

Neutral Citation No: [2018] NIQB 103

Ref: McC10816

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

*Delivered: Ex tempore
10/12/2018*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JAMES ALLISTER
AND ROBERT AGNEW FOR JUDICIAL REVIEW

McCLOSKEY J

[1] The substantive hearing of this judicial review challenge has reached approximately mid-point and ought to be continuing as scheduled. There has however been an unexpected event and that takes the form of an affidavit sworn by one of the Respondent's councillors, Mr McShane. This affidavit was sent by a solicitor representing Mr McShane to the Office of the Attorney General on Friday 7 December 2018. It would appear from the email which has been brought to the attention of the court that it was simultaneously copied to the Northern Ireland Ombudsman's Office. The court has seen the affidavit and considered its contents. It was properly brought to the attention of the court and it was properly distributed among all parties to these proceedings.

[2] The immediate impact of this development is a prosaic one. The court has a series of duties under various provisions of the Rules of the Court of Judicature: Order 53 Rule 3(5), Order 53 Rule 3(7) and Order 53 Rule 9(1), all of which must be construed and applied in accordance with the overriding objective. The court must also be alert to its inherent jurisdiction. The combined effect of these provisions requires the court to ensure that formal notice of these proceedings is given to certain non-parties.

[3] Three such parties in particular are identifiable at this stage. The possibility of identifying others remains open. The parties concerned are the Chief Executive Officer of Causeway Coast and Glens Borough Council, Mr David Jackson, the Council's solicitor, Mr David Hunter and Mr Richard Baker, Director of Leisure and Development. These three persons are implicated in certain events and

conversations that are described in the affidavit of Mr McShane. They plainly have a sufficient interest in these proceedings to be given notice.

[4] What is the immediate impact of this unheralded development? Having regard to the issues which have been canvassed in argument to this point and the issues remaining to be addressed I consider it not appropriate to continue with the presentation of the Applicants' case at this juncture. Time is needed for absorption and reaction on all sides and, further, the court must now proactively take certain steps.

[5] The court has wrestled with the issue of expedition from day one in these proceedings. That is traceable to the first order which I made (in June 2018) and has been a recurring theme of the management of this case. It will therefore be apparent to all concerned that it is a matter of great regret and concern to the court that a halt has been reached, unavoidably so, at this uncompleted stage of the proceedings.

[6] A case management court order is required at this stage. It will have the following components:

- (i) The judicial review papers and Mr McShane's affidavit will be served on Mr Jackson, the Council Chief Executive Officer, by Wednesday 12 December 2018.
- (ii) The affidavit of Mr McShane will be served on the Council's solicitor, Mr Gallagher by the same date.
- (iii) *Ditto* Mr Baker.
- (iv) Any application by Mr Jackson, Mr Hunter or Mr Baker to this court will be made by 20 December 2018.
- (v) Irrespective of whether any such application is made Mr Jackson, Mr Hunter and Mr Baker will have an opportunity to provide affidavit evidence to this court, the time limit for which will be 11 January 2019.
- (vi) The same opportunity is afforded to the un-named person who is described as the "senior planner" in Mr McShane's affidavit.
- (vii) The "Council corporate" will have the same opportunity to provide further affidavit evidence, by 18 January 2019.
- (viii) Any rejoinder affidavit on behalf of the developer will be provided by 25 January 2019. Any rejoinder affidavit on behalf of the Applicants, Mr Allister and Mr Agnew, will be provided by 8 February 2019.

- (ix) Any further Amended Order 53 pleading will be provided by 08 February 2019.
- (x) The court will conduct two further reviews of this case before the end of term. One will be on Friday 14 December and the next will be on 20 or 21 December, to be confirmed.

This order of the court takes effect at once.

[7] There are certain ancillary observations which the court makes at this stage. They are inevitably incomplete and of an embryonic nature. The affidavit sworn by Councillor McShane raises a series of questions and it is to be expected that the parties to these proceedings will formally direct certain questions and requests to Councillor McShane. The court makes no order of any kind at this stage, but it is foreseeable that the court may be formally requested to make an order in respect of certain aspects of the contents of Councillor McShane's affidavit and references which the affidavit contains, in particular references to recorded conversations and to the unidentified person who is ascribed as the "senior planner".

[8] It is to be expected that the issue of cross-examination may possibly arise and the court will deal with that if and when it arises. It is equally to be expected that the issue of disclosure of documents will arise and if that is not addressed in a consensual manner the court will also be in a position to deal with that.

[9] There are several imponderables arising out of this highly unexpected development. They include the conduct of agencies who have their own statutory functions and responsibilities. In the first place there is the Public Services Ombudsman and the Local Government Standards Ombudsman who has been given direct notice of the contents of Councillor McShane's affidavit. The possibility that other public authorities with their own statutory functions and responsibilities may become involved also clearly exists.

[10] What does all of this mean for the future conduct of the judicial review proceedings? The answer is the court is unable to make any confident prediction at this stage. However, flexibility and imagination may well be required with a view to providing the maximum certainty to those who have a direct interest in the judicial review challenge, namely the Applicants, Mr Allister and Mr Agnew, the Respondent, The Causeway Coast and Glens Borough Council and the interested party, CV Developments. The court will consider mechanisms for providing the maximum and swiftest certainty to the four judicial review protagonists at the earliest possible date. Proposals can be made to the court to that effect by the parties either individually or jointly. One possibility, and it is only one I stress, is that the court could adjudicate and provide a judgment on the issues which have been addressed to date and possibly certain further issues still to be addressed having heard argument of course from all of the parties.

[11] Absent a crystal ball it is not feasible to say anything further at this stage. I confine myself to highlighting what appears to be more of a probability than a possibility, namely the court being unable to adjudicate finally on one of the grounds in particular until certain further events have been finalised. All of this is framed in deliberately tentative and provisional terms. If any of the parties to these proceedings wishes to formulate any litigation management proposal to the court in advance of the review on 14 December please do so and I will quite happily receive that late on the evening of 13 December. Alternatively, you may wish to await certain further developments and instructions from your respective clients and defer that until the review to be conducted on the last or penultimate day of term and I will quite happily accept that suggestion also. Any other developments which occur between now and the listing of each of those reviews will of course, as is considered appropriate, be brought to the attention of the court.