Neutral Citation no. [2007] NIQB 23 | *Ref:* **GILF5786**

Judgment: approved by the Court for handing down | *Delivered:* **22/03/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JAMES STEWART MOORE FOR JUDICIAL REVIEW

-and-

IN THE MATTER OF A PLANNING APPLICATION TO THE PLANNING SERVICE (DOWNPATRICK) BY THE NORTHERN IRELAND HOUSING EXECUTIVE (NEWTOWNARDS)

_____

GILLEN J

[1] In this matter the applicant James Moore applies for an interlocutory order that no order for costs be made against him whatever the outcome of judicial review proceedings instituted by him in relation to an application made to the Planning Service (Downpatrick) ("PS") by the Northern Ireland Housing Executive (Newtownards) ("HE"). Counsel on behalf of the respondent PS accepts that the court has a discretion to make such an order pursuant to RSC. (Northern Ireland) Order. 62, r. 3(3) as considered in the leading authority of R v Lord Chancellor, ex parte Child Poverty Action Group 1999 1 WLR 347. Leave has not yet been granted in this matter. However this application was an inter partes matter on notice to the respondent.

Factual background

[2] The factual background in this case arises out of proposed works at Clandeboye Place, Bangor to which the applicant objects. The area consists of a tarmaced road surrounded by semi-detached housing. Of the 26 houses in Clandeboye Place 22 are owned by the HE and each of these houses has recently been subject to a scheme of refurbishment. In the aftermath of the refurbishment of the HE's houses the HE propose the current project which principally consists of the provision of 40 parking bays within the tarmaced road area to be used by residents for visitors. In addition the scheme

envisages, inter alia, the planting of trees around the tarmaced area, the positioning of an entrance feature at the entrance to the area and the improvement of footpaths in the area by changing the layout and providing a black asphalt finish. Planning permission for the project has been obtained from the PS. (These facts are well summarised by Girvan J (as he then was) in a case of similar title to this, unreported, GIRC5648) ("the earlier case").

[3] It is relevant to note at this stage that the original planning application by the HE was made on 15 April 2003. Approval was not forthcoming until 1 August 2006. In the interim, Mr Moore had sought judicial review of the proposed works. In the earlier case Girvan LJ had granted leave on only one ground namely that the works proposed constituted redevelopment of the area and that the Housing (Northern Ireland) Order 1981 ("the 1981 Order") contained a specific set of revisions relating to the redevelopment in Chapter III of Part III of the 1981 Order. It was Mr Moore's contention that the Executive could not satisfy the pre-conditions which must be fulfilled for an area to qualify as a re-development area and hence it had no power to carry out the proposed works. Having granted leave in September 2005, Girvan LJ refused the application at a full hearing in September 2006. That decision has now been referred to the Court of Appeal and a hearing is pending.

[4] The current application for judicial review by Mr Moore, dated 31 October 2006 again seeks to quash the planning approval. Mr Moore is unrepresented and he sets out eleven grounds in his application which can be best summarised as follows:

(a) That the PS failed to ensure that the application had appropriate finalised drawings lodged by the HE so that they could be properly inspected by the public. He alleges that the PS allowed major changes to the original scheme without publicising these in the public domain.

One of the key issues here was that of tree planting. Mr Moore alleged before me that the PS had permitted amendment of the plans to include what he described as "a forest" and which he alleged constituted a major variation of the original plan.

(b) The PS had defaulted on an arrangement to keep him informed about developments. Mr McMillen, who appeared on behalf of the respondent, claimed that Mr Moore was invoking his right to view documents by making advanced block bookings which resulted in the PS having to commit dates which might have been available for other members of the public. Accordingly the PS agreed to send documents to him in the event of any major change taking place. It is Mr Moore's case that the PS has failed to honour that commitment.

(c) The PS has yielded its discretionary powers to the HE and in particular sought and took advice from the HE before making a determination. Mr McMillen denied that the PS had ceded the decision-making process to HE.

(d) Mr Moore seemed to raise again the issue of redevelopment which is currently before the Court of Appeal. In this context Mr Moore asserted that the PS had wrongly determined the application whilst court proceedings were still pending.

(e) Finally Mr Moore asserted that the matter had been going on for so long now that it would be cheaper and more expedient to commence a new planning application. He adverted also to the alleged impossibility of his engaging and retaining legal representation. He asserted that it was a misuse of public funds for Government officials to engage in legal proceedings in these circumstances when he is unrepresented.

[5] Mr Moore augmented these matters set out in his written application with the following oral submissions before me:

(a) He drew my attention to a petition, a copy of which was before me ,of residents in the area addressed to the Housing Executive asserting that they do not want the proposal concerned. Mr Moore recorded that he had lived in this area a life time and that this proposal will have a detrimental effect on the amenities of the area.

(b) He asserted that the proposal and the granting of permission had come about through maladministration.

(c) All he desired was a fresh adjudication with clear drawings which can only be secured by a new initiative and a new planning application.

(d) Mr Moore asserted that he was acting on behalf of his community and future communities in the area.

(e) The applicant asserted that his previous application was mounted prior to the impugned determination by the planning authorities and therefore this current application is of a different genre. He argued that it was a matter of public interest to ensure that the Planning Service handled applications such as this properly and fairly. It was a matter of public interest that the Planning Service had relied on advice from the NIHE before the determination. It was also a matter of public importance that the PS had failed to honour their commitment to him to provide him with appropriate documentation. In essence he said that this was a case of cronyism between Government departments namely the Department of the Environment, the

Department of Regional Development and the NIHE. They had been jointly and severally acting unlawfully.

R v Lord Chancellor, ex parte Child Poverty Action Group 1999 1 WLR 347 and others ("the CPAG case")

[6] I consider this case to be the leading authority on the issue of pre-emptive orders for costs. The researches of Mr McMillen on behalf of the respondent have not discovered any case in Northern Ireland in which this court has been asked to make such a similar determination. In CPAG the applicant was a registered charity which was widely recognised as a leading anti-poverty organisation in the United Kingdom. A second applicant was Amnesty International a human rights organisation of international standing. That case arose out of an application to judicially review and quash the decision of the Lord Chancellor to refuse to extend the availability of legal aid to representation in any cases before Social Security Tribunals or Commissioners. The second application by Amnesty International arose out of a judicial review application to quash the decision of the DPP not to prosecute two individuals. Each applicant sought that no order as to costs be made against them whatever the outcome of the proceedings on the ground that the applicants were acting pro bono publico in bringing the matters before the court.

[7] These applications were refused for the following reasons:

(i) Under Ord. 62, r. 3(3) the starting point was that costs were to follow the event and the discretion to make pre-emptive orders, even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances.

(ii) That the necessary conditions for such an order were that the court was satisfied both that the issues raised were truly of general public importance and that it had a sufficient appreciation of the merits of the claim to conclude that it was in the public interest to make the order. Unless the court could be so satisfied by short argument, it was unlikely to make the order in any event, since otherwise there was a risk of such applications becoming dress rehearsals of the substantive applications. I pause at this stage to rehearse what Dyson J said at page 353G concerning the principle governing the exercise of discretion in cases involving public interest challenges:

> "I should start by explaining what I understand to be meant by a public interest challenge. The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private

> interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."

(iii) Dealing with the rationale behind the principle that a starting point was that costs were to follow the event, Dyson J said at p. 355H et seq:

> "I accept the submission of Mr Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's cost of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling the parties to assess carefully for themselves the strength of any claim. The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases. As Mr Sales points out, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of the public funds diverted from the funds available to fulfil its primary public functions."

(iv) Different considerations about costs may arise after a full argument has been made when the court may feel able to decide that public money should be spent on the clarification of a point of law.

(v) It is appropriate to make a pre-emptive costs order only in exceptional circumstances for the following reasons:

(a) It will often not become clear whether an issue is of sufficient public importance to justify departure from the basic rule that costs follow the event

until the hearing of the substantive application. In other words after the court has seen all the material and heard all the arguments it will be in a better position to determine that in most cases although obviously there will be exceptions.

(b) It will rarely be possible to make a sufficient assessment of the merits of the claim at the interlocutory stage. As Dyson J said at page 357D, a fact that leave to move to apply for judicial review has been granted is not enough. At 357D the judge said:

> "Leave will often have been granted on the papers, or following ex parte oral application. Even if the application is made at an inter partes hearing the respondent may not at that stage place before the court all the material or outline all the arguments that will eventually be considered by the court hearing the substantive application. It may ultimately transpire that the application is hopeless."

(c) The court must also have regard to the financial resources of the applicant and respondent and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

These are the principles on which I determined this case.

Conclusions

[7] I have come to the conclusion that I must reject the application by Mr Moore in this case for the following reasons:

(i) I find no exceptional circumstances in this case. Planning applications of the type under dispute are not uncommon and certainly are not exceptional.

(ii) I do not believe the facts of this case and the issues involved raise public law issues which are of general importance. In essence this is a planning application involving an area of 26 houses in Bangor and is essentially a local, albeit important, issue for those concerned. I can see no basis upon which it raises a public law issue of general importance.

(iii) The question of whether or not the PS have complied with the appropriate procedural formalities with reference to acceptance of drawings, amendment of drawings, and the issue of redevelopment are not of general public importance in the context of this case. The allegations of public impropriety by the PS and the HE are disputed and on the facts so far adduced before me are speculative and vague. Certainly it is not possible for me to make a sufficient assessment of the merits at this interlocutory stage

(iv) I see no reason why the starting point for this case should not be that costs are to follow the event. This is not the first judicial review arising out of this matter and public money is clearly being incurred by the respondent in dealing with these matters. The court should not lightly ignore the depletion of public funds save in exceptional circumstances.

(v) I respectfully adopt the approach of Dyson J that it is necessary that the court be satisfied by short argument in circumstances where it can have a sufficient appreciation of the merits of the claim to conclude that it was in the public interest to make the order. The allegations made by Mr Moore at this stage are insufficiently based on evidence. They are strongly disputed by the d respondent and most certainly do not amount to unchallenged acts of impropriety on the part of the PS and the HE . Whilst his allegations may be of general interest, I do not find them sufficiently evidence based or to raise public law issues which are of such general importance as to merit the relief which he now seeks . I am unaware as to what further evidence he could adduce but at this stage it is certainly not possible to made a sufficient assessment of the merits of his claim to justify the exceptional course of a pre-emptive costs order. In these circumstances the question of the superior capacity of the respondent to bear the costs over the applicant does not arise.

[8] I therefore dismiss the application by Mr Moore.