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Judgment: approved by the Court for handing down | *Delivered:* **18.05.2017**

(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY THE MINISTER OF ENTERPRISE, TRADE AND INVESTMENT FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE MINISTER FOR THE ENVIRONMENT DATED 3 SEPTEMBER 2014

BETWEEN:

BELFAST CITY COUNCIL

Appellant/Notice Party

and

THE MINISTER OF ENTERPRISE, TRADE & INVESTMENT

Respondent/Applicant

Before: Weatherup LJ, Weir LJ, McBride J

WEIR LJ (delivering the judgment of the court)

The nature of the Appeal

[1] This is an appeal by Belfast City Council ("BCC") a Notice Party in relation to the terms of the Order by way of remedy made by Treacy J on 18 November 2016 consequent upon his decision in this matter delivered on 11 March 2016 - [2016] NIQB 26. The original parties ("the principal parties") to the dispute were the then Minister of Enterprise, Trade & Investment (whose functions relevant to the present matter are now discharged by the successor Department for the Economy) and the Department for the Environment (whose planning functions have been transferred to the Department for Infrastructure). We received helpful written and oral

submissions on behalf of the principal parties and their successors and BCC together with written submissions on behalf of the other Notice Parties; Fraser Houses (NI) Ltd, Sprucefield No2. General Partner Ltd and Lisburn and Castlereagh City Council. We are grateful for all the considerable industry which these submissions display and the assistance they have afforded.

[2] In the period between the delivery of the judgment and the holding of the remedies hearing on 18 November 2016 (the latter having been delayed at the request of the principal parties), those successor Departments reached agreement, each of them also having by then a new Minister. Consequently, on 28 July 2016, the Executive Committee of the Northern Ireland Assembly ("the Executive") gave approval to a proposal that both Departments should invite the court to make a Consent Order providing for agreed remedies and a draft of the Order proposed by them was submitted to the court and provided to the Notice Parties including BCC. It is against part of the Remedies Order subsequently made in those terms that BCC now appeals, contending that paragraphs 2 to 4 of its Declarations impermissibly go beyond the matters which the trial judge had been called upon to and had decided.

The planning background

[3] For many years there has been in course of preparation, an important planning document known as the draft Belfast Metropolitan Area Plan ("BMAP") whose many policies are to provide guidance in the formulation and determination of planning applications in respect of the significant geographical area of Northern Ireland to which the plan relates. Nesting above BMAP in the hierarchy of plans exists regional planning guidance for the entirety of Northern Ireland into which, rather in the manner of Russian dolls, subordinate policy such as BMAP should consistently fit. As part of the consultation process leading to the ultimate decision at Departmental level as to what the final terms of BMAP should be, the Planning Appeals Commission ("PAC") was requested to hold an inquiry into representations made about the draft provisions in the plan and to report to the Department thereon and it duly did so.

[4] One of the matters of controversy has consistently been and still remains the nature and extent of the planning policies to be applied to an area known as Sprucefield Regional Shopping Centre ("Sprucefield"). Sprucefield is one of only three Regional Shopping Centres, the others being Belfast and Londonderry with Sprucefield being the only one of those which is "out of town". The PAC reported to DOE that it had reservations about the likely efficacy of the terms of the draft policy for Sprucefield contained within the draft BMAP. It raised doubts not only as to certain proposed terms including minimum unit sizes and "bulky goods" restrictions but also and more fundamentally as to whether it was appropriate to include a policy for what is in policy terms a regional facility within a development plan for a portion of the region just because Sprucefield falls within the geographical limits of BMAP. At paragraph 6.4.8 of its report, it said:

> "We consider that the Department should decide at a regional level what the future status and role of Sprucefield should be and devise clear and unambiguous policy to enable [it] to fulfil that role. The introduction of regional policy in a development plan is unacceptable and cannot be supported."

[5] The Department did not accept that view and it retained the retail policy for Sprucefield as Policy R3 within the draft BMAP. As part of Policy R3 it is provided, among the several criteria that must be met before permission for retail development would be granted there, the following which has given rise to much controversy:

> "The type of goods to be sold is restricted to bulky comparison goods"

This criterion was consistent with the earlier text of the BMAP Retail Strategy which indicated that it comprised among its elements:

> "Expansion of Sprucefield Regional Shopping Centre for bulky comparison goods only."

[6] In addition, Policy R2 of BMAP relating to Belfast City Centre provides as follows:

> "Planning permission will not be granted for proposals for retail development where it would be likely to result in an adverse impact on the distinctive role of Belfast City Centre as the leading Regional Shopping Centre.
>
> The revised Regional Development Strategy 2035 supports and strengthens the distinctive role of Belfast City Centre as the primary retail location in Northern Ireland. It urges a precautionary approach in relation to future major retail development proposals based on the likely risk of out-of-centre shopping developments having an adverse impact on the city centre shopping area."

Thus it may be seen that the DOE's rationale prompting the imposition of the prohibition of the sale of other than bulky comparison goods in any future retail development at Sprucefield was the perceived need to protect and enhance Belfast's role as an important destination for non-bulky comparison shopping.

[7] By early 2013 the point had been reached at which the draft BMAP was ready to be adopted as a statutory development plan. The practical significance of a plan being adopted is that the provisions of an adopted plan carry more weight in the determination of planning applications than do those of a plan that is still in draft. In brief, the planning authority "shall have regard" to the adopted development plan, so far as material to the application whereas, in the case of a plan which remains in draft and has not yet been adopted, the weight to be accorded to any of

its draft policies varies according to the extent to which the relevant draft policy is in accord or at variance with the provisions of an extant development plan and to whether there have or have not been objections lodged to any relevant draft policy. The practical effect of that distinction in the case of Sprucefield is that if the provisions of the retailing policy relating to it in the draft BMAP became formally adopted any attempt to obtain planning permission for a retail development not subject to a bulky comparison goods restriction would face a formidable policy obstacle.

Inter-departmental disagreement about including a bulky goods restriction to future development at Sprucefield.

[8] The DOE Minister announced on 11 January 2013 that he was ready to have BMAP formally adopted and that it would include the bulky goods restriction on future retail developments at Sprucefield. The DETI Minister did not agree, presumably on the basis that such a restriction would affect the number and nature of potential retail uses and occupiers at Sprucefield, for example, the provision of a department store. He, therefore, objected to the inclusion of the bulky goods restriction within BMAP. Agreement could not be reached between those Ministers and the First Minister and Deputy First Minister then became involved and jointly determined that the draft BMAP Retail Strategy should be considered by the Executive. The matter went backwards and forwards inconclusively for months on end in the fashion detailed by Treacy J in his judgment until, despite no agreement having been reached as to the exclusion or inclusion of the bulky goods restriction, on 29 August 2014 the DOE Minister unilaterally decided to and directed his Department to have the BMAP formally adopted which was purportedly done by Order of 3 September 2014. Thereafter he informed the Executive that he had taken this step and refused in subsequent correspondence to alter his position.

[9] In consequence there then followed the present litigation. Treacy J gave judgment in favour of the DETI Minister, holding for the several detailed reasons set out by him that the DOE Minister had acted *ultra vires* in purporting to have BMAP adopted. The judge then indicated that he would hear the parties as to the appropriate relief and the matter was adjourned for that purpose.

[10] BCC was at all material times interested in the outcome of these proceedings, both as a Council whose district lies within the geographical area of BMAP and is therefore directly affected by it and, following the devolution of planning control to councils, also as a planning authority for part of the area within BMAP. BCC applied to Treacy J for leave to become a Notice Party in order to be heard on the question of remedy, which leave was granted on 11 April 2016.

[11] Written submissions in relation to remedy were then provided by the principal parties, by BCC and by other interveners. In brief outline the position of DETI was that there should be a "tailored remedy" involving excising those portions of the retail policy within BMAP relating to bulky comparison goods but saying

nothing about the validity of the adoption of the remainder of BMAP. Interestingly in the light of what later happened, in a submission on remedy lodged on behalf of the then Minister for Enterprise, Trade & Investment in relation to remedies and dated 4 May 2016, the following submission appears at paragraph 16:

> "Finally, it is noted that, consistent with well-established principle, planning matters are not a matter for this court. Accordingly, it is no part of the court's function at this stage to determine what is the better policy position in relation to Sprucefield. The applicant makes no submission on these issues. *The court's task is simply to give effect to the findings it has made, consistent with the rule of law".* (Emphasis supplied here and hereafter).

However, at the subsequent joint prompting of the by then newly reconstituted and reconciled parties and notwithstanding the objection of BCC, the judge did make a Remedies Order that went beyond the giving of effect to the findings he had made which were simply that the DOE Minister had acted *ultra vires* in purporting to have BMAP adopted for the detailed reasons set out at para [49] of his judgment. The Remedies Order of 18 November 2016 is in the following terms so far as material:

> "IT IS ORDERED that the applicant's application for Judicial Review be allowed;
>
> AND IT IS FURTHER DECLARED that:
>
> 1. The decision made by the Respondent on 3 September 2014 to authorise and direct the Department of the Environment to adopt the draft Belfast Metropolitan Area Plan (BMAP) containing retail policy for Sprucefield Regional Shopping Centre (defined at paragraph 2 below) in the absence of discussion and agreement of that retail policy for Sprucefield Regional Shopping Centre by the Executive Committee, was unlawful.
>
> 2. The retail policy for Sprucefield Regional Shopping Centre contained in the adopted BMAP, namely:
>
> (i) the fourth bullet point of the BMAP Retail Strategy ("expansion of Sprucefield Regional Shopping Centre for bulky comparison goods only") at Part 3, Volume 1, page 54;
>
> (ii) the second bullet point of Policy R3 Sprucefield Regional Shopping Centre which states that "the type of goods to be sold is restricted to bulky comparison goods" Part 3, Volume 2, page 57;

(iii) and any related references contained within BMAP referring to the restriction of the type of goods to be sold at Sprucefield Regional Shopping Centre to bulky comparison goods;

was adopted unlawfully and without Ministerial authority.

3. Accordingly, the said provisions within BMAP are of no force or effect and, without prejudice to the generality of the foregoing, should not be taken into account in informing planning decisions.

4. For the avoidance of doubt, in the exercise of the Court's discretion and in light of the retrospective Executive approval given to all other elements of the adopted BMAP (save for those provisions mentioned at paragraph 2 above) on 28th July 2016, the Court:

(a) declines to make any order in relation to the remainder of the adopted BMAP, save as aforesaid; and

(b) further declares that the entirety of the adopted BMAP (save for those provisions specified at paragraph 2 above) may continue to be taken into account in informing planning decisions."

The arguments on appeal

[12] The essential argument of BCC is that these proceedings and the decision thereon were concerned and concerned only with the validity of the purported adoption of BMAP by the unilateral action of the DOE Minister. It's submission is that the declarations then made on foot of the decision went beyond that issue and gave directions that sought to sever and strike down the bulky comparison goods provisions of BMAP as having been "adopted unlawfully" while simultaneously declaring that the remainder of "the *adopted* BMAP may continue to be taken into account in informing planning decisions." In BCC's submission BMAP *as a whole* had been held not to have been validly adopted and there was no occasion for the making of an Order by way of remedy beyond a declaration such as that at paragraph 1 of the Order. The declarations at paragraphs 2 and 3 were unnecessary as they were comprehended within the terms of paragraph 1 and paragraph 4 strayed impermissibly (a) beyond the subject matter of the proceedings and (b) into areas of planning policy which not only formed no part of the proceedings but were also beyond the competence of the court. Finally, BCC submitted that in any event paragraph 4(b) misstated the law pertaining to the weight to be accorded to an *adopted* development plan which is not merely to be "taken account of" in informing planning decisions but rather, by virtue of Section 6(4) of the Planning Act (Northern Ireland) 2011, such decisions "must be made in accordance with the plan unless material considerations indicate otherwise."

[13] It was said on behalf of the Minister that retrospective Executive approval for the adoption of BMAP had been given in the period since the judgment subject to the court making the Order by then proposed by the two Ministers. That draft Order provided for the declaring unlawful of the adoption of the bulky goods restriction but, subject to that, the making of a declaration that the remainder of BMAP had been lawfully adopted. They submitted that the court could, in exercise of its wide discretionary powers, "fashion a remedy appropriate to the case" and that in circumstances in which, by the time of the remedies hearing, Executive approval had been given for all of BMAP except the bulky goods restriction "the court plainly could not ignore the actions of the Executive." It was further submitted that this case is analogous to one such as DPP v Hutchinson [1990] 2 AC, 783 where certain of the provisions of a statutory instrument were found to be *ultra vires* and others not. Lastly, it was submitted that if the Executive had agreed to the adoption of BMAP without the disputed bulky goods condition and it had then been adopted by the Minister in that modified form on 3 September 2014, there could have been no dispute about his entitlement to do so. The effect of the Remedies Order that was made following the "retrospective agreement" of the Executive, simply gave effect to that form of adoption. Therefore the court was not determining planning policy but making an order which reflects the policy choice of the Executive.

Consideration

[14] Firstly, it is now no longer a matter of dispute by any principal, successor or notice party that the Minister's decision to direct the formal adoption of BMAP was, for all the reasons clearly articulated by Treacy J, *ultra vires*. The purported adoption was accordingly of no force or effect; the draft BMAP remains in its entirety unadopted. Paragraph 1 of the Declaration in the Remedies Order makes that clear although the impugned decision and direction of the Minister were actually made and given on 29 August 2014 and not 3 September which was the date of the purported adoption.

[15] Secondly, it is plain that paragraph 2.15 of the Ministerial Code enables the Executive, subsequent to *a decision being taken*, to nonetheless determine that *the decision* has been taken in compliance with paragraph 2.4 of the Code; in other words to retrospectively validate what would otherwise have been an *ultra vires* decision.

[16] However, that is not the course that was followed by the Executive here. When the adoption of BMAP finally came to be considered by it in July 2016, the purported adoption in September 2014 having by then already been found by Treacy J to be invalid, the successor Departments jointly proposed to the Executive and the Executive accepted a proposal that an amended BMAP should be adopted, omitting the still disputed bulky goods requirement. It was, or should have been, perfectly clear by that stage, as a result of the judgment, that there was no validly-adopted plan. It may be, although we do not decide, that the Executive could have resurrected the *ultra vires* Ministerial decision by employing paragraph 2.15 of the

Ministerial Code but that was not what it did. Rather, it reached a decision to vary the terms of what was, and is still, the draft BMAP and to seek to engage the court in a process of preserving the, by then agreed, provisions of the draft BMAP as though they had been validly adopted (and which the draft order submitted to the judge erroneously and repeatedly described as "the *adopted* BMAP") while at the same time asking it to strike down only the disputed bulky goods provisions.

[17] We consider that this approach was impermissible and that the successors to the principal parties led Treacy J into error by pressing upon him the draft order for which by then they both contended. All that the judge should have been asked to do in order to give effect to his decision was to make a declaration in a form such as that contained in paragraph 1. The remaining paragraphs were included with the intention of giving effect to political policy decisions about the content of BMAP that had played no part in the matters argued before or decided by the judge who was not at all concerned with the contents of the draft BMAP but only with what he held to be the invalidity of its purported adoption. Once a declaration along the lines of paragraph 1 had been made, it would be for government to decide how to proceed should it wish to revisit the adoption of BMAP, with or without amendment. What procedures it should follow in that event would be for it to determine, no doubt on advice, and we eschew the temptation to say anything in that regard. For present purposes we need only say that we are satisfied that paragraphs 2, 3 and 4 of the Remedies Order exceeded anything required to give effect to the judge's decision which is adequately reflected by the terms of paragraph 1. We therefore allow the appeal and amend the Remedies Order of 18 December 2016 by deleting those other paragraphs of the Declaration. Paragraph 1 may also require some factual amendment in relation to dates which no doubt the parties can agree.

[18] Finally, we add for the sake of completeness that we agree with the submission of BCC that the Declaration at paragraph 4 (b) understates the weight accorded by statute to an adopted development plan, although in the context of our overall decision that error is of no practical significance.