Neutral Citation No: [2023] NIKB 80	*Ref:*	COL12228
	ICOS No:	2023/019389/01
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	18/07/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY DEBORAH STEVENSON, CATHERINE DONNELLY, SCOTT McCUTCHEON, NICOLA McMULLAN, SARAH GRAY AND PATRICK MacMAHON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

_____

Mr Paul McLaughlin KC with Ms Denise Kiley (instructed by Peden and Reid Solicitors) for the Applicant
Mr Tony McGleenan KC (instructed by Cleaver Fulton Rankin Solicitors) for the Proposed Respondent

_____

RULING ON COSTS

_____

COLTON J

Introduction

[1] The applicants are current and/or prospective parents of pupils at Methodist College, Belfast, Preparatory Department, Downey House ("Downey"). They form part of a broader group of affected parents of current and/or prospective pupils at Downey. The proposed respondent is the Board of Governors of Methodist College Belfast ("MCB").

[2] MCB operates a fee-paid preparatory department across two sites (Downey House and Fullerton House). These proceedings were triggered by a proposal by MCB to rationalise the provision of education in the preparatory department by closing Downey House and to continue preparatory provision on the Fullerton House site only.

Chronology and history of proceedings

[3] On 10 January 2023, the parents of successful applicants to the preparatory department received an email from the proposed respondent which included the following:

> "The Board of Governors of Methodist College has announced today the proposal that Methodist College Preparatory Department (Methody Prep) should become one combined campus situated at the current Fullerton House site from August 2023 onwards. This follows an extended period of in-depth analysis and consideration, and engagement with parents, staff and stakeholders over several years."

[4] The Board of Governors ("BoG") convened a meeting with parents of Downey pupils on 12 January 2023 where the proposal was formally announced. The applicants aver that pre-school parents were not invited to this meeting although several did attend. It is submitted on behalf of MCB that at the meeting it was explained that the future provision of preparatory education would be subject to the statutory procedure prescribed by Article 14 of the Education and Libraries (Northern Ireland) Order 1986.

[5] Following the meeting MCB received extensive communication and requests for information from parents. Correspondence was drafted which stated:

> "Understandably some parents have enquired about the operation of the Pre-School and Pre-1 classes at Downey House in respect of the next academic year 2023/24. In light of the feedback received to date, the college is continuing to review this matter and will provide an update as soon as possible."

[6] MCB explained that this correspondence was drafted prior to receipt of a pre-action protocol letter on 8 February 2023. It was reviewed again in light of the PEP letter and issued on 9 February 2023.

[7] The letter of the 9 February 2023 was headed:

> "**Downey House School**
>
> Update of Methodist College Belfast Preparatory Department."

[8] The letter explains the BoG's commitment to the:

> "Long-term viability of prep education at Methodist College Belfast. The proposal to move to a one-campus

> model for the Preparatory Department is underpinned by the untenable financial situation in which the Preparatory Department finds itself. Ultimately this proposal remains subject to a statutory process."

[9] The letter goes on to state:

> "Having listened to your feedback and further engaged with the aforementioned statutory partners, we have taken the decision to delay any move of pupils from Downey House to the Fullerton House site until further notice. This means that no child(ren) currently at Downey House are expected to move across to the Fullerton House site in their full class cohort or individually. As noted in previous correspondence, the Downey House campus will remain open pending the outcome of the Department of Education process, whenever that may be."

[10] The correspondence of 9 February 2023 should be considered in the context of an email from MCB of 7 February 2023 to one of the applicants, Mrs Stevenson, which included the following:

> "It is currently not the Board of Governors' intention to offer places for P1 at Downey House for September 2023 due to its proposal to close Downey House on 31 August 2023 or as soon as possible thereafter. This is subject to the Department of Education Development Proposal process of which you will be kept informed. The place you have been offered and accepted at this time is for Methody Prep on the current Fullerton House site."

[11] The pre-action protocol letter was sent by the applicants' solicitors on 8 February 2023. The proposed applicants are described as "a group of parents whose children are currently registered pupils in the Preparatory Department of Methodist College, Belfast at Downey House."

[12] The detail of the matter being challenged was described as follows:

> "The applicants propose to challenge the decisions and actions of the Board of Governors to close and/or make a significant change to the size and character of the school's preparatory department, without first following the mandatory statutory process prescribed by Article 14 of the Education and Libraries (NI) Order 1986 and without the prior approval of the Department of Education. The

> Board of Governors have taken steps to commence the process of closure of Downey House and to relocate current pupils to Fullerton House without first formulating the proposal to do so, conducting mandatory statutory consultations on the proposal, submitting the proposal to the Department of Education and awaiting a decision of the department, prior to implementation."

[13] The letter challenged, inter alia, the conduct of the Board of Governors in:

> "Ceasing to accept applications for P1 or pre-school admissions to Downey House but instead offering a reduced number of places in 'Methody Prep' at Fullerton House."

[14] Included in the complaint about ceasing to accept such applications the applicants contended that MCB had acted ultra vires pursuant to Articles 9 and 10 of the Education (Northern Ireland) Order 1997 based on an argument that only the department could make modifications that impacted upon parental preference in respect of admission to the preparatory department.

[15] MCB sought advice and provided a pre-action response on 24 February 2023.

[16] In that response MCB asserted that:

> "The respondent is continuing to engage with the department and Education Authority in order to ensure the Development Proposal is progressed in accordance with Article 14 of the Education and Libraries (Northern Ireland) Order 1986… Your clients can be assured that MCB will adhere to the applicable guidance on an Article 14 Development Proposal in Circular 2017/09 to the extent that it applies to a proposal to change from dual site provision to single site provision for the purposes of preparatory education."

[17] Turning specifically to the ceasing to accept applications for P1 or pre-school admissions to Downey the correspondence pointed out that the reliance on Articles 9 and 10 of the 1997 Order was misconceived because Article 18 of that Order disapplied those articles in relation to the preparatory department of grammar schools.

[18] The response referred to the correspondence of 9 February 2023 which had indicated that the matter of admission was subject to review by the BoG.

[19] Proceedings were issued on 3 March 2023. In the Order 53 Statement the applicants sought the following primary relief:

> "(i) An order of Mandamus requiring the Respondent to publish confirmation that it will accept admissions into Prep1 and Pre-school to Methodist College Belfast, Preparatory Department, Downey for the 2023/24 academic year and thereafter to determine applications for admission in accordance with its published admissions criteria, in particular for those parents who applied for admission for a child and who expressed a preference for admission to Downey House."

[20] The application was reviewed by the court on 14 March 2023, 21 March 2023 and 24 March 2023. On 24 March 2023 the parties confirmed that the issues had been resolved between them and that the application could be dismissed.

[21] The applicants contended that they were entitled to their legal costs. This was opposed by the proposed respondent. It was agreed that the respective parties would file written submissions on the issue of costs and that the court would rule based on those submissions.

[22] I am obliged to counsel in this matter for their detailed and helpful written submissions on costs.

[23] To complete the picture I refer to the relevant correspondence between the parties post the issue of proceedings which resulted in the disposal on 24 March 2023.

[24] On 10 March 2023, following discussions between senior counsel, the applicants wrote to the proposed respondent stating that they had received notification, through senior counsel, that the Board intended to run the P1 and pre-school admission process for Downey House 2023/24 and sought formal confirmation of the position.

[25] On 13 March 2023 the proposed respondent wrote to parents of pupils offered a place at the combined preparatory school advising of the commencement of the consultation phase of the Article 14 process and offering parents the opportunity to choose whether a child commences P1/pre-school at Downey House or Fullerton Campus in September 2023. The letter includes the following:

> "Having listened to the views of parents we should continue to admit pupils to Downey House in 2023-2024 and given that it is now clear that the timescales for the implementation of any possible change to the provision

> will extend into 2024, we therefore write to offer you the option to choose whether your client starts P1 at Downey House or Fullerton House at the beginning of 2023-2024 academic year."

[26] On the same date the applicants wrote to the proposed respondent noting that its communication does not provide any information about the college's communications with parents of children who had applied for pre-school and P1 places in Downey House for 2023-24 but who, in January 2023, were not offered any places at the combined prep.

[27] On 14 March 2023 the proposed respondent replied to applicants advising that only parents of pupils who had been offered a place at the combined prep had been contacted at this stage and pointed out that:

> "The College cannot, of course, offer places to those on a waiting list until it has received confirmation from those who have been offered a place whether or not they will accept or withdraw their application. However, we can confirm that the College will be writing to the cohort on the waiting list with an update regarding Downey House P1 and pre-prep with a further update post 17 April."

[28] On the same date the applicants wrote to the proposed respondent advising that the process suggested by the applicant in its correspondence is not the process required by the school's published admission criteria. The applicants sought confirmation that applications would be determined in accordance with its published admissions criteria. The correspondence also sought further information in relation to numbers for admissions.

[29] On 16 March 2023 the proposed respondent replied providing the numbers sought and confirming that admissions would be in accordance with its published criteria. Further correspondence was sent in relation to 2023/2024 admissions by the proposed respondent on 19 March 2023. On 20 March 2023 the applicants wrote to the proposed respondent stating that there remains uncertainty about the admissions process and seeking further clarification. This related to the prep admissions form on the MCB website and questions about the timetable for the completion of the process. These issues were addressed in a response from the proposed respondent on 21 March 2023. That letter concluded with the following:

> "The College would invite your client to immediately withdraw the proceedings before the High Court. It is not necessary to continue to incur High Court costs in order to have matters which are entirely peripheral with the judicial review challenge addressed in correspondence."

The legal principles

[30] The starting point is that the court has a broad discretion in relation to the award of costs in applications for judicial review.

[31] The powers of the High Court to deal with costs of and incidental to proceedings are set out in the Rules of the Supreme Court and, primarily, in Order 62. The general rule is that the unsuccessful party should normally pay the costs of the successful party. Order 62 Rule 3(3) provides:

> "(3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[32] As a general rule the practice in this jurisdiction has been not to make any inter partes order in relation to costs at the leave stage. If leave to apply for judicial review is refused the almost invariable practice of this court in this jurisdiction is that an unsuccessful applicant for leave should not be required to bear the costs of the proposed respondent.

[33] In this case the matter has been resolved without the necessity of a leave hearing.

[34] In such circumstances again the invariable practice of the court in this jurisdiction is not to make any inter partes order in relation to costs.

[35] The genesis of this practice can be traced to the general principles to be applied to the issue of costs when a judicial review is being discontinued without a hearing established in *R (Boxall) v London Borough of Waltham Forest* [2000] All ER (D) 2445 (EWQBD). The relevant principles are as follows:

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial, but the parties have not agreed about costs.
>
> (ii) It will ordinarily be irrelevant that the applicant is legally aided.
>
> (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.

(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

[36] This decision and practice developed in the era prior to the pre-action protocol procedures is now firmly embedded in the judicial review process. A primary characteristic of a leave application is its *ex parte* nature. As a result of these procedural changes judicial review has become progressively an inter partes process. As a consequence, the court is more fully sighted of the conduct of the parties and the issues between them.

[37] Perhaps as a consequence the issue of costs in judicial review applications which have been resolved has been the subject matter of judicial consideration. The relevant principles were reviewed again by the Court of Appeal in England and Wales in *R (M) v London Borough of Croydon* [2012] EWCA Civ 595. That decision has been considered in this jurisdiction in cases such as *R v YPK* [2018] NIQB 1 (per McCloskey LJ), in *Re JR115* [2021] NIB 105 (per Morgan LCJ), in *Re Coleman* [2022] NIQB 25 (per Colton J) and in *Re Ferguson* – 6/2/23 (per Colton J).

[38] In *Re YPK & Ors' Applications* [2018] NIQB 1 McCloskey J carried out a detailed review of the authorities on costs in judicial review proceedings and set out the relevant principles in detail at para [5] of his judgment as follows:

"(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs -

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

….

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -

(a) the conduct of all the parties;

(b) whether a party has succeeded in part of his case, even if he has not been wholly successful; and …

(5) The conduct of the parties includes -

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

[39] There are no particular principles applicable to costs in judicial review proceedings. In *YPK* McCloskey J noted with approval the guidance provided by the English Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595 as to how the general costs principles are to be applied in the context of judicial review. In that judgment the following guiding principles were set out:

> "(i) Where a claimant has been wholly successful whether following a contested hearing or via settlement `… it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary': see [61].
>
> (ii) In a case where the claimant succeeds in part only following a contested hearing or via settlement, the court will normally evaluate the factors of '… how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim.' (see [62])
>
> The court's evaluation of such questions will be greatly facilitated where the case has proceeded to the stage of substantive judicial adjudication. But the judicial task will be altogether more difficult in cases where the claimant's partial success arises through the mechanism of consensual resolution. In the latter type of case '… there is often much to be said for concluding that there is no order for costs.' (see [62])
>
> (iii) In cases where a compromise which does not 'actually reflect the claimant's claims' is struck, the court '… is often unable to gauge whether there is a successful party in any respect … Therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some cases it may well be sensible to look at the underlying claims and enquire whether it was tolerably clear who would have won if the matter had not settled.' See [63]"

Summary of the parties' submissions on costs

[40] Mr McLaughlin argues that the applicants have been entirely successful in their challenge. The proposed respondent, he says, has conceded the relief sought in the Order 53 Statement (see para [19] above). In such circumstances he says that the normal rule is that the applicants should be awarded costs.

[41] In addition to conceding the main relief he argues that as a result of the proceedings and the post-proceedings correspondence the proposed respondent was obliged to retreat on other aspects of the proposed closure of Downey, in particular in relation to the issue of admissions.

[42] He submits that the parents were compelled to act promptly but in doing so gave the proposed respondent every opportunity to change its stance. The pre-action response confirmed that no Downey pupils would be required to move to Fullerton until after the approval of a development proposal. However, it offered no further confirmation on admissions in relation to Downey confining itself to the assertion that it was "continuing to review" the position.

[43] In summary, he contends that the announcement by the proposed respondent on 10 January 2023 prompted the entire chain of events which necessitated proceedings.

[44] He contends that it is clear that had the proposed respondent not changed its position and contested the application, the applicants were bound to have won the case. He argues that their error was obvious and brought to the attention of the proposed respondents in advance of the proceedings.

[45] Mr McGleenan, on behalf of the proposed respondent, argues that there is a strong general presumption in this jurisdiction that a proposed respondent will not be penalised in costs where a judicial review application has been resolved at the leave stage.

[46] On the facts of this case he argues that the judicial review application was unnecessary given that prior to the issue of proceedings it had been confirmed that the proposed respondent would comply with the Article 14 procedure. It was confirmed that Downey House would remain open for the academic year, it also confirmed that the Board of Governors was continuing to review the admission process for P1 and pre-school applicants.

[47] He contends that it was clear the proposed respondent was addressing the issues raised and was doing so expeditiously. He argues this must be seen in the context of a Board of Governors composed of volunteers which operates on a scheduled programme of meetings. Comparisons with a well-resourced public authority secretariat are inapt. He points out that the BoG sought external legal advice in matters of legal complexity, which resulted in a significant element of the applicants' legal argument in the pre-action protocol correspondence not being pursued in the Order 53 Statement.

Conclusion

[48] There are sound reasons behind the general practice not to make an *inter partes* award of costs at a leave stage. This is particularly so in circumstances where no leave hearing was required at all.

[49] In this regard I refer to the reflections of the Divisional Court in the case of *JR78's Application* [2017] NIQB 93 as follows:

> "[23] We say just a word more. The approach in the Judicial Review Court in this jurisdiction, as we understand it, has been that costs are not normally awarded at the leave stage. That has a number of advantages. Amongst those it has an advantage for applicants who are not denied access to justice by being deterred from bringing a leave application conscious that they may face a stiff bill in costs from a respondent if they fail to get leave. It is true to say that many applicants enjoy the benefit of Legal Aid and some have commercial interests behind them but some do not, and so it is a virtue of the present system that applicants who fail to get through the leave stage are not normally penalised on costs.
>
> [24] It is virtuous for the respondents also. It means that public bodies have the incentive of saving costs and making sensible concessions at the leave stage or other early stage of proceedings. It also recognises the reality that these applications by definition are being brought against public bodies. Almost always therefore procedures will have to be adopted within those public bodies before a fresh decision can be taken. They will have to take advice internally and usually, at least often, externally from counsel or at least from solicitors as to the strength or weakness of their legal position. It is reasonable that they should have done so by the leave hearing, but it might be harsh on them on occasions to have expected to be done before that. A further advantage of continuing the present practice of not normally awarding costs at the leave hearing is that it avoids an already busy Judicial Review Court spending time on satellite issues of costs."

[50] I consider these reflections are particularly apt in this case.

[51] I understand fully the real and obvious concern of the applicants in this case. There are valid criticisms that can be made about the manner in which the proposed respondent announced its proposal. Inevitably this caused grave concern for parents of existing and prospective pupils at Downey. This concern was made clear from the meeting of 12 January onwards. It is equally clear that the proposed respondent took those concerns on board. Prior to proceedings it confirmed that it would comply with the Article 14 procedure and indicated that pupils at Downey would not be moved to Fullerton in 2023/2024. True it is that the question of admissions remained under review and that further clarification was required to reassure the applicants.

[52] In my view, on any fair reading of the papers, the proposed respondent engaged expeditiously with the issues raised in the pre-action protocol correspondence and continued to do so after proceedings were issued. As a consequence, it was not necessary to have a leave hearing.

[53] Of interest the court notes that in the pre-action protocol correspondence the applicants asked the proposed respondent to agree to a Protective Costs Order. The request was framed in the following way:

> "As set out above, the parents have no desire to engage in potentially acrimonious litigation with the Board of Governors. They wish to work constructively with them to discuss and determine the future of the Preparatory Department, in the interests of their children. They understand that this will be necessary irrespective of the outcome of any future litigation. They expect that the Board of Governors holds the same view and will wish to work and consult parents on any proposals for a major change in the school. They therefore seek the Board of Governors agreement that, if litigation is necessary, a Protective Costs Order will be made providing for each party to be responsible for their own legal costs."

[54] Whilst this proposal was not accepted in the proposed respondent's response the application was also included in the Order 53 Statement.

[55] The court considers that the spirit of this proposal reflects the appropriate response to the dispute about costs that has arisen at this stage.

[56] I consider that in the circumstances of this case the appropriate course of action is to make no order in relation to costs between the parties.