issues and the revised hearing dates

[21] The respondent and notice party then filed their affidavit evidence. There was some slippage in the timetable in that the respondent required an extension for the filing of its evidence. By email dated 6 May, the applicant indicated that he may wish to ask for a mention before the court to re-schedule the hearing fixed for 4 June 2024 and amend the associated timetable. This was because of the very large amount of material set out in the respondent's and notice party's replying evidence. On 12 May 2024, the applicant did make a request by email that the court vacate the hearing on 4 June in order to allow him to receive and consider the content of a response to an FOI request he had made to the Council. The applicant's request suggested that a date agreeable to all parties in September 2024 "or early next term would seem a fair adjustment to the timetable" with "the other matters working backwards from that date." This email concluded as follows:

> "I again sincerely apologise for any disruption that I may be causing but it is important that the hearing relies on the correct factual evidence rather than be disposed of quickly."

[22] In response, the notice party indicated that they had prioritised their evidence in order to ensure that the hearing date of 4 June remained achievable. They reiterated that the existence of the judicial review application was "having a harmful impact on the health of the Notice Parties, causing significant emotional distress." The notice party was keen to progress the matter to hearing as soon as possible in order to bring a resolution to this. The notice party also requested that, *if* the hearing was adjourned, it be adjourned to later in June, to allow the FOI response to be received and digested. The notice party's submission was that an adjournment to September would be "unnecessary and would have a disproportionate impact on the Notice Party."

[23] This issue was dealt with in a case management review hearing, lasting almost an hour, on 31 May 2024. At that hearing, I accepted that the listing on 4 June was no longer realistic. In email correspondence between the court and the parties, it had been suggested that the hearing could be dealt with towards the end of June. This was the notice party's preferred option. Mr Duff opposed this proposal. Ms Kiley made submissions at the review hearing indicating strongly that the notice party was asking for the hearing to proceed before the end of Trinity Term, with any necessary delay being kept to a minimum. She reiterated that the reasons for this were set out in the notice party's evidence, relating to the detrimental effect which the proceedings were having on their physical and mental health, and which would worsen with any continuing delay. Particular emphasis was placed on the physical health of Ms Gibson. Ms Kiley submitted that Mr Duff should not be permitted to go on a "fishing expedition" just because he was surprised by, or not content with, the evidence which had been filed by the other parties. Her submission was that

Mr Duff could and should deal with these issues by way of submissions on the evidence in the course of the hearing.

[24] In his submissions at this hearing Mr Duff emphasised his desire to have the matter dealt with on the basis of full facts, rather than expeditiously. Having said that, he indicated that he empathised with the notice party and submitted that it was not in anyone's interest to "put the date back too far." In response to being informed that it was unusual in judicial review for interrogatories to be issued, Mr Duff submitted that this was an unusual case given the Council's concession and the evidence which had been received in relation to it. He mentioned that there were other grounds in the case on which leave had not been refused, since the case had been brought forward on the conceded ground in order to deal with it expeditiously. Having mentioned the stayed grounds, he indicated that these did *not* need to be progressed if the grounds on which leave had been granted were successful.

[25] At the conclusion of this hearing, the substantive hearing which had been scheduled for 4 June 2024 was vacated. A new timetable was set which permitted the applicant to file any further interlocutory application he wished to make in relation to the provision of evidence on or before 4 June 2024. The other parties were to file any response to this application by 11 June. A hearing date for the consideration of any interlocutory issues was listed for 27 June 2024 and the substantive hearing was listed for a full hearing on 9 and 10 September 2024. I made clear at the end of this hearing that there was nothing to stop either the respondent or notice party from filing any further evidence which would avoid the need for a contested hearing on any application made by Mr Duff. The listing on 27 June 2024 was mentioned to be scheduled "assuming there remains something to be argued about." The directions allowed the summer period for anything further which was required. I indicated that I would be reluctant to move the September dates, which suited all parties, since I was keen to provide reassurance that the case would be concluded. The listing was for two days, even though it might be anticipated that the case could be concluded in one day, in order to provide leeway if anything arose which meant two days were required. Mr Duff indicated at this hearing that he was "very happy" with the directions provided.

Vacating the listing on 27 June 2024

[26] As appears from the above, a hearing was scheduled for 27 June 2024 so that the court could decide any interlocutory issues which required determination, principally whether leave should be granted for the applicant's proposed interrogatories. In the event, both the respondent and notice party indicated in advance of this hearing that they were content to voluntarily answer the interrogatories which Mr Duff served and that they would do so. In those circumstances, the notice party requested (by correspondence of 19 June 2024) that the planned hearing be vacated on the basis that the respondent had provided, and the notice party had committed to providing by 1 July 2024, replies to the interrogatories which Mr Duff had served. I asked for the other parties' views on

this suggestion. The respondent indicated that it was content to proceed as suggested. On the other hand, the applicant did not favour this hearing being vacated. In a response of 21 June 2024, he indicated that this was because he intended to serve *further* interrogatories (in particular, upon the respondent). The applicant now says that, had the proposed hearing of 27 June not been vacated, the issue of evidence could have been more thoroughly addressed, including his desire to provide further interrogatories, and a discussion could have been had as to whether there should be cross-examination (albeit the issue of cross-examination was not mentioned in his email of 21 June 2024). He did indicate that he would "like to agree to the September dates but for the time being they should remain provisional until the affidavit evidence is complete."

[27] I determined that, in light of the position adopted by the respondent and notice party, it was appropriate to vacate the listing which had been planned to deal with the question of whether responses to the applicant's proposed interrogatories should be given. In my view, that issue had become academic in light of the indication from the parties that they would provide answers. Any further interrogatories served by Mr Duff would have to be considered on their own merits in the event, and to the extent, that objection was taken to them by the responding party. The parties were advised of this, and further directions were given an email from the Judicial Review Office of 26 June 2024, in the following terms:

> "The Judge has considered the various issues and correspondence and has determined to proceed as follows:
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> (i) The listing tomorrow will be vacated. The issue of what further steps, if any, are required should be considered after the notice party has provided their response to the first set of interrogatories. Those responses should be provided by close of business on Monday 1 July 2024, as previously indicated.
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> (ii) At that point, Mr Duff should then consider what further application, if any, he wishes to make and those applications should be submitted by close of business on Monday 8 July 2024, setting out clearly the nature of the application and its basis. He is urged to bear in mind that interrogatories and cross-examination are very unusual in judicial review and that responses to interrogatories will already have been provided voluntarily by the other parties to a broad range of questions posed.
>
> (iii) The respondent and notice party should respond to any further applications made in writing by Mr Duff by close of business on Monday 29 July

2024. They are urged, again, to try to resolve issues as far as possible without the need for a contested hearing on interlocutory matters in order to save time and costs.

(iv) The judge will reconsider the issues as they then stand on the papers at the start of August and determine whether any further interlocutory hearing is necessary. One option may be to adjourn any outstanding interlocutory issue into the substantive hearing to be dealt with in a rolled-up fashion. Alternatively, the Judge expects to be in court as the duty judge in week commencing 26 August 2024 and there may be scope for an interlocutory hearing that week, if determined appropriate.

(v) In the meantime, the case will remain listed for 9-10 September. This listing was not provisional, and the court is extremely reluctant to countenance further adjournment given the opposition to the adjournment of original hearing dates.

(vi) The applicant should provide his skeleton argument for hearing on or before Monday 19 August; the respondent by Monday 26 August; and the notice party by Friday 30 August.

(vii) If the applicant is required to lodge his primary skeleton argument without sight of further information from the other parties which later becomes available, he will be afforded the opportunity to provide a supplementary skeleton on or before close of business on Wednesday 4 September.

(viii) A trial bundle and agreed joint bundle of authorities should be lodged by close of business on Friday 6 September. The court would be grateful if the respondent could make the practical arrangements for these bundles to be supplied and for the authorities bundle to be provided to the court in electronic format."

[28] These directions were designed to recognise the fact that the respondent and notice party had voluntarily agreed to reply, or had replied, to the applicant's

interrogatories; the fact that the applicant might nonetheless later feel that further queries were necessary or appropriate (as transpired to be the case); to encourage the respondent and notice party to deal pragmatically with any further request from the applicant in this regard in the interests of saving time and costs; but nonetheless to build in capacity for a further determination on these issues, if necessary, either on the papers or by way of oral hearing during the Long Vacation. The directions also imposed the burden of providing the trial bundle, and authorities bundles, on the respondent, in recognition of the applicant's status as a personal litigant with limited resources, notwithstanding that that such bundles ought usually to be produced by the applicant as the moving party.

Developments over the summer period

[29] On 12 August 2024, the applicant emailed the court referring to a further FOI request he had made on 25 June 2024. He was complaining that this had not been responded to within four weeks and also that the respondent had not replied to his further interrogatories (of 8 July 2024) by 29 July 2024. He indicated that "at present" he was not able to submit an "adequate" skeleton argument and objected to the possibility of the listed hearing also addressing the question of cross-examination. He requested further directions or, alternatively, a mention in order to consider how to proceed. There was further email correspondence between the parties and the court over the next few days in relation to the timing of responses to the applicant's further enquiries (both by way of FOI request and interrogatories), particularly from the respondent. The respondent's solicitors confirmed on 15 August that an affidavit had been drafted in response to the further interrogatories which should be served shortly and that an FOI response was intended to be provided that day.

[30] On 22 August the notice party wrote to the court "with great concern." This arose because the applicant had not filed his skeleton argument, as directed, and had also, on 20 and 21 August respectively, served further interrogatories on both the respondent and notice party. The notice party's correspondence expressed the view that the applicant's actions were designed to, or had the potential to, delay the hearing of the matter which had been fixed for 9 and 10 September. In the notice party's submission, the applicant could have submitted a skeleton argument on the basis of the substantial evidence, which was in his possession at the time, noting that the timetable set by the court had specifically afforded the applicant a mechanism to supplement his primary skeleton argument after it had been filed if additional evidence later became available. The notice party's letter complained that the applicant had failed to offer any explanation as to why he did not submit a primary skeleton argument which could be supplemented at a later date. This correspondence made the case that there was "no reasonable basis upon which the applicant can contend that he does not have adequate information to submit his skeleton argument." As to the fresh interrogatories, the notice party observed that the application issued to them did not bear a deadline for reply; but that the application issued to the respondent afforded 28 days for a response but said the

response should be "preferably within a very short period of time to enable the existing timetabling of the hearing of this matter."

[31] The correspondence indicated that instructions would be taken from the notice party in relation to the further interrogatories. However, the notice party wished to put on record their position that these further applications should not be permitted to delay the substantive hearing. They suggested that, if necessary, any outstanding issue in relation to interlocutory applications was capable of being dealt with during the course of the substantive hearing. The letter emphasised, yet again, that the ongoing nature of the proceedings was having "a serious and deleterious effect on the Cottney family", which was anxious for the hearing to proceed.

[32] The applicant responded on 22 August. He relied upon the ongoing process of his collecting evidence and said that he did "not believe justice will be served if I am to be harassed into submitting my skeleton argument when important evidence which could be given to me is being withheld." He further said that submitting a partial skeleton argument was "not possible until I understand the facts." He indicated that he had submitted three more interrogatory applications that week and had requested to view a range of further planning files to assist the search for evidence. He professed that he was aware of the notice party's concerns and was "truly sorry for their unfortunate circumstances and have no wish to add to their pain or stress." He indicated that he had "struggled with that issue" but that it could not be allowed to deflect from a proper hearing. He indicated that he was working on a further affidavit which was already fairly lengthy, which would explain what he knew and what he believes had occurred in the case. This would be completed later that afternoon or evening and was to be sworn and served first thing the following morning. He indicated that this would "form a significant part of my skeletal argument." He therefore requested patience from the court but said that, unfortunately, his planned course "will almost certainly interfere with the court hearing scheduled for the 9th and 10th of September."

[33] There was no indication in the applicant's email of 22 August of when he considered that he would be in a position to provide his skeleton argument. On this, his email said as follows:

> "Due to the sheer volume of accumulating evidence, I will need at least a week and probably slightly more than [that] from the moment I have clear insight into the facts of this case. Unfortunately, I can only function from a deep place of conviction and that is what inspires me to write. Without clarity I cannot function properly and even if the court directs me to submit my skeletal argument now I will not be able to adequately do so even if I tried."

[34] In summary, the applicant had failed to comply with the court's direction in relation to the lodging of his skeleton argument and he simply assumed that the hearing would have to be adjourned for an undefined period because, in his view, he could not (and would not) provide a skeleton argument in time. The Judicial Review Office responded to the parties, on behalf of the court, that afternoon, as follows:

> "The Judge has considered the correspondence of today's date from the notice party's solicitors (WG Maginess & Son) and the response from the applicant in his email of earlier this afternoon, along with the various developments over the last number of weeks.
>
> As previously indicated, the Judge is extremely reluctant to countenance any adjournment of the listed hearing dates. The hearing was scheduled for the commencement of the incoming term, rather than last term, in order to permit further factual matters to be explored. The applicant has now served two sets of interrogatories on both the respondent and notice party, each of which have been answered voluntarily. It is regrettable that the respondent's second response was not provided in line with the timetable which had been indicated; and also that the applicant's further interrogatories to the notice party were not provided in line with that timetable.
>
> The Judge agrees with the basic point made by the notice party that it is possible for the applicant to provide a skeleton argument at this stage. A considerable amount of evidential material has been filed and there is further information available about the issues the applicant wishes to be clarified. A skeleton argument can, amongst other things, make submissions on the state of the evidence and/or inferences to be drawn from the evidence as it stands. As also noted in the notice party's correspondence, the timetable fixed by the court at the end of last term expressly provided for the circumstance where the applicant was still pursuing further information at the time when his skeleton argument was due. That could be catered for by the provision of a supplementary skeleton if or when additional information was provided. In the alternative, consideration of whether further information or evidence should be ordered could be addressed in the course of the full hearing itself.
>
> The Judge appreciates Mr Duff's concern to have clarity and certainty in relation to certain matters before filing his

skeleton argument but does not accept that it is impossible to file a skeleton argument until every issue is clarified to the applicant's own satisfaction. Judicial review hearings frequently proceed where there is a lack of clarity in the evidence on some or other issue which some or all parties would prefer to be more clear. That arises in part because of the limited nature of fact-finding, which is generally appropriate in the judicial review procedure, as has been recognised in various authorities. As indicated above, any alleged shortcomings in the evidence, and the approach the court is invited to adopt in respect of that, whether by way of further steps or its conclusions on the evidence, can be addressed in the skeleton argument itself. This can also be revisited, as necessary, in the course of the substantive hearing.

In view of the above, the Judge considers the following directions to be appropriate:

(i) The further affidavit which the applicant has indicated will be lodged should be filed and served by no later than close of business tomorrow, Friday 23 August;

(ii) The applicant should file and serve his main skeleton argument by close of business on Tuesday 27 August;

(iii) The respondent should file and serve its skeleton argument, and any further response it proposes to make to the third set of interrogatories directed to it, by close of business on Monday 2 September;

(iv) The notice party should file and serve their skeleton argument, and any further response they propose to make to the third set of interrogatories directed to them, by close of business on Wednesday 4 September;

(v) A trial bundle and (electronic) agreed bundle of authorities should be lodged by close of business on Friday 6 September; and

(vi) The applicant may also serve a supplementary skeleton argument, if necessary, by close of business on Friday 6 September.

> It should go without saying that any party is at liberty to file and serve any document sooner than the deadline indicated above and all are encouraged to do so, where possible."

[35] In the event, the applicant missed the deadline for lodging his affidavit on 23 August. He apologised for this and indicated that he would serve the affidavit with exhibits on Monday morning, 26 August. He provided a soft copy after close of business on Friday 23 August. On 26 August, he then provided an "amended affidavit" which he had drafted over the weekend which was to replace the version which he had circulated the previous Friday. He indicated that he was unable to get this affidavit sworn that day because of the Bank Holiday and further indicated that he would therefore lodge it in court the following day (27 August). He apologised for any inconvenience. Importantly, the applicant also indicated in his email of 26 August that he was "hoping to also lodge my preliminary skeleton argument at the same time" (ie on 27 August, in accordance with the court's revised directions of 22 August). On 29 August, the applicant emailed the court office again outlining a mistake which was contained in his affidavit and noting that, in one respect, he now accepted the evidence of the notice party which he had previously challenged. The applicant was therefore plainly still working on the case, but his skeleton argument had not been provided.

[36] The applicant's affidavit of 27 August was lengthy and consisted largely of commentary upon documentary and other evidence which had been provided by the other parties, rather than first-hand evidence on the part of the applicant. The majority of the content of this affidavit could have been included in submissions (and indeed was more appropriate for submissions than averment upon affidavit). It is unsurprising, therefore, that the applicant indicated the content of the affidavit would also form a significant part of his skeleton argument.

[37] On 30 August 2024 the respondent provided its skeleton argument. In an email from its solicitor the Council complained that, although the court had directed Mr Duff's skeleton argument to be lodged on 27 August, he had not complied with that direction. The respondent served its skeleton argument early because, if it was to await Mr Duff's skeleton and then respond, that would jeopardise the listed hearing dates. Mr Duff responded on the same date, not with his skeleton argument but to provide his fifth affidavit.

[38] On 30 August 2024, having considered Mr Duff's recent correspondence and affidavit evidence, a further response was provided by the Judicial Review Office on behalf of the court. The substance of that response was follows:

> "The thrust of Mr Duff's recent correspondence is that he wishes to pursue an application for cross-examination and wishes the listed hearing dates on 9-10 September to be

downgraded from a substantive hearing to an interlocutory hearing, with the substantive hearing to follow at some further point.

The applicant is free to make an application for cross-examination of deponents and, if necessary, to seek an order compelling further particulars of replies to answered interrogatories; but the Judge does not consider it necessary or appropriate to downgrade the forthcoming two-day listing for this purpose.

An application for cross-examination of a deponent is generally dealt with *after* the affidavit evidence is complete. In the present case, that would be after the respondent or notice party provides any further response to the applicant's request for further and better particulars of earlier answers (including any claim for privilege which might be made pursuant to RCJ Order 26, rule 5(1)) or, alternatively, objects to having to provide further particulars. As the authorities cited by the applicant illustrate, cross-examination should be permitted if necessary for the claim to be determined. Whether it is or is not necessary in the circumstances of the individual case is often determined after the evidence is complete and once the submissions are received (i.e. at the time of, or in the course of, the full hearing). That is because the arguments one way or another may be so clearly correct that it is possible to determine the application without the need for cross-examination and because, once the respective cases have been advanced, it is easier to decide precisely which issues (if any) need further investigation and the limits of any permissible cross-examination: see Anthony, *Judicial Review in Northern Ireland* (2nd edition) at para 3.61 and the case there cited, *Re McCann's Application* (Carswell J, NI High Court, unreported, 13 May 1992). The Judge does not accept that this course is "unjust." Rather, it is a common manner of dealing with such applications, endorsed in authority.

The applicant has suggested that the hearing must go ahead only "as fully informed as possible." However, securing the fullest information possible on every issue is not the guiding principle. Pursuant to the overriding objective in RCJ Order 1, rule 1A, dealing with the case justly includes matters such as saving expense; dealing with the case in a way which is proportionate to the

importance and complexity of the case; ensuring that the case is dealt with expeditiously, as well as fairly; and allotting to it an appropriate share of the court's resources. In short, the pursuit of the greatest amount of information is not the primary end. This is reflected in the fact that interrogatories must be addressed to issues properly relating to matters in question between the parties; and that discovery, interrogatories and cross-examination are generally only ordered where necessary to fairly dispose of the case. "Providing context" is unlikely to be a sufficient basis for the court to exercise coercive fact-finding powers.

The applicant seems particularly concerned to identify "who placed documents in the planning file before [his] open viewing on the 18th December 2023." Although one can understand why Mr Duff may be interested in this, the court is concerned as to whether this can properly be said to be something "relating to any matter in question between" the applicant and respondent. The more appropriate focus is upon the consideration given to documents at and before the time of the impugned planning decision.

The applicant is further concerned to establish facts since that may "inform whether [he has] sufficient interest to be granted relief." The court did not understand that lack of standing was being raised by the respondent or notice party in this case, given the applicant's participation in the planning process itself. Whether, and if so the extent to which and basis upon which, a standing objection is to be taken will become more clear when the skeleton arguments have been lodged.

The applicant has expressed a concern that the respondent is "running the clock down." If, however, it is appropriate to adjourn the case (or part of it) or fix a further hearing after the listed dates in order to properly conclude the case, that facility remains open to the court; and the Judge will not hesitate to do so if that is appropriate. In the meantime, the court is keen to make progress on the listed dates, including by hearing as many substantive submissions as possible and concluding the case if that can be achieved. It will also ensure that any further steps necessary (in the judge's view) to fairly dispose of the

proceedings are taken, even if that gives rise to some additional delay to the conclusion of the case.

The court continues to be of the view that Mr Duff is incorrect to state that he is "unable" to submit an adequate skeleton argument at this stage. It also notes his comments in other communications with the JR Office to the effect that he has been working on the skeleton argument.

In light of the above considerations, the Judge has amended the previous directions of 23 August, as follows:

(i) A sworn version of the applicant's recent draft affidavit must be filed and served, if it has not already been filed and served, by no later than close of business tomorrow, Friday 29 August;

(ii) The applicant should file and serve his main skeleton argument by close of business on Friday 29 August;

(iii) The respondent should file and serve its skeleton argument, and any further response it proposes to make to the third set of interrogatories directed to it, by close of business on Tuesday 3 September;

(iv) The notice party should file and serve their skeleton argument, and any further response they propose to make to the third set of interrogatories directed to them, by 2:00pm on Thursday 5 September;

(v) A trial bundle and (electronic) agreed bundle of authorities should be lodged by close of business on Friday 6 September; and

(vi) The applicant may also serve a supplementary skeleton argument, if necessary, by email by 2:00pm on Saturday 7 September.

The respondent and notice party have been afforded some additional time in respect of the steps required to be taken by them in light of the applicant's late service of his additional affidavit and skeleton argument. The applicant has slightly less time to file a supplementary skeleton argument in view of (i) his expressed view that this facility will be of limited assistance to him in any event and (ii)

> the compression of the timetable by reason of his failure to comply with the previous directions.
>
> The case will remain listed for substantive hearing on 9 and 10 September.
>
> If the applicant wishes to make a formal application for cross-examination of any deponent, he should do so by 2:00pm on Saturday 7 September. Such an application should be by summons and affidavit (although only a very short, formal grounding affidavit would be required in light of the points already made by the applicant). If this is served over the weekend before the hearing, the position can be regularised in terms of court fees and stamps, etc. the following week. Time for service is also abridged.
>
> The respondent in particular is directed to ascertain the availability of its deponents to attend on Tuesday 10 December in case oral evidence is required."

[39] As appears from the text of this response, it had initially been formulated on 28 August but, regrettably, was not in fact sent by the office until Friday 30 August (meaning that some of the directions related to the previous day). It had been intended to extend the date for the applicant's skeleton argument yet again but to emphasise that it should be served at that point in whatever form was possible. The court considered that the case to be made on the grounds upon which leave had been granted and the question of discretion as to relief was unlikely to involve any significant legal argument but would focus on the facts in the case, which had been the subject of significant evidence, and which had been commented upon at length in the applicant's recent affidavit.

[40] The applicant provided an email of 2 September indicating that he retained serious concerns with the fairness of the directions with which he was expected to comply and was concerned about his ability to do so. This email attached a letter which indicated that the applicant was unable to comply with the court directions because he was not capable of coping with the intense workload and the multiple matters which the court proposed to cover within a single hearing. In this correspondence the applicant indicated that he had memory issues which affect his ability to recall information quickly and which are exacerbated in stressful situations. He also indicated that a recent MRI scan had recorded an issue, which was set out in the letter, which the applicant considered was related to his memory issues. Nonetheless he also commented as follows:

> "I assure the court that even though I have often difficulty recalling matters quickly and work slowly that that is

> compensated by operating from understanding and intuition and that equips me well in planning and legal matters and these proceedings provided they are conducted in an orderly fashion."

[41] The applicant's letter of 2 September also included a draft amended Order 53 Statement which he sought permission to lodge at a later date ("once the process of candour and answering interrogatories or cross examination is completed"). He noted that this draft Order 53 statement was also subject to further additions or amendments once outstanding evidence was received. In the course of this correspondence the applicant also indicated, for the first time since leave had been granted, that the court may be required to revisit the stayed grounds at that point. The correspondence complained again about the interlocutory hearing which had been fixed for 27 June being vacated and sought a specific interlocutory hearing to deal further with "the process of interrogatories and cross examination" with the substantive issues in the case being addressed at a later stage. On the same date (2 September), the skeleton argument on behalf of the notice party was provided.

The recusal application

[42] On Thursday 3 September the applicant forwarded a sworn version of his further affidavit and a recusal application, indicating that they should both be lodged in the court in the morning. The content of the recusal application is discussed in further detail below.

[43] The court office replied to the parties on 4 September indicating as follows:

> "1. The Judge is obviously sorry to hear of Mr Duff's recent diagnosis… and offers his sympathies in that regard.
>
> 2. The Judge is concerned at the suggestion that the applicant is "unable to comply" with the directions set out in the email from this office of 30 August. Although the applicant is concerned about the "multiple matters the court proposes to cover within a single hearing", the Judge's directions merely proposed that (i) the applicant make his case on the basis of the evidence as it stands at the time of the hearing and (ii) the applicant could also make whatever submissions he wanted in the course of the hearing about further evidential steps, if any, which he contended were necessary.
>
> 3. The applicant seems to wish to deal only with the second of the above issues at the forthcoming listing.

However, since that will involve consideration of the evidence as it stands at the moment in any event, and since the respondent's concessions mean that there is no substantial argument likely to be required on planning policy or the law, the proposal to deal with the matters in a composite way did not appear to the judge to impose an unreasonable burden on the applicant or indeed a significantly greater burden than what the applicant proposes. That is particularly so given that (i) a substantial amount of evidence has been available for some time and the applicant has previously indicated that he has been working on his skeleton argument; (ii) the initially-listed substantive hearing in June was adjourned, contrary to opposition from the notice party, in order to allow the summer period to advance evidential issues; (iii) the judge extended the time for the applicant to file his main skeleton and allowed for a supplementary, replying skeleton argument to also be provided; and (iv) the judge also indicated that if it transpired that a further adjournment or hearing was necessary, that could be facilitated.

4. Obviously, the judge is sympathetic to any reasonable adjustments required by virtue of a medical condition on the part of the applicant. It would have been of greater assistance if this issue, if it is being relied upon, had been raised sooner and/or was supported by medical evidence. The judge remains unsure of the extent to which the applicant is making the case that he needs adjustments to what would otherwise be the usual approach in light of the medical issue he has raised, given the assurance he has offered about being well equipped to deal with the proceedings "provided they are conducted in an orderly fashion."

5. It seems the key issue may be Mr Duff's view that it is not orderly to deal with any application for cross-examination which he may make in the course of the substantive hearing, despite the fact that this approach has support in authority; and/or that it is not orderly to also deal with the sufficiency of interrogatory responses in the course of the hearing.

6. The judge notes that two sets of enquiries have been answered by each of the other parties voluntarily and that the respondent has very recently provided two further affidavits (in draft at this stage) responding to the applicant's third set of enquiries. Whether anything further by way of substantive response is to be provided by the notice party remains to be seen.

7. In any event, there are now a number of outstanding applications, namely (i) the renewed application in Mr Duff's correspondence to re-timetable the case and the substantive hearing; (ii) the application to amend the Order 53 statement to grant leave on additional grounds; and (iii) the recusal application."

[44] It was suggested that a review should be convened on Friday 6 September to ascertain whether the respondent and the notice party intended to provide any further evidential responses (if that had not been clarified in the meantime) and to discuss how to proceed generally in all of the circumstances.

[45] On Thursday 5 September Mr Duff, for the first time, provided medical evidence (described as "the limited medical evidence that I can find at this stage") relating to the matters he mentioned in his correspondence of 2 September. One particular aspect of this had previously been provided to the Court of Appeal in February 2023. Mr Duff also indicated that he was pursuing further open file viewings and that he had recently gathered evidence from another local resident which he felt was relevant and raised further questions to be put to the notice party. This correspondence indicated that he therefore intended to provide further interrogatories but only to apply to cross-examine if necessary thereafter. He also indicated that he wished to submit an amended Order 53 statement removing the conceded ground to "allow the court to focus on the most important grounds" which were currently stayed.

[46] On Friday 6 September 2024, there was a review listing, and it was determined that, in light of the recusal application, which would require to be heard and resolved in the first instance in order to determine whether or not I should continue to deal with the case, there was no realistic alternative but to vacate the hearing which was listed for the following Monday and Tuesday. Instead, the second of those dates was set aside to deal with the contested recusal application. Ms Kiley's submissions recognised that this was the only realistic course but indicated that the word "disappointment" was not strong enough to describe her clients' feelings at the hearing being postponed further. They were "despairing" and found this "very distressful", she explained. On the same day, Mr Duff had served yet a further set of interrogatories for response by the notice party.

The present position

[47] The further management of these proceedings has been put on hold pending the determination of the present application. A number of outstanding issues were, however, discussed at the review hearing on 6 September. Mr Duff is concerned, in particular, that a range of factors need to be considered in order to properly grapple with the questions of (i) how the court shall exercise its discretion in relation to relief in this case, and (ii) whether his standing is sufficient to pursue the relief he seeks, namely a quashing order. In addition, it is clear from his submissions that Mr Duff also has one eye on how the Council may deal with the notice party's application (or an application by them for retention of the constructed house mounted on a different basis, or enforcement action more generally) in the event that the impugned permission is quashed.

[48] Mr Duff is concerned that the case made by the notice party is essentially that they were unaware of important facts (relating to the dwelling having been replaced before) and carried on building work because they were told by the Council that there was no evidence that the house they were proposing to replace had been replaced before. Their case is essentially that they were innocent, good-faith beneficiaries of the planning permission under challenge. Although Mr Duff doubts this (and has indicated that he does not believe certain parts of their or the Council's evidence), he is concerned about whether he will achieve the primary relief he seeks, namely an order quashing the planning permission. Mr Duff has therefore belatedly contended that he needs to progress the stayed grounds now, which he now says are "predominantly environmental grounds or restrictive grounds based on policies COU15 and COU16… [which] were or are not vulnerable to lack of candour by the Parties."

[49] As noted above, Mr Duff clearly has in mind what might happen if the notice party lodges some further planning application and, in fact, yet further planning applications (for infill dwellings) which may or may not be made in future if the dwelling which is the subject of the impugned permission remains in situ. In any event, he has lately indicated an intention to widen out the grounds which he wishes to pursue at this stage and is considering further proposed amendments to his Order 53 statement, including the possibility of abandoning completely the grounds upon leave has been granted, the central one of which has been conceded by the Council.

Summary of the parties' positions on the recusal application

[50] The recusal application is advanced by Mr Duff on three bases. First, he contends that there is a conflict of interest in the case, particularly on the basis of the way in which the previous judicial review applications challenging the grant of planning permission at the same site were dealt with by me. Second, he contends that there is bias displayed by the way in which leave was granted in this case; and arising from other judgments of the court in separate litigation. Third, he contends that there has been unfairness in case management directions recently given in

relation to the progress and conduct of the case. I address each of these issues separately below.

[51] Mr Duff advanced the application in a balanced manner. He was careful to make clear, both in his written and oral submissions, that the application was brought "with respect and absolutely no ill will." He further submitted that he was not able to "prove any of his grounds for recusal" but relied upon how the decisions and directions about which he complained felt to him personally. He also indicated that he was not alleging any deliberate intent on the part of the court to act in an unfair or biased way and therefore was reliant upon my own assessment of these matters in determining this application.

[52] The respondent and notice party both made brief submissions in relation to the application. Mr Beattie helpfully drew my attention to one of the leading authorities on the issue of judicial recusal which sets out the relevant principles (discussed further below). He also provided this authority to Mr Duff in advance of the recusal hearing so that he would be familiar with these principles and would be able to tailor his submissions accordingly. The respondent and the notice party took the position that the matters outlined by the applicant did not properly give rise to a reason for recusal. Ms Kiley also urged me to consider carefully the timing of the application for recusal which, she submitted, was particularly material in assessing its strength and/or true purpose. For instance, she submitted that the concerns about the February 2022 judgment would have been evident to Mr Duff from the start; and that issue and any concerns about decisions in other cases could and should have been raised much sooner.

[53] In addition, the respondent cautioned against any temptation on my part to step aside from the hearing of the case on a pragmatic basis if I was not persuaded that the test for recusal was met. In its submission, such a practice, even if well intended, permits a litigant to engage in an element of forum shopping (or "judge shopping") merely by means of mounting a recusal application, even if this lacks merit. In fairness to Mr Duff, his position in reply was that, if I was not persuaded that the test for recusal was met in this case, he felt that the appropriate course was that I should continue to deal with it.

Relevant principles

[54] The only case to which I was referred in detail, which helpfully sets out the relevant principles in a comprehensive fashion, was the judgment of McCloskey J (as he then was) in *Re Hawthorne and White's Application* [2018] NIQB 5. In that case, the judge dealt with the issue of recusal at paras [138]-[181] of the judgment. He set out the governing principles in this area, by reference to a review of earlier cases, at paras [147]-[155]. I have read these passages of the *Hawthorne* case carefully and adopt the summary of the principles there set out, to which specific reference is made (as appropriate) later in this ruling.

[55] The overall test (arising from the decision of the House of Lords in *Porter v Magill* [2002] 2 AC 357) is whether "a fair-minded and informed observer [would] conclude that, having regard to the particular factual matrix, there was a real possibility of bias." In that context, bias has been explained as connoting "an unfair predisposition or prejudice on the part of the court or tribunal, an inclination to be swayed by something other than evidence and merits." Although Mr Duff has three broad grounds for the application, only one of which is expressly termed as 'bias', in reality I consider that all three amount to a contention that there is actual or apparent bias by reason of the matters upon which he relies.

[56] In his submissions, Mr Beattie particularly emphasised the guidance in the *Locabail* case (recited at para [148] of the *Hawthorne* case) in the following terms:

> "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of the party or witness to be unreliable, would not without more found a sustainable objection."

[57] That portion of the judgment in *Locabail* also continued as follows:

> "In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on issuing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

[58] The authorities also show that judges should be careful to apply rigorous scrutiny to a recusal application since some such applications, although superficially attractive, may on analysis be made on flimsy grounds. Judges are therefore warned against being overly sensitive and/or defensive. The court should apply its own sense of fairness and its own "grasp of realities and perceptions" in the case.

The Statement of Ethics for the Judiciary in Northern Ireland

[59] In resolving this application, I have also reflected on the terms of the *Statement of Ethics for the Judiciary of Northern Ireland* published by the Office of the Lady Chief Justice ("the Statement of Ethics"). In relation to applications for recusal based on the appearance of bias or possible conflict of interest, the Statement of Ethics says this at para 4.6:

> "Circumstances will vary infinitely, and guidelines can do no more than assist the judge in the decision to be made. The test is to be applied by considering whether the fair-minded and informed observer would perceive that there is a real possibility of bias. While the purpose of the guidance contained in this statement is to express general principles, it may help to provide some detail on issues known to have caused problems for judges for example, under the heading personal relationships and perceived bias (see paragraph 8 below)."

[60] Para 4.8 provides that:

> "If a judge is known to hold strong views on topics relevant to issues in the case, by reason of public statements or other expression of opinion on such topics, this may make it unsuitable for him or her to hear the case whether or not the matter is raised by the parties. It will seldom, if ever, arise from what a judge has said in another case."

[61] The idea that judges should not readily recuse themselves unless a proper ground for this is made out is expressed in para 4.9 of the Statement of Ethics:

> "Judges should, however, be astute to identify and prevent attempts to use procedures for disqualification illegitimately. If the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear a case, parties might be encouraged to attempt to influence the composition of the bench or to cause delay and the burden on colleagues would increase. A previous finding or previous findings by the judge against a party, including findings on credibility, will rarely provide a ground for disqualification. The possibility that the judge's comments in an earlier case, particularly if offered gratuitously, might reasonably be perceived as personal animosity, cannot be excluded but such a possibility is likely to occur only very rarely. A judge should take great care not to give even the appearance of personal animosity. In this context it should be noted that a judge is not obliged to ignore past experience of the conduct of a party's legal representative but any opinion a judge may form in respect of particular advocate must not be allowed to cause any unfairness to any party."

[62] Para 4.12 notes that:

> "A judge is entitled to keep in mind his or her general duty to try the cases in his or her list, and the listing burden and delay which may be occasioned by a recusal. Moreover, it must be recognised that the urgency of the situation may be such that a hearing is required in the interests of justice notwithstanding the existence of arguable grounds in favour of disqualification."

Consideration

[63] Before turning to address each of the three bases upon which the recusal application is advanced, some introductory observations may be appropriate. It seems to me that, in large measure, the situation which has given rise to this application for recusal has come about because of Mr Duff's determination to gather as much information about the case as is possible in circumstances where (i) he is suspicious that the other parties in the case are intentionally being difficult in this regard; (ii) he feels the need to have information well in advance of any hearing in order to marshal his submissions; and (iii) he appears to place little store in the willingness or capacity of the court to make a proper assessment during the course of the hearing itself as to whether adequate information has been provided and to take any further steps considered by it necessary. As discussed in exchanges with Mr Duff during the course of the hearing, I think it likely that I have a very different view to him in relation to the third of these concerns. As to the second, having heard Mr Duff make submissions in a number of cases, I also may have more faith in his ability in this respect than he gives himself credit for. The first concern is really a matter for submissions at the full hearing.

[64] However, there is a further aspect to Mr Duff's preoccupation with establishing the facts to as full an extent as possible. His own submissions state that:

> "Having sufficient, honest and as complete a picture of the facts of this case was very highly important to the Applicant and the exchanges between the Applicant and the Court show the increasing anxiety of the Applicant being forced into a hearing before the Parties had explained <u>what had really happened and why</u> in this matter to the best of their ability."
>
> [underlined emphasis added]

[65] As appears from the above, Mr Duff's concern was not only to have as complete a picture of the facts as possible but also to have an "honest" picture of the facts from the principal parties which "explained what had *really* happened." To some degree, it appears that Mr Duff's anxiety in this case arose because the evidence provided by the respondent and the notice party did not correlate with his

view of what had happened, namely that each of these parties has in some way knowingly conspired to procure the grant of planning permission which they knew should not have been granted. He has contended that the other parties have provided "very unlikely answers"; evidence which is "inadequate, incomplete and potentially dishonest"; and evidence which is "evasive and scant on truthful and full explanations and answers." Relatedly, it is clear from Mr Duff's written submissions that he was then speculating as to how the court would address this matter (his view being that "any suggestion of dishonesty was going to be dismissed by the court through lack of proof").

[66] The result was a view on the part of Mr Duff that he was "unable" to submit a skeleton argument. This was set against the view I adopted in late August which was that Mr Duff was able to provide a skeleton argument which would be adequate at that stage in light of the significant amount of evidence which had already been assembled in the case. His skeleton argument would have been able to make submissions both about the evidence which had been filed (including the interrogatory responses he had already received) and, indeed, about any further steps that he felt were necessary in terms of fact-finding. He would then be able to supplement that skeleton argument before the hearing if he wished. This appeared to me to be an appropriate way to proceed because the adequacy of the evidence is, in the final analysis, a matter for the court; and these issues could all be the subject of debate and argument at the hearing itself.

[67] It is also clear that Mr Duff has become increasingly concerned that the grounds upon which leave had been granted were "becoming more difficult to argue." In relation to the conceded ground, this is obviously not difficult to argue (let alone becoming more difficult to argue) by reason of the very fact that it has been conceded. It seems that Mr Duff is really concerned that he may be unable to prove bad faith on the part of either the respondent or notice party and/or that, in the absence of a finding of bad faith, his prospects of securing an order of certiorari may be less than he would wish. In that regard, he is prejudging the decision the court may take.

Conflict of interest

[68] The nature of Mr Duff's objection relating to conflict of interest is that the notice party in this case has been prejudiced by virtue of the court quashing their original planning permission on foot of an application for judicial review brought by the Council's Chief Executive, rather than proceeding to hear and determine all of the grounds raised by Mr Duff in a previous application for judicial review brought by him against that permission. The logic of Mr Duff's argument is that if the court had proceeded to determine all of his grounds at that time then some of the issues which form the basis of his present application for judicial review (and, in particular, the issue of whether the dwelling to be replaced had previously been the subject of a successful application for planning permission for a replacement dwelling) would have been explored in more detail sometime during 2022 or 2023. In that instance,

he contends, the notice party would have been "fully warned of the risks" and would have been less likely to have continued to build the house which has now been developed to completion. In his written submissions, Mr Duff contends that had his earlier case proceeded the notice party "would have been better informed and couldn't have argued later that they for a variety of reasons hadn't read the papers and been aware of the substantial grounds." If his earlier case had proceeded, that either would have been successful (in which case the notice party may not have continued to build) or unsuccessful (in which case the notice party could have proceeded to build with confidence).

[69] This point is encapsulated in the pithy submission that, "The Judge, therefore, failed to select a course in February 2022 which would have nipped this matter in the bud." In the circumstances, Mr Duff contends that the court's previous approach "has arguably contributed to such significance [sic] prejudice to the Notice Party and failed to pose questions and failed to deter further financial commitment (which later escalated) (being the thin end of the wedge)" to such a degree that this represents a conflict of interest meaning that the same judge cannot now hear this later application. Mr Duff has provided a photograph that he took of the site on 6 December 2021 to show the extent of the building which had been completed at that stage. It is difficult to say precisely what had happened by that point with any clarity, given the limited nature and quality of the picture exhibited to Mr Duff's affidavit evidence. However, it is clear that preparatory site works had occurred; that foundations had been laid; and that the building had progressed to a very low level of the ground floor. Mr Duff says that these works were "not sufficient that the building project had to proceed at all risks and at all costs."

[70] I do not consider that this situation represents a conflict of interest, properly understood. Plainly, this is not a case where I or any member of my family have any personal or financial interest in the outcome. Nor is it a case where I have a close family relationship, personal friendship or personal animosity towards any of the parties. These are the classic instances where a conflict of interest would be considered to arise.

[71] The nub of the argument seems to be that I might feel some responsibility for the notice party's situation by reason of the February 2022 judgment which, in turn, would lead me to be more sympathetic to any case made by the notice party at this stage. However, it appears to me that the applicant's submission to this effect misunderstands both the role of the court and the nature of the decision previously given.

[72] The February 2022 judgment was an exercise of judicial discretion reached on the reasoned basis which is set out in detail in the judgment. The fact that Mr Duff's application had been lodged a few days earlier than Mr Burns' application – a factor emphasised by Mr Duff – was of no great significance. The original permission was quashed on the ground advanced by Mr Burns – which was also relied upon by

Mr Duff – for the reasons spelt out in the judgment. The judgment also contains the following matters which are relevant:

(a) At para [51], I recognise that, in a small number of instances, Mr Duff had asked me to be cautious about granting relief because of the prejudice which might be caused to the beneficiary of the planning permission in future. That was specifically recorded in the judgment.

(b) In the same paragraph, I also indicated that the court was bound to proceed on the basis that those interested parties who had not objected to the planning permission being quashed – which includes the notice party in this case – "have done so after full consideration of their circumstances and having taken, or at least having had the opportunity to take, their own professional advice on the matter." I noted that many had had the assistance of planning consultants, architects and/or solicitors advising them. In the present case, it is clear that the notice party had an architect advising them, who could also have sign-posted them to other professional assistance if this was considered necessary or desirable.

(c) I further noted that, in the absence of Mr Burns withdrawing his application that the relevant planning permissions be quashed, the court had little other option but to rule upon it.

(d) I also recognised that many of the planning applicants who had consented or raised no objection to quashing had nonetheless requested that the Council reconsider their application as soon as practicable. I specifically recorded that in the judgment and the Council's commitment to do so (see para [9]). I also directed that the reconsideration occur "as expeditiously as possible" (see para [52]).

(e) I recognised, at para [53] of judgment, that a corollary of proceeding in the way which I had determined was proper in the circumstances was that the relevant planning decisions were not scrutinised by reference to all of the grounds raised by Mr Duff. For the reasons given, I indicated that I did not consider that the court must decide any wider issues "at least for the moment" and that it was appropriate for relief to be granted on the ground relied upon by Mr Burns. This was, I believe, a clear indication that some of the wider issues raised by Mr Duff may require to be dealt with in future.

(f) It was also made abundantly clear that the issues raised by Mr Duff in his pre-action correspondence or proceedings (as the case may be) relating to a permission which he challenged would not simply go away. That is because the Council agreed that, in the course of reconsidering any application, it would take into account any points raised by Mr Duff and treat those as an objection made in the course of the planning process. That would follow as a matter of course, provided the matter related to a material planning

consideration, once the Council had been made aware of it. However, this intention was explicitly recorded and made clear in para [9] of the judgment; and was further alluded to in paras [10](b), [10](c) and [30](c).

(g) Paragraph [30](c) included this express note of caution:

> "… it is also extremely difficult to say with any degree of confidence that when the Council reconsiders the planning applications on foot of any quashing order that its decisions will necessarily be the same. Quite properly, the Council has declined to give any planning applicant such an assurance (and indeed it could not do so, since it cannot fetter its discretion in that way if the reconsideration exercise is to be undertaken genuinely and in good faith). The Council has agreed that, when it is taking a fresh decision, it will carefully consider the points which Mr Duff has raised in his pre-action correspondence or proceedings relating to the case. In light of that, it is quite possible that a different view may be taken or more enquiries may have to be undertaken."

(h) The possibility of a further challenge to any fresh grant of planning permission was also mentioned in para [36].

(i) The judgment also expressly recorded, in a number of places, Mr Duff's view that a number of the grounds he relied upon were very strong and provided a more significant basis for quashing an impugned permission than the legal error which had been identified by the Council. See, by way of example, paras [12](b) and [13].

(j) It is also relevant to record that Mr Duff himself identified three cases in particular which he contended what to proceed to a full hearing (see para [16] of the judgment) and the notice party's case was not one of these.

(k) Finally, the judgment also recognised that some interested parties had commenced work on site or had plans to do so. Nonetheless, it also made clear that where development occurred within the timeframe for bringing a judicial review of the relevant planning permission, the developer must be considered to have proceeded at risk (see paras [49]-[50]). That must apply, a fortiori, to a circumstance where work is progressed in the absence of a fresh permission having been granted.

[73] In summary, the February 2022 judgment made clear that:

(i) where a planning permission was quashed, the Council would have to re-determine the matter;

(ii) in doing so, the Council would have to take into account all of the issues raised by Mr Duff, including those which he considered to be stronger grounds of challenge than that upon which Mr Burns had relied in his application;

(iii) there was no guarantee that planning permission would be granted again and, indeed, the Council could not lawfully give any assurance to a planning applicant in that regard;

(iv) if planning permission was granted again, Mr Duff would be free to bring another challenge to that fresh permission by way of judicial review; and

(v) this might well result in further court proceedings where grounds which had been raised by Mr Duff in his pre-action correspondence or in an application for judicial review relating to the original permission had to be considered again on their merits by the court.

[74] Although the court had a duty to act in a procedurally fair way to the parties in the cases before it (including those interested parties who had been put on notice of the proceedings), it did not owe a duty of care to them to advise them as to how to manage their affairs. I expressly proceeded on the basis that they had sought advice, or had had the opportunity to do so, in relation to those matters. In any event, as the preceding paragraphs show, the February 2022 judgment went out of its way to set out the implications of the permissions being quashed on Mr Burns' application and the possible ramifications that that might have in the future. It was entirely a matter for the affected parties, with the benefit of any advice they may wish to take and on the basis of their own assessment of the relative risks, to determine how they would then proceed.

[75] In addition, in her submissions in relation to this issue Ms Kiley made clear on behalf of the notice party that they did not make the case that they had been prejudiced by the way in which the respective applications for judicial review were dealt with in February 2022; nor that the court had contributed to any prejudice they now face.

[76] In light of the above, I do not consider that the fair-minded and informed observer would perceive that there is a real possibility of bias simply by reason of how the court dealt with the applications on behalf of Mr Burns and Mr Duff in relation to the notice party's original permission.

Bias

[77] As noted above, there are two aspects to the applicant's complaint in relation to bias. It was unclear from the initial application whether Mr Duff alleged actual bias or merely the appearance of bias. The applicant's written submissions also leave this unclear to a degree, although they make clear that there is no suggestion that the court acted otherwise than in good faith. The first element of this complaint is that bias was displayed in the way in which the court dealt with the leave application in this case. The second element relates to other cases. I deal with each, in turn, below.

The leave stage in this case

[78] As to the leave stage in this case, Mr Duff has particularised his concern about this in his application in the following way:

> "i. Bias is displayed in the Courts [sic] decision to stay the majority of the grounds of challenge of the Applicant, so that the full range of errors of the Respondent are not now a matter for consideration in the judicial review.
>
> ii. Bias in granting leave before the Parties fulfilled their duty of candour satisfactorily."

[79] In his written submissions the applicant repeats his concern that leave was granted in the case before the other parties fulfilled their duty of candour. He argues that it "now looks folly by the judge to have granted leave on limited grounds before the Parties fulfilled their duty of candour and before the most important grounds were identified."

[80] To a degree I consider that this criticism displays an element of revisionism in relation to the initial conduct of the case. At the start, the grounds upon which leave has been granted were in my estimation considered to be "the most important grounds" by all parties. That is because the first ground upon which leave was granted (and which was conceded by the Council) removes the policy underpinning for the grant of planning permission in principle in this case. It is generally only where development is in principle acceptable that one need turn on to matters of siting, design, integration, etc. The second ground upon which leave was granted was also considered by the applicant to be of importance, namely the suggestion that there had been an improper motive or bad faith which tainted the impugned decision in this case. This ground was obviously not conceded by the Council; but leave was granted on it in order to ensure that it was explored and that the replying evidence squarely addressed it.

[81] When leave was granted on limited grounds, the case management plan was to focus on what relief should be granted in light of the Council's concession, as a means of dealing with the case expeditiously and proportionately. Importantly, having revisited the hearing at which the proposed way forward was discussed (see paras [16]-[18] above), the applicant was not objecting to the proposal to proceed in this way. The only other ground about which there was any serious debate was the EIA ground. I undertook to consider whether leave should be granted on this ground but the applicant himself abandoned it before the order was made granting leave on some grounds and staying the others. It is only more recently – after it has become clear that neither of the other parties are likely to make any concession on the ground of bad faith, and indeed have filed evidence designed to explain what happened in this case otherwise than by way of the operation of bad faith – that the applicant's focus has shifted onto other grounds which he now contends are *more* important. That case was not made until shortly before the September hearing dates at or about the same time that the recusal application was made.

[82] In any event, the applicant's position has not been prejudiced since the grounds upon which leave was not granted were not dismissed but, rather, were stayed pending further order. It has always been possible for the applicant to apply for the stay on those grounds to be lifted. They were stayed merely on the basis that it may not be necessary or proportionate to deal with them in light of the fact that the Council had conceded the central ground of challenge in the case.

[83] The applicant's position was also not in the least prejudiced by failure to extend time for service of his notice of motion. The notice of motion formally commences the application for judicial review once leave to apply for judicial review has been granted. However, as was explained to the applicant in the Judicial Review Office's email of 12 March 2024 (see para [20] above), the Order 53 statement remains the grounding pleading in the case (pursuant to RCJ Order 53, rule 5(2)) and, therefore, the more important of the two documents in terms of which grounds of challenge are permitted to be pursued. After the grant of leave, Order 53 statements are frequently amended without the need for consequent amendment of the notice of motion. In any event, the court also has power to amend a notice of motion at a later stage, as necessary or appropriate. The applicant was therefore able, and remains able, to apply to the court to proceed with the stayed grounds and/or to add additional grounds to the Order 53 statement.

[84] In his written argument Mr Duff has indicated that he was content to proceed as suggested in relation to filing and serving his notice of motion. His concerns arose because he does not consider the evidence filed by the other parties to be "honest, complete and sensible." Again, this does not appear to me to provide evidence of any unfairness or bias towards Mr Duff at the time the initial directions were made but, rather, simply a desire on the part of Mr Duff that the earlier case management plan be changed because the evidence filed has not been in the terms he expected or wished. Any application to proceed with new or stayed grounds

can be made and will simply be dealt with on the merits of that application. One option may be for some additional grounds to be dealt with on a rolled-up basis at the hearing rather than a further leave hearing being held. That will be a matter for consideration once Mr Duff makes clear what further application, if any, he may wish to make.

[85] I also do not consider the grant of leave on limited grounds "before the other parties fulfilled their duty of candour" to be an indicator of bias. This case was unusual because the proposed respondent conceded the central ground of challenge but the grant of a quashing order on that ground was nonetheless opposed by the notice party. As discussed above, the course adopted at the start of the case – without significant objection from any party – was to grapple with that ground, and the associated allegation of bad faith, as well as the question of the appropriate relief to be granted, leaving other grounds to the side unless and until it was necessary or appropriate to consider them.

[86] This aspect of the applicant's complaint also appears to me to misunderstand or mischaracterise the way in which judicial review procedure operates. An applicant will usually apply for leave to apply for judicial review and, if leave is granted, the respondent (and any relevant notice party) is then expected to provide a full and frank evidential reply addressing the grounds upon which leave has been granted and any other facts which, in candour, ought to be disclosed for the court to determine the matter on a fair and proper basis. It is not the case – as the applicant appears to suggest – that the mere lodging of an application for leave to apply for judicial review triggers an obligation on the part of the proposed respondent, and any interested party, to make a full evidential response *at that stage* and before the grant of leave is addressed by the court. Although authority rightly indicates that there are obligations of candour before leave is granted, particularly in responding to pre-action correspondence, the full duty of candour (in the sense relied upon by Mr Duff) arises only once leave has been granted. A basis for granting leave may be that the ground of challenge requires a full evidential response (sometimes referred to as granting leave because an issue requires further investigation). However, if proposed respondents were required to file full evidence on every pleaded ground before the question of leave was determined, this would impose an unreasonable burden on public authorities; entirely circumvent the Freedom of Information Act regime in relation to the disclosure of information to the public; and permit applicants to fish for information, at limited costs risk and on frivolous grounds, in advance of the grant of leave.

[87] The applicant's complaint is really that he wanted to know the strength of the evidence in relation to the bad faith ground before deciding, as a matter of strategy, how he wanted to run his case. I do not accept that this was either necessary or appropriate. Again, however, the fact that the remaining grounds were merely stayed means that no unfairness arose in this respect. The grant of leave on limited grounds, including the bad faith ground, was designed to expedite

the resolution of the central issues in the case and, indeed, to encourage a candid explanation on evidence from the respondent and notice party (see para [18] above).

Other cases

[88] The second element of the complaint of bias is formulated in the following way in Mr Duff's application:

> "General bias of the court against the applicant in other Judgements, when dismissing applications or when addressing relief or using its discretion in other cases brought by the Applicant; and particularly in *Gordon Duff v Causeway Coast and Glens Borough Council* [2024] NIKB. This is a similar but not so significant case as this current case and despite the applicant winning his case effective relief was denied to the applicant in breach of Article 9(4) of the Aarhus Convention."

[89] The applicant also says that he is very concerned with my track record of not granting the relief requested in other cases. The only specific instance mentioned is the 'Drumsurn' case: *Re Duff's Application (Re East Road, Drumsurn)* [2024] NIKB 31. In particular, the applicant is concerned at the conclusion in para [57] of that case, in which he says, "rings alarm bells" because the current case "has much higher stakes."

[90] In the Drumsurn case I set out in some detail the reasoning which led to the exercise of the court's discretion to merely grant declaratory relief, rather than a quashing order. That applicant, of course, enjoys a right of appeal against that decision in the event that he disagrees with it. However, the reasoning in that case was based to a large degree on the issue of Mr Duff's standing in circumstances where he had not participated at all in the planning process which gave rise to the impugned permission. In those circumstances, planning permission had been granted and the planning applicant was entirely unaware, until after permission had been granted, of Mr Duff's interest in the application and of any of the points that he wished to raise. As the discussion in that judgment recounts, including in the paragraph of most concern to the applicant, it was a "highly fact specific" case with exceptional features in relation to the question of standing.

[91] Without prejudice to any further argument there may be on this point in this case, the circumstances of the present case are plainly different from the Drumsurn case. That is because, in advance of the impugned permission being granted, Mr Duff *was* involved in the planning process, as well as the previous court process which resulted in the quashing of the original permission, so that the notice party was aware both of his interest and the grounds of his objection.

[92] In the course of oral submissions, this issue was essentially explained as an apprehension on the part of the applicant that I had too much sympathy towards (those who are described in his written submissions as) "unfortunate planning applicants caught up in the applicant's broader litigation to protect the countryside." As indicated above, the Drumsurn case is the only case specifically mentioned in this regard. Having reflected on previous cases brought by the applicant with which I have dealt, and indeed other planning judicial reviews with which I have dealt, I do not consider that this complaint is well-founded; nor that the fair-minded and informed observer would consider it to be so or perceive that there is a real possibility of bias on this basis.

[93] Moreover, the guidance from authority and from the Office of the Lady Chief Justice is clear that a reasoned decision given in a previous case will rarely form a proper basis for a recusal application, even in circumstances where the judge has commented adversely on the party in question or made a finding against them on the basis of their credibility (see paras [56] and [61] above). Neither of those circumstances arise in the present case. On the contrary, I have previously found Mr Duff to have standing in litigation where he participated in the planning process, notwithstanding his lack of direct personal interest, on the basis that I accepted his genuine concern for the environment: see the Drumsurn case (supra) at para [45] and also the leave decision in that case ([2022] NIQB 11) at paras [55]-[56]; and the *Glassdrumman Road* case ([2022] NIQB 37) at para [87].

Unfairness

[94] The third element of the applicant's recusal application is on the basis of alleged unfairness which has been displayed in the court's case management of these proceedings. In turn, there are three aspects to this complaint. First, the applicant complains about the court's decision to vacate the interlocutory hearing which was listed on 27 June which, he contends, had been "scheduled to consider the need for interrogatories, cross-examination and the way forward generally in relation to evidence." Second, he contends that there was "unfairness in setting a definite date for a hearing before satisfactory interrogatory responses had been supplied by the parties and before the other questions arising were able to be resolved." Third, he contends that there was unfairness in more recent directions provided by the court, on 22 and 30 August 2024, which "rush the applicant into a hearing without the necessary evidence to properly inform issues of standing, the discretion of the Court and the Notice Part'/s [sic] contention that quashing the planning permission would amount to a breach of human rights." The applicant contends that "the factual context is fundamental before a fair judgement can be made by the court."

[95] The applicant has, in my view, placed an undue amount of significance upon the difference between the other parties answering his first sets of interrogatories voluntarily and, on the other hand, a position whereby they had been ordered to answer those interrogatories. (He further assumes, for that purpose, that if the

hearing on 27 June 2024 had proceeded he would have been successful in his application that those parties be compelled to answer each and every question he had posed). However, I fail to see how an order compelling the provision of responses would have resulted in any materially different outcome than in fact transpired, when both the respondent and notice party voluntarily agreed to answer the applicant's questions. They did so upon affidavit, in sworn evidence, with the necessary statement as to the truth of the matters to which they deposed. The court's directions given at the end of June were designed, and were understood, to encourage the other parties to answer any further questions raised by Mr Duff in order to avoid the need for contested applications about these matters if possible.

[96] The applicant's real complaint appears to be that a date for hearing was fixed before he had exhausted the interrogatory process to his satisfaction. However, the assessment which was made by the court at that stage was that there was adequate time over the summer for the applicant to administer further interrogatories (should he consider these necessary) and for these to be answered in advance of the scheduled hearing dates. Indeed, that assessment appears to have proven correct and in light of how matters transpired:

(i) The respondent provided replies to interrogatories from three deponents – Mr Hughes, Head of Planning; Ms Heaney, Principal Planning Officer; and Ms O'Neill, Senior Planning Officer – on 14 June 2024, in response to the applicant's initial interrogatories directed towards the respondent dated 4 June 2024.

(ii) The applicant initially sought responses from the notice party, arising out of the affidavit evidence of Mr David Cottney, Mr Peter Cottney and their planning agent, Mr Andrew McCready, on 5 June 2024. The notice party provided responses to these in the second affidavit of David Cottney, the second affidavit of Peter Cottney and the second affidavit of Andrew McCready, all sworn on 1 July 2024.

(iii) David Cottney later provided his third affidavit, sworn on 26 July 2024 and filed on 5 August 2024, in response to the second set of interrogatories directed to the notice party from the applicant dated 16 July (which had been sent by the applicant over a week later than directed).

(iv) Ms Heaney provided a further affidavit on 16 August 2024 replying to the second set of interrogatories directed to the respondent from the applicant dated 8 July 2024.

(v) David Cottney provided a fifth affidavit on 2 September 2024 replying to the third set of interrogatories directed to the notice party from the applicant dated 20 August 2024.

(vii) Ms Heaney provided a lengthy third affidavit on 4 September 2024 replying to the third set of interrogatories from the applicant dated 19 August 2024.

[97] The applicant is aggrieved that the fixing of hearing dates has in his view been "probably responsible for the Respondents [sic] slow and obtuse responses which appear to be a deliberate attempt to run the clock down so that the hearing would go ahead with inadequate evidence." This is allied to the applicant's characterisation of the court's approach as a determination to hear the matter "with or without the full evidence needed." On the other hand, the notice party submitted in its skeleton argument that Mr Duff has "engaged in a proliferation of applications for interrogatories and FOI requests" which have been "disproportionate, have delayed the timely determination of this litigation and have resulted in increased costs." On their case, Mr Duff created the situation where responses were being provided only close to the hearing because of his repeated requests for information when the evidence which was provided was not as he expected or wished. In response, Mr Duff feels that the other parties should have been more fulsome and candid in their explanations from the start. There is, accordingly, a clear difference of view between the parties as to the necessity and proportionality of the enquiries which have been pursued by Mr Duff.

[98] More importantly, the applicant's objection ignores the fact that the September hearing dates were set at the hearing on 31 May 2024, without objection from him, *before* he had issued any interrogatories (see para [25] above); and, indeed, the fact that the timetable reflected what he had himself suggested in his email of 12 May 2024 (see para [21] above). It also fails, in my view, to adequately reflect the fact that the hearing was adjourned from the original date of 4 June 2024, upon his application and in the face of opposition from the notice party; and re-listed for September, rather than later in June, again in the teeth of objection from the notice party but in order to facilitate the applicant.

[99] As discussed above, the directions given at the end of June (see para [27] above) were then designed to allow the entire summer period for additional evidential issues to be bottomed. They allowed time for the applicant to serve yet further interrogatories and for those to be responded to. They also built into the proposed timetable the possibility of a further interlocutory hearing in relation to any application the applicant may have over the course of the summer period. In the event this did not prove necessary, since the other parties continued to voluntarily provide answers to the applicant; because he had not made any application for cross-examination at that point (nor has any been made to date); and because, in any event, it was in my view appropriate to deal with any such application in the course of the full hearing itself.

[100] In turn, the directions provided towards the end of the summer (see paras [34] and [38] above) were designed to make use of the court time which had been set aside on 9 and 10 September and move the case along on those dates insofar as possible. They provided the applicant with the facility of filing a late

supplementary skeleton argument in order to address any further evidence received shortly before the hearing. They also did not close down the possibility of the applicant making any further application he might wish to make in relation to evidential issues, in particular an application for cross-examination which he had by then mooted. In fact, it was made clear to the applicant, particularly although not exclusively in the email of 30 August 2024, that (i) he was free to make an application for cross-examination which would be considered by the court; (ii) time for service of such an application was abridged in his favour; (iii) the respondent was directed to ascertain the availability of its deponents to attend on 10 September 2024 in case oral evidence from them was required; (iv) the applicant was free to make an application seeking an order compelling further particulars of replies to answered interrogatories; (v) if it was appropriate to adjourn the case (or part of it) or to fix a further hearing after the listed dates in order to properly conclude the case, that facility remained open to the court and, indeed, "the Judge will not hesitate to do so if that is appropriate"; (vi) the case would only be concluded on those dates "if that can be achieved"; and (vii) the court would ensure that any further steps necessary, in my view, to fairly dispose of the proceedings were taken, even if that gave rise to some additional delay to the conclusion of the case.

[101] Chamberlain J, in a recent case, helpfully set out a summary of how a court hearing a judicial review claim will resolve disputes of fact: see *F v Surrey County Council* [2023] EWHC 980 (Admin), at paras [46]-[50]. The first question will almost invariably be whether the court is *required* to resolve the dispute of fact. That is a question for the court to determine, whatever any (or all) of the parties' views on the issue may be. That question might well depend on the view the judge takes of other pleaded grounds. Where the court has determined that an issue of fact should be resolved, it will usually do so on the basis of written evidence. There is no absolute rule either that a party's written evidence must be accepted unless the deponent has been cross-examined; nor that, where there is a dispute, the respondent automatically succeeds on the issue: see paras [49] and [50](c)-(d) of Chamberlain J's judgment.

[102] The facility of cross-examination of a deponent remains open to the court, although this is used rarely in judicial review. As indicated to the applicant in the email of 30 August, authority in this jurisdiction suggests that it will often be appropriate to adjourn any application to cross-examine a deponent into the substantive hearing itself, so that a fully informed and balanced view can be taken once the evidence and submissions are clear. That approach is frequently adopted. In the *McCann* case (unreported, 13 May 1992), Carswell J (as he then was) said this:

> "I do consider, however, that there is some substance in Mr Kerr's contention that a general cross-examination of the respondent's witnesses should not be ordered at this stage. I think that in this case, as in all applications for judicial review, it is of importance that any cross-examination should be directed only to specified

> issues and that the party cross-examining should not be at liberty to range over all the evidence in the hope of establishing something on which he might fasten to found a case on some issue. I agree with Mr Kerr's suggestion that the applicant should open the case and present his arguments on the documents put before the court, and that the respondents should have the opportunity to present their arguments in reply, before the question of the extent of permissible cross-examination is determined. At that stage it should be easier to decide precisely what issues require further investigation and to define the limits of cross-examination with greater clarity. It might even occur, although it is perhaps less likely in this case that in others which one might envisage, that the arguments presented by the applicant, or the respondent may be so clearly correct that it is possible to determine the application without the need for cross-examination.
>
> I accordingly propose not to make an order at present for cross-examination, but I shall not dismiss the application, for I think that such an order may well be required at a later stage. It should be considered by the judge who hears the substantive application at a stage when he thinks it appropriate. Skeleton arguments should be submitted by each party to the court… Parties should then be prepared to present their arguments on the issues, founded upon the documents then before the court, and return to the question of cross-examination when the issues are sufficiently defined. If witnesses are cross-examined counsel can then supplement their arguments in the light of the evidence given. It would be desirable if [the potential witnesses] were in court and available to give evidence from an early stage, and preferable that they should hear the arguments presented by the parties from the beginning.
>
> I, accordingly, adjourn the application for cross-examination."

[103] This was the approach which I proposed to adopt in the present case in the event that the applicant made an application to cross-examine. This would allow the court to determine whether cross-examination was necessary and on which issues. It may not prove necessary, for instance, if a conclusion was reached that Mr Duff was entitled to the primary relief which he seeks in any event.

[104] Although Mr Duff was concerned that he could not provide an adequate skeleton argument and could not deal with all that he would be required to deal with at the hearing, I formed the provisional view that he would be able to do so. He had been working on the case for some months and had a clear grasp of the factual issues he wished to rely upon and those he wished to explore. This was evident from the interrogatories he had served and from the lengthy affidavit commenting upon the evidence which he filed towards the end of August (which he himself indicated would form part of his skeleton argument). Since he is a litigant in person, he would benefit from the normal assistance the court will seek to provide to ensure that such a litigant's case is fairly set out and explored. It would ultimately be a matter for the court whether further evidential steps were required. In the event that cross-examination was considered necessary, realistically a large part of the burden of this exercise would have been discharged by the court itself, given that Mr Duff appears as a litigant in person with no legal training, supplemented by questioning from the other counsel on the identified issues. All of this would have been subject to the clearly identified potential for adjournment or further listings if necessary.

[105] In those circumstances, I do not consider that the directions given were objectively unfair; or would have been perceived to be unfair (or indicative of bias) by the fair-minded and informed observer.

[106] Having said that I do not doubt that, subjectively, Mr Duff may have felt overwhelmed to some degree, largely as a result of the matters mentioned in para [61] above. It is probably also the case that, had Mr Duff outlined the medical issues he raised on 2 September 2024 with supporting evidence at an earlier stage, I may have taken a less robust view of the wisdom of asking him to proceed as directed. Indeed, in his written submissions Mr Duff has indicated that he accepts that some of the directions given by the court "could or would have been different had [he] spelt out his concerns more articulately at an earlier stage"; and that he had not "spelt out his health limits in detail" such that the court "may not have been aware of the medical evidence the Applicant now has presented."

[107] In his application, Mr Duff has candidly indicated that recusal is sought on the basis of how the impact of the court's directions felt to him. However, the court is required to balance the rights and interests of all of the parties to the litigation. As appears above – without providing any significant level of detail in this judgment – the notice party has raised serious medical and/or mental health issues in relation to several members of the family arising from the ongoing effect of these proceedings and of delays in bringing them to a conclusion; and the resultant uncertainty and concern about the possibility of losing planning permission for a family home which has been built at considerable financial and emotional cost.

[108] Mr Duff has previously indicated that he does have "considerable sympathy for the plight of the Notice Party", notwithstanding them having submitted "a very flawed planning application." His written submissions recognise "that the court

was genuinely attempting to balance various demands when making directions and had no bad intent towards the applicant"; and he accepts that the court has "tried to balance the stresses and anxiety being suffered by the Notice Party with the need of the applicant to receive prompt and honest and complete answers from the Parties to interrogatories from the applicant." In a further submission he has also recognised that the court's reluctance to vacate the September hearing dates was "for good reasons and in good faith so that the matter could be resolved with as little distress to the Notice Party and without taking up a disproportionate amount of the court's limited time to allocate to this case." I consider that the applicant was correct to identify these aims but, in the final analysis, has prioritised his own concerns in a way which the independent and objective fair-minded and informed observer would not.

The timing of the recusal application

[109] As noted above, the notice party's submissions drew attention to the late timing of the application, which was made on 3 September 2024, some four working days before the hearing date. For his part, the applicant accepts that the "need for recusal only arose at a very late stage." Mr Duff explains that this was because he felt that anything that was said in his letters of 28 August and 2 September (or set out in his affidavits of 27 August and 30 August) had been insufficient to dissuade the court from (in his words) "insisting that hearing went ahead without very important evidence which would potentially have still become available if the parties fully answered questions put to them." For the reasons given above, I consider that the hearing had the capacity to ensure that any real shortcomings in important evidence, if any were found by the court, were rectified.

[110] In the *Hawthorne* case, McCloskey J considered that the timing of the application was a 'striking feature', which was relevant to the court's evaluation and application of the governing test (see paras [139] and [140]). Ms Kiley's submission effectively invited me to conclude (i) that the application was made at a late stage simply as a means to secure the outcome Mr Duff had wanted throughout the summer, namely an adjournment of the hearing; and (ii) that the grounds for the application were confected, to a greater or lesser degree, because they had only been made at a late stage (rather than earlier in the litigation) when matters were not panning out in the way in which the applicant had hoped.

[111] I consider there to be some force in this point. Indeed, Mr Duff himself has explained both the reasons for and timing of the application as having arisen from a degree of desperation on his part in the face of the imminent hearing (although he would plainly characterise matters very differently than did Ms Kiley). As I have mentioned above, it seems to me that the applicant is now complaining about a number of matters which were not the subject of objection or complaint by him at an earlier, more appropriate time. The late recusal application has also, of course, inevitably resulted in the scheduled hearing being adjourned. I could not have presided over that hearing until the recusal application had been ruled upon. Nor,

could I have simply asked another judge to deal with that hearing on 9 and 10 September instead, since Mr Duff was contending that it was unfair to require him to proceed in the circumstances. Any other judge would have had to have considered that matter at the outset, without any significant prior knowledge or experience of the case. Realistically, once this application was made, the case was not going to proceed on the fixed dates. In that way, it secured at least part of the substantive outcome which Mr Duff had been seeking, namely the postponement of the hearing.

Conclusion and the appropriate way forward

[112] For the reasons set out in detail above, I do not consider that the recusal application is well founded. I have considered each of the applicant's grounds separately above but, for the avoidance of doubt, have also considered them cumulatively. Being as objective as I can about the matter, I do not consider that the fair-minded and informed observer would perceive that there is a real possibility of bias in this case on the bases advanced by Mr Duff.

[113] I have also, however, conscientiously considered whether I should nonetheless step aside from the hearing of the case in any event. Authority suggests that it can be appropriate to ascertain whether or not another judge is available to hear a matter "if there is any real as opposed to fanciful chance of objection being taken by [the] fair-minded spectator" (i.e. a "real chance" of a "real risk" of bias). This advice is classically applicable where a matter is known to a judge which might give rise to an objection and therefore has to be disclosed to the parties, particularly at short notice before the hearing, where additional cost and inconvenience may arise if a cautionary approach is not taken. That is not the position in the present case, where there has been time for argument and reflection on the application and where, as explained at para [111] above, the hearing could not have proceeded in any event. However, it is not uncommon for judges to arrange for another judge to hear a case where objection has been taken to their hearing it either out of an abundance of caution or simply as a means of avoiding controversy over the issue.

[114] In addition, as explained in the *Hawthorne* judgment (at para [182]), a judge may still withdraw from a case even though not required to do so on the basis of a successful recusal application. That was the course adopted by McCloskey J in that case.

[115] Having reflected on the matter, I do consider that there are circumstances in this case which would warrant the approach adopted by McCloskey J in *Hawthorne*. I have borne in mind the warnings (see paras [58] and [61] above) that a judge should not too readily withdraw from a case if they conclude that the test for recusal is not met. Nonetheless, for the reasons given below, I consider it best that I do so. I have gone to the trouble of considering and determining the application in any event for two reasons. The first is to avoid the consequence of the applicant

suggesting that I should recuse myself from any further case brought by him which either has been, or might be, assigned to me. In view of the discussion above, I do not consider that there is a reason why I should not deal with any other litigation brought by Mr Duff. The authorities make clear that a judge who has been asked to recuse himself or herself should make clear to the objecting party – as I hope I have done but now do again – that "the court will not take it amiss if the right is exercised." That will of course apply in any other cases brought by Mr Duff which have been, or may in future be, assigned to me. The second reason is because case-law suggests that, where recusal is put in issue, it is vital that the judge's explanation be carefully set out in order to avoid any greater controversy about how the application arose or how it was resolved.

[116] The reason why I have determined that it is best to step aside for the remainder of *this* case is because I consider that the making of the recusal application itself has placed the court in a very difficult position. An issue of particular controversy in this case, in light of its unique history and features, is likely to be the manner in which the court exercises its discretion in relation to the grant of relief, with Mr Duff seeking a quashing order and the notice party resisting it. Where that comes down to a matter of discretion, an element of evaluative and discretionary judgment is obviously required (albeit guided by the legal principles set out in case-law). My concern is that, however that issue is resolved, there may now be a suspicion raised about the fairness and impartiality of the approach taken.

[117] Put bluntly, if I was ultimately to withhold the relief Mr Duff seeks, he is likely to take the view that his recusal application was justified all along and that the outcome in the case simply confirms his suspicions. Worse still, he may fear that the outcome was motivated in some way by the fact that he called into question the impartiality of the court or the case management of the proceedings. On the other hand, if I was to grant the relief Mr Duff seeks, the notice party may feel that this has been motivated, in whole or in part, by a desire on the part of the court to demonstrate its impartiality and/or prove that the assertions made in the course of the recusal application were unfounded. That places the court in an invidious position whatever the correct outcome may be.

[118] In the *Hawthorne* case, McCloskey J recused himself from further adjudication in the case, notwithstanding that he did not feel compelled to do so by acceding to the recusal application, because the litigation had been protracted and emotionally draining for the families involved, with a variety of twists and turns, and he was concerned not to reach a final conclusion where the litigants could not "have genuine confidence in the outcome" and in his choice of remedy (see para [186] of his judgment). He applied a wider test of the interests of justice, asking whether trust and confidence in the legal system pointed towards withdrawal, and decided that they did. For similar reasons, albeit in a different context, I consider the same approach is warranted, exceptionally, in this case.

[119] The applicant has described his feeling in the two weeks before the scheduled substantive hearing as being one of "desperation." As I mentioned during the oral hearing of this application, it is always disappointing for a judge to be told by a litigant that they feel they have been treated unfairly. In my estimation, being as objective as I can, the applicant was not treated unfairly, although I do not doubt his assertion that he became distressed at being required to present his case in circumstances which he viewed as less than optimal.

[120] Nonetheless, for the reasons given at paras [116]-[118] above, I will now pass this case back to the Senior Judicial Review Judge for him to either deal with himself, or for another judge to be assigned by him to deal with it, from this point on. The parties should therefore be informed shortly of a review listing before another judge for them to determine how best to proceed.