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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY CLOGHER ENVIRONMENTAL GROUP LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PLANNING APPEALS COMMISSION

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Mr Gordon Duff (in person) for the applicant
Mr Philip McAteer BL (instructed by O'Reilly Stewart, Solicitors) for the proposed respondent
Mr Stewart Beattie QC and Mr Philip McEvoy BL (instructed by Cleaver Fulton Rankin, Solicitors) for the interested party

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SCOFFIELD J

Introduction

[1] By this application, the applicant, Clogher Environmental Group Limited ('the Company'), seeks leave to apply for judicial review of a decision of the Planning Appeals Commission for Northern Ireland (PAC) whereby it allowed an appeal (No 2018/A0208) against the refusal by Lisburn and Castlereagh City Council ('the Council') of an application for planning permission for two dwellings at an 'infill' site between Nos 31 and 35 Clogher Road, Lisburn.

[2] I have today given judgment in two related applications for leave to apply for judicial review – *Re Portinode Environmental Limited's Application* [2021] NIQB 31 ('*Portinode*') and *Re Rural Integrity (Lisburn 03) Limited's Application* [2021] NIQB 32 ('*Rural Integrity '03''*) – which, like this case, have been dogged by a variety of procedural difficulties for quite some time. The three applications were heard together because they are each brought by a company which has been incorporated for the purpose of mounting judicial review litigation with Mr Gordon Duff as a

director. They also each form part of a limited sub-group of cases which were reprieved from dismissal when McCloskey LJ considered a broad cohort of cases sharing common features, many of which were brought by companies bearing the words 'Rural Integrity' as part of their name, and dismissed 29 out of 32 of those cases on a variety of related grounds.

[3] Many of the procedural issues arising in this case are common to the *Portinode* case and I do not intend to repeat in this ruling the analysis contained in my judgment in that case, to which the reader's attention is drawn.

[4] The applicant company in the present case has no legal representation. For the purposes of the leave hearing only, I permitted Mr Duff to make representations on behalf of the company – without objection and in the exercise of the Court's discretion – but without prejudice to the respondent's position (and, indeed, the correct position in law) that Mr Duff was not entitled to appear on behalf of the company as of right.

The respondent's application to strike out or stay the application for leave

[5] As in the *Portinode* and *Rural Integrity '03'* cases, the proposed respondent in this case has applied for the applicant's application for leave to apply for judicial review to be stayed or struck out on a variety of bases. These include breach of RsCJ Order 5, rule 6 (because the application has been, and continues to be, brought by the company acting otherwise than through a solicitor); absence of standing; and abuse of process. This application on the part of the respondent was initially made by way of summons dated 25 February 2020; and was renewed by way of an amended summons dated 10 December 2020. It was supported by the Council who appeared at the leave hearing as an interested party.

[6] After the initial summons was issued on the part of the proposed respondent in this case, but before the summons was amended and re-listed for further determination, McCloskey LJ considered the issues arising in this case, and others which raised materially similar issues, in his ruling in *Re Rural Integrity (Lisburn 01) and Related Limited Companies' Applications* [2020] NIQB 25, a judgment delivered on 6 March 2020. As discussed in my judgment on leave in the *Portinode* case, McCloskey LJ considered that, in each of the cases where a company had been used as the vehicle for mounting the judicial review application and was purporting to act as a litigant in person with Mr Duff appearing for it, there had been manifest non-compliance with the requirements of RsCJ Order 5, rule 6(1), which also amounted to a misuse of the process of the Court.

[7] On the basis of his findings, McCloskey LJ refused leave to apply for judicial review in 29 of the 32 cases (see paragraphs [43] and [46] of his ruling). The judge was plainly of the view that, in light of the breach of the Court Rules identified by him and the misuse of newly incorporated companies to bring proceedings, purportedly represented in person by a director, such as to evade or restrict personal

costs liability, these cases should not be permitted to continue. It is clear from McCloskey LJ's commentary that he also had concerns about the conduct of the cases by Mr Duff which meant that they were not being managed and progressed in conformity with a number of the imperatives inherent in the overriding objective in RsCJ Order 1, rule 1A.

[8] The limited exceptions to this disposal were the three cases in which I am giving judgment on leave today: *Portinode*, *Rural Integrity '03'* and the present case. These cases were excluded from the general dismissal of the judicial review claims only because "*in light of the most recent developments the applicant companies in those three cases (only) should have one further and final opportunity to demonstrate compliance with Order 5.*" McCloskey LJ indicated that this further and final opportunity would "*endure for the finite period of two weeks, ending on 20 March 2020.*"

[9] In the present case, unlike the position in *Portinode* and *Rural Integrity '03'*, the applicant has *not* managed to secure legal representation, much less so within the timescale permitted by McCloskey LJ. It seeks to progress the case, as before, with Mr Duff appearing on its behalf.

[10] Accordingly, Mr McAteer invites me to refuse leave, or alternatively dismiss the case, *in limine.* In both the *Portinode* and *Rural Integrity '03'* cases, I have taken the view that it would not be right for me to go behind McCloskey LJ's March 2020 ruling. Since, in those cases, the two applicant companies complied with the requirement to put their representation in order within the limited two week period afforded to them by McCloskey LJ, I considered that they had a legitimate expectation that their earlier non-compliance with Order 5, rule 6 should not, of itself, act as a bar to the continuation of the proceedings. Albeit at the eleventh hour, they had grasped the lifeline extended to them by the March 2020 ruling. By the same token, however, I also consider that the proposed respondent in the present case has a legitimate expectation that – because the Company has *not* availed of the limited, finite and final opportunity granted to it in March 2020 to demonstrate compliance with the Rules – its case should be brought to an end.

[11] That conclusion is sufficient for me to dispose of the present case. As McCloskey LJ did in the 29 cases which were dismissed in March 2020, I refuse leave to apply for judicial review on the basis that the leave application is brought in breach of Order 5, rule 6 and, as such, is a misuse of the Court's process. The opportunity to rectify that breach has not been taken by the Company and the irregularity in the proceedings continues. Moreover, the affidavit evidence provided by the applicant evinces no intention to correct this irregularity even if leave were to be granted. On the contrary, it maintains that the applicant company cannot afford legal representation, can raise no more than £2,000 at a maximum by way of covering costs (against a background of the company already being in debt), and therefore would not be in a position to give any greater sum as security for costs. I am not prepared to sanction the continuation of the breach of the Rules of Court and will therefore set the application for leave aside pursuant to the Court's powers

under Order 2, rule 1(2) or its inherent jurisdiction. Alternatively, I consider that these failures are also a proper basis on which to refuse leave to apply for judicial review in the exercise of the Court's broad discretion in public law proceedings of this nature. That is evidently what would have happened in March 2020 if Mr Duff had not persuaded McCloskey LJ that there was some reasonable prospect of the applicant in this case securing legal representation; but it has not done so.

Additional issues raised on the applicant's behalf

[12] The key submission made by Mr Duff as to why I should not follow the approach set out by McCloskey LJ in his March 2020 ruling was because, he submitted, that ruling was wrong to conclude that an application for leave to apply for judicial review under Order 53, rule 3 constituted "*proceedings*" which were caught by the provisions of Order 5, rule 6(2). On the applicant's case, only the substantive application for judicial review commenced by notice of motion after the grant of leave represents such proceedings. I have already indicated in paragraph [27] of my ruling in the *Portinode* case that I do not accept that submission and am not persuaded that it would be right for me to depart from McCloskey LJ's finding on that point. I give the following additional short reasons for this view:

(a) McCloskey LJ was right to point out, at paragraph [36] of his ruling, that Order 5, rule 6(2) is not qualified by reference to Order 5, rule 1 (which is in permissive terms in any event), nor is it restricted to proceedings commenced in any particular manner. Section 18(2)(a) of the Judicature (Northern Ireland) Act 1978 requires that leave of the High Court be obtained before judicial review proceedings proper are commenced, save for in one limited exception. Plainly, there must be some form of application to the Court for this purpose, as recognised by the terms of Order 53, rule 3. This invocation of the Court's jurisdiction at the suit of a party would ordinarily in my view be considered to be a proceeding or proceedings, as McCloskey LJ held at paragraph [37] of his ruling.

(b) Interlocutory or preliminary proceedings can nonetheless be "*proceedings*" within the meaning of Order 5, rule 6. So too can *ex parte* proceedings, which are simply proceedings which need not be made on notice to the other party.

(c) I further note that authority in England and Wales, preceding the advent of the Civil Procedure Rules, has established that an application for leave to apply for judicial review constitutes 'proceedings' for the purposes of section 51 of the Senior Courts Act 1981 and the Contempt of Court Act 1981: see the cases cited at section 21.1.2 of Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart).

(d) In addition, an application for leave to apply for judicial review and the substantive application itself are not always separated by a clean, bright line. For instance, the Court is entitled to grant substantive relief at the leave stage

(see Order 53, rule 3(9)) and, in this jurisdiction, the proposed respondent frequently appears at the leave hearing by invitation of the Court. Moreover, it is not uncommon for the Court to convene a 'rolled-up' hearing in cases of urgency or where lengthy affidavit evidence is not required, in which case the two separate stages on which Mr Duff relies are elided. If Mr Duff's submission were correct, the requirements of Order 5, rule 6(2) as regards companies' representation would be denuded of effect in some applications for leave which were to all intents, or became, substantive applications for judicial review.

(e) The mischief at which Order 5, rule 6(2) is aimed applies to both substantive applications for judicial review *and* the application for leave. In either case, the policy objectives pursued by the requirement that a body corporate act by solicitor (as explained in the body of case-law dealing with this issue at common law referred to in my judgment in *Portinode*) apply with equal force.

[13] In any event, as I have alluded to at paragraph [11] above, it is well established that judicial review is a discretionary remedy. Even if Mr Duff were correct that no breach of Order 5, rule 6(2) could occur at the leave stage, I consider that the Court is entitled to take into account in the exercise of its discretion as to whether or not leave (or eventual relief) should be granted the applicant company's plain intent to pursue its substantive application for judicial review in a way which is in breach of the Rules (absent the exceptional exercise of the Court's discretion to permit the Company to be represented by a lay director).

[14] Mr Duff also asserted that it was not open to the Court to dismiss the application for leave without the applicant being heard, *i.e.* having a hearing on the merits in relation to leave. That submission was made on the basis of RsCJ Order 53, rule 3(10): "*… no application for leave shall be refused without first giving the applicant an opportunity of being heard.*" In my view, this provision is not a barrier to the leave application in this case being dismissed as non-compliant with the Rules without a hearing on the merits since, properly construed, it is referring to applications for leave which have been validly and regularly made. But, in any event, in the present case the applicant has been given an opportunity of being heard. A leave hearing was convened and Mr Duff was at liberty to, and has, addressed me on the merits of the application. I proceed on the basis that some of the applicant's grounds may surmount the modest threshold of arguability for the grant of leave on the merits, albeit it seems to me that this case is much more vulnerable to the charge of being essentially a merits challenge to the planning judgment of the PAC. However, that is beside the point given the basis on which I have determined that the case should not be permitted to proceed.

[15] For completeness, I make the following additional observations in relation to aspects of the case which were raised in the written or oral argument:

(a) I do not accept that it has been established that Mr Duff is an employee of the applicant company who might be permitted to appear on its behalf pursuant to Order 5, rule 6(3). This is consistent with paragraph [30] of McCloskey LJ's March 2020 ruling; and paragraph [12] of the Court of Appeal's judgment in *Rural Integrity (Lisburn 01) Ltd* [2020] NICA 12, in which, in respect of that company, Mr Duff accepted that there was no contract of employment between himself and the company. The applicant's Order 53 statement in this case has been signed by him *as a director*. He is described as a director in paragraph 1 of his grounding affidavit of the case. He is nowhere described as an employee of the Company in his sworn affidavit evidence in this case. Although he described himself in an email of 9 September 2019 to the respondent's solicitors as being "*employed as director*", he has provided no contract of employment or other supporting information which would normally attend a relationship of employment by a company or which evinces an intention to effect legal relations to that end. In the company resolutions provided to the Court in evidence, exhibited to Mr Duff's second and third affidavits, he is referred to as a director rather than an employee and, perhaps more importantly, the Company approved his 'co-joining' the application (*i.e.* becoming a litigant in his own right) rather than authorising him to act on its behalf as an employee.

(b) Further, I do not consider that the Company has established to the requisite degree that, even if Mr Duff was an employee, it has appropriately *authorised* him to begin or carry on the proceedings on its behalf for the purposes of Order 5, rule 6(3)(a). Again, there is no documentation from the Company to this effect and, indeed, the resolution of 21 February 2020 about Mr Duff 'co-joining' the proceedings suggests that this was selected by the Company as the course which was most appropriate to try to secure the onward conduct of the proceedings in some form. This is consistent with McCloskey LJ's finding at paragraph [26] of his March 2020 ruling. I differ from McCloskey LJ insofar as he may have expressed the view (at paragraph [35] of his ruling) that the resolution of 21 February 2020 may be read as providing an authorisation on the part of the Company for Mr Duff to act on its behalf as an employee. Rather, my reading of that resolution is that the Company decided that Mr Duff should 'co-join' the proceedings as an applicant *in his own right* (as he has applied to do) because it acknowledged the difficulties which had been raised in respect of his acting *on behalf of* the Company. In short, Mr Duff co-joining the proceedings was seen as a way *around* those problems rather than as a means of the Company appropriately authorising him to act on its behalf for the purposes of Order 5, rule 6(3)(a).

(c) In any event, the Court has at no point granted leave for Mr Duff to appear on behalf of the Company pursuant to Order 5, rule 6(3)(b). Insofar as this issue fell to me for consideration, I would not exercise my discretion to grant such leave. Although Mr Duff presented his arguments in relation to the leave application cogently in writing, and is to be commended for so doing, it is in

my judgment plain that permitting Mr Duff to represent the applicant company would be likely to add considerably to the time and costs which these proceedings would take. This is in circumstances where the company has resolutely opposed any suggestion that it could lodge anything more than a maximum of £2,000 by way of security for the respondent's costs. I am also concerned that the pattern established by Mr Duff incorporating the relevant companies and using them to initiate proceedings in the 33 cases which McCloskey LJ considered, with evidence of him being remunerated in some of those cases (or having engaged in the litigation with the intention of being remunerated) for his services in acting for the companies, supports the proposed respondent's objection that, in effect, this amounts to the unregulated provision of legal services. I have no reason to doubt the genuine nature of Mr Duff's concern for the environment. However, whether or not this was his intention, to permit him to act for such companies in order to represent the interests of those shareholders directly affected by the planning permission under challenge would have the effect of permitting him to provide legal or quasi-legal services without being subject to the protections for clients and professional obligations which arise when a regulated legal representative so acts.

(d) For the same reasons, I would not be persuaded to exercise the Court's residual discretion to permit the Company to be represented by a lay person (such as a director, in this case Mr Duff) outside the scope of the exception in Order 5, rule 6(3). The proposed respondent has rightly pointed to authority which indicates that it will be exceptional and rare for the Court to authorise such a course given the reasons behind the requirement for legal representation in Order 5, rule 6(2) and the safety valve facility in rule 6(3). Although this facility was afforded to Mr Duff by the Court of Appeal in *Re Coulter's Hill Residents Limited's Application* [2020] NICA 59, it was made expressly clear that this was an exceptional course taken on strict conditions and in the unusual circumstances which had arisen (where Mr Duff had represented the applicant in the court below with no apparent objection): see paragraph [7] of the Court's judgment. In contrast, in the *Rural Integrity (Lisburn 01) Ltd* case (referred to above) the Court of Appeal dismissed the appeal on the basis that Mr Duff was *not* entitled to pursue the appeal on behalf of the company: see paragraph [14] of the Court's judgment.

(e) In the exercise of any such discretion, I also take into account that, subject to protections for the respondents in the form of security of costs, I have granted leave to apply for judicial review in the *Portinode* and *Rural Integrity '03'* cases, so that a central concern of the applicant, namely that the Court ought to address the proper construction and application of Policy CTY8 of PPS21, may be addressed in one or both of those cases if they proceed.

(f) In exercising my discretion, I am also entitled to consider the time and cost which have already been expended as a result of the applicant company, and

other related companies, proceeding in the way in which they have and, as McCloskey LJ found during his tenure as case manager of this cohort of litigation, having failed to act reasonably in pursuit of the objective of efficient and expeditious disposal of the issues: see paragraphs [18] and [20] of McCloskey LJ's March 2020 ruling.

(g) I also take into account that these proceedings were commenced on 29 September 2019 at a time *after* issues had clearly been raised by respondent authorities with the mode of proceeding which had been adopted by a range of the applicant companies incorporated by Mr Duff. Accordingly, at the time of the institution of these proceedings, Mr Duff would have been aware, and others with an interest in the Company should have been aware, that they were taking a significant risk in proceeding in the way in which they did. As the Court of Appeal pointed out in paragraph [13] of its ruling in the *Rural Integrity (Lisburn 01) Ltd* appeal, the choice to proceed in this way is made at risk, particularly when a more straightforward option (such as issuing proceedings in the normal way in the name of a natural person) is eschewed.

[16] For the same reasons as given above, I also refuse the application for the applicant's Order 53 statement to be amended under Order 15, rule 6 to introduce Mr Duff personally as an additional applicant (or, more properly, to substitute him for the applicant company as the only applicant). This is again consistent with McCloskey LJ's approach when this prospect was raised before him as a means of avoiding the applicant's difficulties: see paragraph [39] of his March 2020 ruling. To allow Mr Duff to be added as a party and to appear as a litigant in person, making the same points as the Company would wish to raise through him, would be to permit them to circumvent the requirement of the Court Rules. Although this option was offered to Mr Duff by the Court of Appeal in the appeal in *Re Rural Integrity (Lisburn 01) Ltd* (albeit declined by him), I accept Mr McAteer's submission that this was in materially different circumstances to the present case. In particular, in the *Rural Integrity (Lisburn 01) Ltd* case, leave to apply for judicial review had already been granted by Sir Ronald Weatherup without the issues forming the proposed respondents' present objections having been addressed in such detail as they have at this point.

[17] I would accept – as I have in the *Portinode* and *Rural Integrity '03'* cases – that the Company has sufficient interest in the matters under challenge, by reason of the involvement of directors and shareholders who are local residents likely to be directly affected by the proposed development. However, it is a good deal more questionable whether Mr Duff, acting on his own part, would have sufficient interest to satisfy the requirements of Order 53, rule 3(5) and, in turn, Order 15, rule 6(3).

Conclusion

[18] In summary therefore, in light of the applicant company's failure to rectify the breach of Order 5, rule 6(2) established by McCloskey LJ in his March 2020 ruling, and with no apparent prospect of it doing so, the Court:

(a) refuses the applications for Mr Duff to be allowed to represent the applicant and the application for him to be joined as a party in order to proceed with the application in his own name;

(b) sets aside the application for leave pursuant to RsCJ Order 2, rule 1(2) or its inherent jurisdiction; and, in any event,

(c) refuses leave to apply for judicial review.

[19] I will hear the parties on the issue of the costs of the proposed respondent's application to strike out the application for leave, which has in substance been successful. I am provisionally minded to allow the respondent the costs of its second application in that regard (*i.e.* of its more recent summons, but not the costs of the initial application which resulted in McCloskey LJ's March 2020 ruling, since that application was not, at that time, successful) on the bases (i) that costs ordinarily follow the event and (ii) that the applicant persisted in seeking to advance its case having failed to avail itself of the unambiguously final opportunity provided to it by McCloskey LJ to rectify its identified breach of the Rules. I appreciate that, in the event such an order is made, it may be of little practical value given the apparent impecuniosity of the applicant company. Nonetheless, I will take submissions from each party on the appropriate course as a matter of principle.