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(subject to editorial corrections)*

2015/051522

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 TONY O'HARE AND PATRICK O'HARE AS PERSONAL REPRESENTATIVES OF THE ESTATE OF TERENCE O'HARE (DECEASED) FOR JUDICIAL REVIEW

and

IN THE MATTER OF PLANNING CONSENT Z/2013/0930/F IN RESPECT OF LANDS AT GLEN ROAD HEIGHTS, GLEN ROAD, BELFAST, IN FAVOUR OF OAKLEE HOMES GROUP

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O'Hare's application [2016] NIQB 20

MAGUIRE J

Introduction

[1] This application for judicial review is concerned with the development of land *inter alia* for social housing. The land in question is situated off the Glen Road in West Belfast in an area of substantial demand for social housing. The site as a whole features in the Belfast Metropolitan Area Plan ("BMAP") under the designation WB04/11. It comprises some 12.64 hectares. In BMAP the zoning is described as "lands between Glen Road, Glencolin Rise, Glencolin Grove, Meadowhill and Glen Road".

[2] A number of "key site requirements" are stipulated in BMAP in relation to the zoning. These are:

- A concept statement to facilitate the comprehensive development of the site shall be submitted and agreed with the Department.

- A minimum of 240 dwellings shall be provided for social housing.

- Access shall be agreed with DRD Road Service and the following improvement shall be required:

    - An improved right turn pocket, which may require third party land, shall be required on Glen Road into Glencolin Drive.

[3] At page 88 of BMAP it is stated that the "key site requirements have been attached to Site WB04/11 for the purpose of meeting social housing need in West Belfast, namely a minimum of 240 units".

[4] Policy QD2 of PPS7 also may be relevant to the development of this site. This deals with the subject of design concept statements, concept master plans and comprehensive development. It notes that:

> "The Department will require submission of a design concept statement or, where appropriate a concept masterplan, to accompany all planning applications involving –
>
> A. 300 dwellings or more;
>
> B. the development in part or full, of sites of 15 hectares or more zoned for housing in development plans; or
>
> C. housing development on any site of 15 hectares or more."

[5] In the case of the proposals for partial development of the site zoned for housing the concept masterplan will be expected to demonstrate how the comprehensive planning of the entire zoned area is to be undertaken.

[6] Any proposals for housing that would result in unsatisfactory piecemeal development will not be permitted, even on land identified for residential use in a development plan.

[7] In the section justifying and amplifying this policy it is stated that:

> "4.48 Where a concept masterplan is required, this will need to indicate in graphic form a scheme for comprehensive development of the whole area, and include a written statement, detailed appraisals, sketches, plans and other illustrative materials to address all of the relevant matters set out in this statement and its associated supplementary planning guidance. The

concept masterplan should also clearly demonstrate how it is intended to implement the scheme."

[8] At paragraphs 4.52 and 4.53 of PPS7 under the heading "Comprehensive Planning", it is stated:

> "4.52 The comprehensive planning of new or extended housing areas is considered to be of vital importance in pursuit of an improved quality standard. Piecemeal development may result in the undesirable fragmentation of a new neighbourhood and fail to secure the proper phasing of development with associated infrastructure and facilities.
>
> 4.53 The Department would encourage land pooling by owners and developers to facilitate the comprehensive development of residential sites. Where this cannot be achieved and the comprehensive development of the site would be prejudiced, the Department will refuse the application."

[9] The particular planning application with which these proceedings are concerned was made by Choice (formerly Oaklee Housing Association). It was submitted on 20 August 2013. The application is not for the development of the zoning in WB04/11 as a whole but it relates to a particular part of it. That part consists of 3.582 hectares. The permission sought was for "proposed social housing development comprising 90 no general needs housing units and 3 no complex needs bungalows (93 no units in total) associated landscaping, parking, site and access works".

[10] The supporting planning statement for the application (also produced in August 2013) refers to the draft zoning designation in what became BMAP and to site requirements "associated with the comprehensive development of the zoning". These include the submission of a concept statement, access details and the need for a minimum of 240 dwellings to be provided for social housing. At paragraph 2.5, 4.2 and 4.3, the following references appear:

> "2.5 Any development on the subject site would seek to take account of the existing topography of the site and retain a satisfactory means of access to adjacent lands.
>
> 4.2 Provision of improved access arrangements to the Glen Road sufficient enough to provide a right hand turn pocket to ensure comprehensive development of the entire zoned lands can be accommodated through future phases of the development. The layout also provides a

> roads layout to achieve access to the adjacent lands to ensure the proposed layout does not stifle the ability to comprehensively develop the zoned housing lands … A comprehensive masterplan layout is provided as part of this planning application.
>
> 4.3 In accordance with PPS7 this design concept statement illustrates the ability of the site to accommodate the proposed social housing development whilst having regard to context, adjacent uses, planning policy, design and layout, amenity space and movement between linkages in the area."

[11] Annex 6 of the supporting planning statement consisted of a layout plan for the subject site with an illustrative layout of the remainder of the WB04/11 zoned lands. The roads layout showed a road going to what appears to be the boundary between the subject site and the applicant's lands. There is a label which indicates "future access". The layout was intended to show how roads access through to the remainder of the zoned area WB04/11 including the applicant's lands would be achieved.

[12] An important contextual aspect of Choice's application for planning permission relates to how in due course it acquired the land upon which the development was to take place. The land was purchased by Choice from Belfast City Council ("BCC"). The purchase occurred on 31 March 2014. The purchase price was £1,575,000 (with a deposit of £157,500.00). Completion was to take place on grant of full planning permission or 2 years after the contract, which ever was earlier.

[13] A key feature of the purchase was that the land acquired for the development did not include all of the land held by BCC. Rather, BCC deliberately retained what is colloquially referred to as a ransom strip. This consisted of a strip of land said to be key land because it held the key to and was essential for the development of other lands. In an affidavit filed on behalf of Choice in these proceedings, Kenneth Crothers, an expert witness, provides a definition of a ransom strip as follows:

> "A strip of land abutting land capable of development which is needed by the developer usually for access to the land so enabling development or enhanced development. The owner of the strip frequently obtains ransom value on its sale to the owner of the development land."

[14] What occurred in this case is what Mr Crothers later described in his affidavit:

> "It is not uncommon for vendors or developers of land to retain ownership of a 'ransom strip' between the boundary of the land in sale or development and adjacent land with development potential thereby creating the opportunity to obtain 'ransom value' for that strip."

[15] The strip of land not sold by BCC to Choice was thus kept by BCC so that it could extract ransom value from those whose lands form part of the BMAP zoning and who wished to have their lands developed.

[16] The applicants in this judicial review were such persons.

The course of Choice's Planning Application

[17] Choice's application for planning permission was granted by the Department on 4 March 2015. This is the decision now impugned by the applicants in this judicial review.

[18] It is unnecessary, for reasons which will become clear, to go into detail about the decision making process relating to the grant of this permission but the following points of relevance to this decision are worthy of highlighting:

(a) The applicants objected to Choice's application for planning permission. A letter of objection was sent by Turley Associates on behalf of the applicants, on 4 November 2013. *Inter alia*, this letter pointed out that the configuration of the application effectively created a ransom strip which rendered the applicants' lands inaccessible. It was argued that this situation was fundamentally prejudicial to the object of comprehensively developing zoning WB04/11. It was also argued that PPS7 and policy QD2 were not being observed.

(b) The importance of this letter for present purposes is that it will have placed Choice on clear notice of the views of the applicants in this case.

(c) In December 2013 there was a meeting between representatives of the applicants in this case and officials of BCC. At this meeting the council explained its view that it was retaining its ransom strip in order to extract what it viewed as "best value" for the land.

(d) In the aftermath of this meeting the applicants were in direct contact with Choice about the situation. At this stage Choice were negotiating with the council for the purchase of the lands, the subject of its planning application.

(e) The professional planning report of the Planning Service issued on 10 April 2014. The applicants' objection was before them but notwithstanding this the development control group recommended the grant of planning permission.

(f) Approval was also recommended by the Planning Service to Belfast City Council on 17 April 2014.

(g) Further objections were received by the Department from the applicants herein dated 13 June 2014 and a meeting between the two was held on 18 June 2014.

(h) The case was considered in the form of ministerial submissions on a number of occasions *viz* 17 September 2014, 24 October 2014 and 10 February 2015. The first of these submissions referred to the strip of land within the ownership of BCC and said it could be "the key link to developing land in the remainder of the housing zoning". The submission went on to note that the objector's objection would have to be fully considered. The second submission depicts some further consideration of the issue. It noted that "comprehensive planning is a material consideration especially in cases where proposals relate to the partial development of a site zone for housing as is the case here". There is clear reference to the inclusion of the strip of land prejudicing comprehensive development of the zoning and to the internal roads layout stopping short of the objector's land so rendering the land inaccessible contrary to planning objectives set in PPS7. A development in the case since the last submission was stated to be that there had been a meeting with the applicants where the objection was discussed. This had been on 10 September 2014. In the light of this, officials had written to the applicant for planning permission requesting an amended plan to show the access road extended to the boundary of the objector's land. A further update was promised. The update came on 10 February 2015 by way of a further submission. This rehearsed the history. It indicated that the planning applicant had declined to do as they had been asked: that is to extend the road boundary to the objector's land. Choice had explicitly disagreed with the argument that their proposal prejudiced comprehensive development of the site and this is recorded in the submission. The submission referred to there being two options before the minister:

> "Option 1 – The Department reasserts its view that the red line must be extended as requested by the Department in its letter dated 24 October 2014. If the applicant is not willing or able to do so, then the application is refused. The applicant would have a right to appeal and the final decision would rest with the Planning Appeals Commission. In turn the PAC would face a possible JR, rather than the Department.
>
> Option 2 – The Department accepts the [planning] applicant's argument that it is unnecessary to extend the red line. This approach is contrary to the Department's

> stated requirements and leaves the objector's land inaccessible. This course of action may leave the Department open to judicial challenge by the objector."

[19] The submission ended with recommendation that the Minister consider how he wished to proceed.

It appears that the Minister made a decision seeking the issue of a decision notice in favour of the application for planning permission speedily after receiving the submission. No reasons were provided by the Minister for his decision. The formal permission issued on 4 March 2015.

The Judicial Review Application

[20] The applicant's application for judicial review of the Department's decision was launched on 29 May 2015.

[21] Leave to apply for judicial review was granted by the court on 23 October 2015 after a contested hearing. In the course of the hearing, the issue of the applicants' delay in seeking judicial review was contested by the Department and by Choice. On the substantive grounds for judicial review, the Department made no submissions. The court made a ruling on the delay issue and did not defer the issue to the full hearing. In respect of that issue the court found as follows:

(i) That given the strong emphasis on promptitude in planning applications, it could not be said that the applicants' application had been made promptly.

(ii) However, notwithstanding this, the court was prepared to extend the time for the receipt of the application to the date when it was received. This extension was granted because:

  (a) The court accepted the applicants were not expert professionals in planning matters, although they did have professional assistance.

  (b) The applicants, as executors of an estate, were allowed some leeway as there was a need for them to consult with the beneficiaries under the deceased's will before deciding to proceed.

  (c) The court was satisfied that some of the delay had been brought about by the failure of the Department to provide access to a variety of key documents which ought to have been on the planning file and/or the Department's website but were not. The court estimated that the delay this entailed was at least in the region of 3 weeks ending on 21 April 2015.

(d) There had been a failure by the Department to reply to correspondence the applicants had sent which even at the date of the leave hearing had not been remedied.

[22] In the above circumstances, the court considered that the short delay in initiating the proceedings was excusable.

[23] The court also indicated that if it had had to decide the issue, which in fact it did not have to do, it would have been willing to extend the time in this case also on public interest grounds. A significant BMAP zoning was at issue in the case. It provided for a minimum of 240 units of social housing in an area in which this was badly required. The goal of comprehensive development, it seemed to the court, was endangered by the impugned decision and some investigation into this was therefore required, given that there appeared to be grounds for believing that the Department had not fully or substantially applied or considered the relevant policy framework which was engaged in the making of its decision.

[24] At the hearing before the court on 22 October 2015 the court expressly considered whether it should refuse leave because of the lack of promptitude given that there was said to be prejudice caused to Choice should it grant leave.

[25] In particular it was submitted that Choice would be prejudiced because it had entered a contract with BCC for the purchase of the lands in question. Additionally, it had obtained grant aid for the development from the Northern Ireland Housing Executive. Choice had also entered into a contract with contractors for the construction of the housing on the site. Notably this contract was entered into within a very short time after the grant of the planning permission and well before the overall time limit in judicial review of 3 months had expired.

[26] The court declined to refuse leave on the basis of prejudice to Choice. Among the reasons given for the court's stance on this point was that the court was entirely satisfied that Choice, at all material times, was fully aware of the existence of the applicants and the applicants' outlook and interest in relation to Choice's application for planning permission. The possibility of the applicants' mounting a judicial review challenge to any grant of planning permission to Choice was plainly there. Accordingly, in so far as Choice decided, well within the outer time limit for any judicial review application which the applicants might decide to bring, to enter into contracts with others for the purpose of giving effect to their permission (which it was perfectly entitled to do), it must have known and appreciated that it was running a risk. Unfortunately for them the risk materialised in this case.

Post Leave Developments

[27] In the aftermath of the grant of leave to apply for judicial review there have been some important developments. Apart from the filing of further affidavit evidence by both Choice and the applicants, BCC (which had notice of the leave

hearing but did not appear at the leave stage) sought and obtained the court's leave to take part in the proceedings. As a result, BCC has also placed affidavit evidence before the court.

Most importantly, without filing affidavit evidence, the Department, through its solicitors, indicated that they had been instructed not to contest the judicial review.

[28] By a letter of 10 November 2015 the Department's solicitors proposed that there should be a remedies hearing in respect of the case.

[29] In the light of this development the matter was mentioned before the court on 26 November 2015. There was general agreement that the matter should proceed to a remedies hearing. As the Department had only indicated in their solicitor's letter of 10 November that at the time of the impugned decision proper consideration had not been given to a material planning policy, the court requested that the Department, prior to any remedies hearing, should provide additional detail about its reason for not defending the judicial review.

[30] On 16 December 2015 additional detail was provided in a letter from the Department's solicitors. It was indicated that the Department accepted that "the comprehensive development of the entire zoned site [was] a material consideration in the application for development of part only. The final paragraph of the policy which prohibits 'unsatisfactory piecemeal development' on sites zoned for housing [was] therefore applicable to the present application".

[31] The letter went on to state that the Department did not accept the applicants' contention that the policy prohibited the grant of planning permission for part of the zoned site in circumstances where the owner of that part proposes to exercise private property rights in a manner which controls or regulates access to the remainder of the site by other owners. However it was accepted that policy required that an application for partial development should demonstrate how this could be achieved in a manner which enabled the development of the entire site in a way which was satisfactory to the Department.

[32] While noting that the wording of the key site requirements for the zoning was slightly different to the wording of policy QD2, the Department went on to indicate that it did not consider that there was a difference in substance. In the end, the letter went to say that "in deciding to grant planning permission these planning policies were not properly taken into account in the sense that proper consideration was not given to the meaning and requirements of the policy or to the question of whether the decision to grant planning permission would be in accordance with policy or a departure".

[33] The revelation was also made in the letter of 16 December 2015 that on the day after the Minister's decision further consultation advice had been presented to the Department by Transport NI. The Minister at the time of making his decision

had not been aware of this advice and accordingly "these matters do not appear to have been fully taken into account".

[34] When the letter of 10 November and that of 16 December are read together it is further plain that the Department did not contend that the same decision as that contained in the impugned decision would inevitably be reached if all material considerations were taken into account – both those relating to comprehensive development and those relating to Transport NI's consultation response.

The Remedies Hearing

[35] The court agreed to the proposal that there should be a hearing to consider the issue of the appropriate remedy, if any, which should be granted in the light of the concessions made by the Department and in the light of its decision not to defend the judicial review. Below the court will outline the position adopted at the hearing by the parties.

The applicants

[36] On behalf of the applicants Mr Scoffield QC, in both oral and written submissions, placed emphasis on the significant concessions made by the Department. In his view, the concessions were fundamental and went to the root of the decision to grant Choice's planning permission. In addition to the concessions made in respect of the grounds of judicial review in the Order 53 statement, counsel also relied on the revelation made by the Department in respect of the information from Transport NI which had not been available at the date of the Minister's decision. While there was no ground of judicial review which was on this point, nonetheless, it was significant and the court should take it into account. It was another instance of policy not being considered.

[37] In terms of legal principle, Mr Scoffield's submission was that in planning matters where the decision-maker had been found to have acted or had conceded acting unlawfully the normal consequence should be that the resultant planning permission should be quashed. In the present case the neglected policy was a failure by the Department to take into account a relevant consideration. The breach in this case, he argued, was a failure to have regard to a material consideration contrary to Article 25(1) of the Planning (Northern Ireland) Order 1991. In these circumstances the court should grant the remedy of *certiorari*. Mr Scoffield cited the well-known case of Gransden and Co Limited v Secretary of State for the Environment (1987) 57 P&CR 86 and the less well known case of Tata Steel Limited v Newport City Council [2010] EWCA Civ. 1626 in support of his submissions.

[38] While counsel accepted that there can be exceptional cases where the general approach he contended for might not be applied, such cases were exceptional and, in his submission, this case did not fall within an exceptional category. This was particularly so as the Department itself had conceded that it could not say that the

decision on Choice's planning application, if referred back to them, would be the same if the Minister had proper regard to all relevant considerations. Insofar as it might be contended that the planning permission should not be quashed because of the applicant's delay in mounting the judicial review this, according to Mr Scoffield, had been cured by the court's express grant of an extension of time to bring the proceedings, a decision made at the leave stage. In respect of the issue of prejudice to Choice were the planning permission to be quashed, Mr Scoffield argued that any prejudice was as a result of the fact that once the planning permission had been granted Choice "rushed to enter contractual commitments within weeks". In respect of the purchase of the land from Belfast City Council, Choice, in fact, had entered into legal arrangements well before the planning permission was granted. Mr Scoffield relied also on BCC's indication in an affidavit filed before the court that they would not intend to rescind the contract for the sale of the land. It was also submitted by counsel that Choice might be protected from legal liabilities to their building contractor because of the terms of additional Clause Z7.5 in the relevant building contract. Insofar as the issue of what might happen to grant aid from the Northern Ireland Housing Executive provided to Choice, Mr Scoffield argued that as Choice had not placed sufficient evidence before the court in respect of the grant aid arrangements the court would be unable to form any opinion about what degree of prejudice might result, if any.

[39] Mr Scoffield also addressed the issue of where the public interest lay in respect of the facts disclosed in this case. In his submission the public interest favoured the comprehensive development of the BMAP zoning which had been prejudiced by the grant of planning permission to Choice. He put the point pithily as follows:

> "A plea based on retaining the 92 permitted dwellings is at the expense of jeopardising the (minimum) further 148 dwellings for social housing which planning policy dictates as being required to be provided. This is the core public interest at issue in this case."

[40] Apart from the public interest, Mr Scoffield contended that his clients' own interests were of importance. In particular, the applicants remained cut off from access by reason of BCC's ransom strip which was being viewed as key land - but this was occurring only because the entire site was not being developed comprehensively.

The Department

[41] Mr McLaughlin BL for the Department expressed to the court the Department's position of neutrality in respect of the issue of remedy. Specifically, he did not wish to advocate any particular approach, nor did he wish to make any submissions on the issue of alleged prejudice to the interests of Choice or BCC.

Choice and Belfast City Council

[42] Mr Beattie QC appeared on behalf of Choice. Mr Anthony BL appeared on behalf of BCC. For practical purposes, the position of both was similar: namely that the court should either grant no relief or, in the alternative, a declaration of unlawfulness only. Both parties also offered the further suggestion that if the court was minded to grant an order of *certiorari*, it should, instead of doing so, exercise its powers under section 21 of the Judicature (Northern Ireland) Act 1978 to remit the matter to the Department with a direction to reconsider it and reach a decision in accordance with the ruling of the court.

[43] In respect of Choice, Mr Beattie reminded the court that there was an acute social housing need in West Belfast and that Choice, a non-profit making entity, was the applicant for planning permission and was actively seeking to provide a substantial contribution to meeting that need. In doing so, he pointed out that Choice was supported by grant aid from the NIHE. A total of £5,620,329.23 in grant aid he claimed was at risk if there was a failure to complete the planned project on which Choice was engaged and this might "result in the grant being recovered with interest".

[44] Mr Beattie submitted that Mr Scoffield was wrong to suggest that Choice might be protected against litigation by its building contractor by reason of Clause Z7.5 of the building contract. In his submission, the contract entered into was absent any provision relating to planning permission.

[45] In respect of the ransom strip, Mr Beattie asserted that Choice had no objection to the road they intended to build being used for access to the adjoining land. In particular, it was not Choice's planning permission which prejudiced comprehensive development of the zoning. Rather, it was BCC's ransom strip which was the "potential culprit".

[46] Counsel's view was that delay remained a live issue in the context of remedies. In this regard he quoted paragraph 14.51 of Larkin and Scoffield's, Judicial Review in Northern Ireland. Reliance was also placed by Mr Beattie on Re Aquis Estates Limited [2000] NIJB 1 and Corbo Properties Application [2012] NIQB 107, as examples of cases where unlawfully obtained planning permissions had not been quashed by the court.

[47] Overall Mr Beattie's analysis was that the real issue in the case was between the applicant and BCC and in this regard Choice could not compel BCC to allow access. In support of this, in his skeleton argument the following comment is made:

> "The case represents an attempt to use planning policy to trump property rights and the statutory duty [under the Local Government Act (Northern

> Ireland) 1972] imposed on BCC" *i.e.* the obligation to achieve best price.

[48] In the conclusion section of his skeleton argument, the court was reminded that Choice had committed no offence and was suffering on-going prejudice.

[49] Mr Anthony BL supported the central submissions of Mr Beattie – the delay of the applicants in seeking judicial review; the adverse financial consequences which would be sustained if NIHE grant aid were to be lost; and the public interest in the provision of social housing. He also quoted authority which chimed with Mr Scoffield's submission that unlawful decisions should ordinarily be struck down and relief granted save in exceptional circumstances (see Horner J in Corbo Properties (*supra*) at paragraph [45]). From the same authority, counsel drew attention to paragraph [49] which spoke about the needs of good administration. In particular Mr Anthony quoted the following words:

> "In some cases good administration will dictate that the relief is granted. In other cases good administration will demand that relief should be refused. It all depends on the particular facts and circumstances of that case."

Further cases cited by Mr Anthony included portions of the judgment of Gillen J (as he then was) in Re Omagh District Council's Application [2007] NIQB 61 and portions from the judgment of Girvan LJ in Re Downes Application [2007] NIQB 1 (not a planning case).

The court's assessment

[50] The court has considered the totality of submissions made by the parties. It accepts that the appropriate remedy where unlawfulness is established must take account of the particular circumstances of the case before the court. However, this is not inconsistent with the court accepting, as it does, that where unlawfulness is established or conceded, generally in the context of planning applications the remedy which should follow will be a quashing order. In the court's view, such a position is consonant with the rule of law as a general concept and with the requirements of good administration but the court also accepts that it may have to deviate from the norm in exceptional cases where this would be appropriate. Accordingly the court should be prepared to deviate from the norm where such a step is called for.

[51] The question in this case is whether a deviation from the norm is required.

[52] In this regard the court is content to recognise that in this case there are two sets of broad circumstances in play which might lead to the result which Choice and BCC favour. These are where: (i) the issue of the applicant's delay in bringing the

proceedings looms large and may have been material to the course of events and (ii) the issue of prejudice to a party or others which may arise in the event that the court grants a quashing order. It is to these issues that the court will now turn.

Delay

[53] In the present case the issue of delay in making the judicial review application was fully canvassed in the course of a contested leave hearing. Having heard the arguments the court extended the time in so far as this was required. This is not a case where the issue of delay was deferred to the final hearing or only provisionally decided. What then is the effect of this? In particular, can the court have regard to the issue of delay when determining what relief, if any, it can grant if the application subsequently is resolved in favour of the applicant or is conceded?

[54] If the court at the leave stage grants leave notwithstanding a lack of promptitude on the part of the applicant – for reasons such as those explained in paragraph [21] *supra* - the effect of this is to enable the application to proceed and it will not be appropriate for the court at the full hearing to revisit the issue of delay under Order 53 Rule 4. However this does not mean that delay cannot at the substantive hearing be viewed as relevant to the grant of relief.

[55] The above analysis is consistent with that of Weatherup LJ in the recent Court of Appeal decision in the case of Re Laverty's Application [2015] NICA 75 where the position in respect of delay under Order 53 Rule 4 is set out: see paragraph [21]. In a summary of the law, it is stated that "On a substantive hearing delay may impact on the relief granted". The court will proceed on the basis that this is correct.

[56] The usual situation where delay may impact on the relief granted will be where the delay itself can be said to have produced prejudice to an affected party, in planning cases, usually the developer. An obvious example would be where a party has acted in the confident belief that the time in which a judicial review application could be taken challenging a decision on which that party relies had passed so enabling steps to be taken which give effect to the decision in relative safety but where nonetheless, for one reason or another, the time for challenge is extended. In this type of case the delay in making the challenge may cause or contribute to prejudice to the affected party.

[57] The court has asked itself whether the present case is such a case and whether the applicants' delay has itself brought about prejudice to the developer or BCC. On balance the court does not consider that the delay in this case has had that effect. While the judicial review may have generated a degree of prejudice, in particular, to Choice, the court is inclined to the view that this does not arise from the short delay on the applicants' part in initiating the proceedings (which were underway within three months of the impugned permission) but arises from the fact that proceedings have be taken at all.

[58] The chronology of events supports this conclusion. The land for the proposed development was purchased by Choice in 2014 long before the planning permission was granted. When the permission was granted on 4 March 2015 Choice would have been well aware of the risk that the applicants might seek judicial review. However, notwithstanding this, Choice completed the 2014 purchase of the land from BCC and entered into a contract with a building contractor both before the end of March 2015. The contractor started preparatory work on site speedily. This plainly was not a situation in which Choice was awaiting the expiry of the period within which a judicial review challenge might be mounted. If Choice had been, it might have been expected that it would have held off committing itself in material respects until at least the period of three months had passed from the date on which the planning permission had been granted.

[59] The reality, it seems to the court, is that Choice was faced with the issue of how it should manage the risk of judicial review which the applicants represented. The deleterious effects which arise from the applicants' challenge, on a proper analysis, do not arise from the absence of promptitude on the applicants' part. Their source is the existence of the judicial review not the timing of it.

Prejudice

[60] The court is willing to accept that on the basis of the evidence which has been placed before it that if it quashes the planning permission this will involve a measure of prejudice to Choice and, to a lesser extent, BCC.

[61] A quashing order will have the effect of rendering the grant of planning permission now enjoyed by Choice a nullity. This will mean that the planning authority will have to make a fresh decision. The impact this may have is uncertain. At the least, the process will be likely to delay the realisation of Choice's development. There may, as a result, be knock on effects and perhaps litigation. It does not seem likely, though it is possible, that there would be litigation between BCC and Choice but Choice's builder may be able to sue for losses he might sustain. Issues concerning the interpretation of contractual provisions may arise. The site will in the meantime have to be maintained and issues may arise in connection with the financing of the project and with the grant aid provided or ear marked for the project. The court lacks information as to what stance the NIHE might be minded to adopt.

[62] At worst, the application for planning permission might be refused. It might turn out that the work already done would in the end be wasted, though this cannot be assumed. Again, litigation may ensue. It is possible that grant aid may be lost altogether or recovered.

[63] The court is unable to quantify the exact costs of the various scenarios with any exactitude especially as much of what is said above involves more than a little speculation. But the court is willing to accept that prejudice to Choice may indeed

arise, greater in the latter than the former scenario. The question which arises therefore is whether the court should grant no form of coercive relief in this case to the applicants because to do so creates prejudice to Choice? It seems to the court that the resolution of this issue involves the court balancing the general norm of quashing decisions which are unlawful against the prejudice which may be caused by doing so.

The balance

[64] The court is of the clear view that this is a case in which it should quash the decision impugned notwithstanding the fact that this decision may cause a measure of prejudice to Choice (or BCC). It has arrived at this view for the following main reasons:

(i) First of all, it is evident that the subject matter of the impugned decision in this case relates to a matter of considerable importance. At issue is how the zoning identified in BMAP making provision for much needed social housing in West Belfast is to be treated. The court is not dealing with an isolated application or with a minor proposal within an area plan.

(ii) Secondly, the unlawfulness in this case goes to the root of the planning authority's functions. There has, on any view, been a substantial failure by the planning authority in this case to consider material considerations and reach a planning judgment which reconciles the various interests and policies at issue.

(iii) Thirdly, the court is satisfied that this case is one where it is feasible for the planning authority to decide afresh the application. The case is not one where it is too late for this to be achieved.

(iv) Fourthly, to leave matters to lie where they have currently come to rest would be inherently unsatisfactory where serious issues arise about the comprehensive development of the zoning. These issues should not be resolved by an unlawful decision.

(v) Fifthly, the court is of the view that the grant of a declaration or similar relief in this case has little or no attraction as it would leave the impugned planning permission in place. While suggestions were made at the hearing to the effect that, if necessary, the planning authority could later revoke the planning permission if it thought it right to do so, such a course is speculative and, in reality, is no substitute for the court itself now providing the appropriate relief.

(vi) Sixthly, the court cannot ignore the fact that the applicants have a legitimate interest of their own in taking these proceedings. They have

an expectation that a decision affecting their interests should be determined lawfully. The course of denying them an effective remedy should only be resorted to exceptionally.

(vii) Seventhly, Choice was aware of the position of the applicants and of the risk of judicial review which they represented. In these circumstances it was open to them to make provision for this contingency and so mitigate any potential loss which might arise.

Other Issues

[65] There were a variety of other issues raised in the course of the remedies hearing to which the court will provide a response.

[66] One such issue related to the new information that the Minister's decision was made at a time prior to the receipt of further consultation information provided by Transport NI: see paragraph [33] *supra.* It would appear from material put before the court that an issue had emerged about the stress the comprehensive development of the zoning might place on a near-by roundabout. This may need to be alleviated before the comprehensive development of the site takes place. For Choice, Mr Beattie argued that there are available ways of dealing with this issue and that a fair resolution of this issue was possible without the court making a quashing order.

[67] The court's reaction to this issue is that there may well be strength in Mr Beattie's submission on this point. While the court need not decide the issue, in view of the conclusions it has already reached, it is content to make it clear that its consideration of this issue has not affected the view overall which it has reached. Its conclusion would have been the same whether this roads issue had arisen or not.

[68] As noted earlier, both Mr Beattie and Mr Anthony had submitted that a way the court could deal with the issues of remedy was to invoke section 21 of the Judicature (Northern Ireland) Act 1978 whose terms have briefly been referred to above (see paragraph [42] *supra*). In other words, the court could decide simply to refer the matter back to the planning authority without quashing the decision. The court has not been persuaded that this course of action is one which it should adopt in this case. A referral back would in law leave the planning permission extant and, while the planning authority would have to give effect to the court's judgment, it is difficult to see how this would work in practice. It seems to the court that section 21 was principally intended to be of assistance to the court in cases where it was open to a decision maker simply to reconsider a decision and substitute a new decision for an old one. That, however, is not the case here as the permission which has been granted confers a legal right which continues in law unless and until it is set aside or it expires.

[69] Finally, the court wishes to acknowledge that the parties drew to the court's attention to the fact that the planning authority to which the application for planning permission would go, in the event of a quashing order, would now be Belfast City Council. At the same time, it was suggested that the Council, because of its interest in the matter of this application, would not be the appropriate authority to deal with it. In these circumstances, the Department may have to exercise its powers under section 29 of the Planning Act (Northern Ireland) 2011 to call in the application.

[70] The court is of the view that the Department should be the authority which deals with this case in the future. If this means exercising call in powers so be it. However the court is anxious that whatever route is adopted the matter should be dealt with as soon as possible.

Conclusion

[71] In all the circumstances of this case the court will order *certiorari* to quash the decision of the planning authority impugned in this case by the applicants.