Neutral Citation No. [2010] NIQB 38 | *Ref:* **MOR7804**

Judgment: approved by the Court for handing down | *Delivered:* **19/3/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Thompson's (Ciara Patricia) Application [2010] NIQB 38

IN THE MATTER OF AN APPLICATION BY CIARA PATRICIA THOMPSON FOR JUDICIAL REVIEW
AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE)

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MORGAN LCJ

History of the application

[1] On 4 November 2008 the applicant was granted leave to apply for judicial review of a planning permission granted for a housing scheme at lands at 45 Bryansford Village. This ruling deals with a further application made on 4 February 2009 whereby the applicant seeks a protective course order so that she shall not bear the respondent's costs in these proceedings in any event.

[2] The applicant resides at a housing development in Bryansford very close to the proposed development. She is a supporter of the Tullymore Community Association which supported local residents in objecting to the planning application giving rise to the impugned permission. The Tullymore Community Forum is a member of the Newcastle Sustainable Community Planning Forum which is an umbrella grouping of community groups and other bodies. Bryansford is within the area covered by this group.

[3] The applicant applied for legal aid in order to fund these proceedings. She has a low income and is financially eligible for legal aid and this was a factor in the decision that she was the one who ought to bring these proceedings. Her application for legal aid funding was refused on the basis of Regulation 5 (11) of the Legal Aid General Regulations (Northern Ireland) 1965 which provides that where an application is made by or on behalf of a

person in connection with a cause or matter in which numerous persons have the same interest the appropriate committee shall refuse the application if they are satisfied that it would be reasonable and proper for the other persons having the same interest in matter as the applicant to defray so much of the costs as would be payable from the fund in respect of the proceedings if a certificate were issued. This decision was appealed to the Appeal Committee of the Legal Services Commission but the appeal was unsuccessful.

The grounds of the application

[4] The challenge to the planning permission was made on four grounds. The first is that the proposal was not referred to the Planning Service Management Board as requested by the District Council. Planning Service operates a procedure whereby District Councils can refer to the Planning Service Management Board developments which they want to see reconsidered. In a response dated 26 May 2009 to the pre-action protocol letter the respondent refers to the guidance on the operation of this mechanism which indicates that the proposal must relate to a significant development. In this case the proposal is for the construction of 23 dwelling units within the development limit of Bryansford. The referral letter from Down District Council identified that there were 90 objections to the proposal and that the scale of the development would fundamentally change the character of the conservation village. The issue, therefore, is whether the respondent's approach to the identification of what is significant is unlawful.

[5] The second ground of challenge relates to the applicant's contention that the proposal is not in conformity with certain identified elements of the Draft Ards and Down Area Plan 2015 and PPS 6: Planning, Archaeology and the Built Heritage. Planning Service contends that these policies were taken into account and that their application is a matter of professional judgment. A reduction in the number of dwellings was required in order to honour these policies. The applicant contends that the approach to the policies is Wednesbury unreasonable.

[6] The third ground of challenge is that the consultation response by EHS (Protecting Historic Buildings) was improperly amended having regard to budgetary considerations. It is common case that EHS indicated their opposition to the original scheme. The respondent contends that in answer to the amended scheme EHS indicated that they had no objection in principle. This will clearly be a matter for analysis of the replying affidavits and other materials at the trial.

[7] The fourth ground of challenge concerns the impact of the development on the local sewerage system. In the initial response from the Water Management Unit on 10 February 2006 it was recommended that the developer provide temporary treatment for the waste water from the site until

the system is upgraded. On 19 October 2006 Water Service confirmed no objection to the proposal and indicated that funding was available for foul and storm water sewers. On 14 November 2006 Water Management Unit recommended that the developer provide a temporary treatment works but on 23 July 2007 a further e-mail was received by Planning Service indicating that Water Management Unit was content to accept the connection of the foul sewer to the Northern Ireland water main system and that accordingly a temporary treatment works would not be required. On 12 September 2007 a further e-mail was received by Planning Service from Northern Ireland Water confirming that it would be refusing foul sewer connections for future planning applications affected by capacity problems.

[8] The applicant contends that the decision to grant permission without a legally enforceable condition in relation to treatment of waste water is contrary to Directive 76/160/EC and Directive 2006/7/EC and the relevant domestic regulations in relation to bathing water and urban waste water treatment. The applicant points to material demonstrating that the local bathing waters have been subject to excessive spillage as a result of the existing infrastructure and contends that to include the need for a private wastewater treatment facility as an unenforceable informative is contrary to both community law and domestic law.

The relevant case law

[9] The circumstances which a party should be entitled to a protective costs order has been subject of recent jurisprudence both in this jurisdiction and the Court Of Appeal in England. Some of that jurisprudence has been influenced by the provisions of Article 9 of the Aarhus Convention which provides that procedures for access to justice in relation to the contravention of national law relating to the environment shall be fair, equitable, timely and not prohibitively expensive although the case law makes clear that the principles applicable to public interest litigation should be the same whether or not the issue relates to the environment. The leading case is R (Corner House Research) v Secretary Of State for Trade and Industry [2005] EWCA Civ 192. The court reviewed guidance which had been put forward by Dyson J in R v Lord Chancellor ex p CPAG [1999] 1 WLR 347 and set out governing principles in paragraph 74.

> "74 We would therefore restate the governing principles in these terms.
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> (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those

> issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
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> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
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> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

[10] This guidance was subsequently reviewed and largely endorsed in this jurisdiction in Re McHugh's Application [2007] NICA 26. The court noted, however, that the fact that an applicant had a personal interest in proceedings did not invariably amount to a complete bar to the making of a protective costs order. In this case the court endorsed the exceptionality test. In R (Compton) v Wilshire Primary Care Trust [2008] EWCA Civ 749 the court indicated that this test was simply a consequence of the application of the relevant principles rather than a freestanding further hurdle.

The application of the principles

[11] The first question is whether the issues raised are of general public importance. I can deal briefly with the issues under the Draft Ards and Down Area Plan 2015 and PPS 6. In my view the issues raised in relation to these matters are essentially matters of interpretation of well-known planning policies and I consider that there is no issue of general public importance arising in respect of them. I consider that the same is true in relation to the complaints about the approach of the EHS. It appears that this may well turn out to be a fact specific matter but in any event I do not consider that it raises any question of general public importance.

[12] The issue of compliance with the bathing water regulatory regime has clearly been a matter of some concern and interest within the general Newcastle area. On one view this is a dispute about whether this permission if implemented would or would not adversely contribute to difficulty in complying with the relevant European and domestic regime. If that were the sole issue I do not consider that it would constitute a matter of general public importance even bearing in mind the broad purposive interpretation that should be applied to this concept and the locality to which it relates. There is,

however, a separate issue raised in relation to the extent to which Planning Service has an independent obligation to take into account the relevant regulatory regime. In most instances Planning Service will not have the expertise to go behind recommendations made by expert consultees. The papers suggest, however, that the position of Water Management Unit may have modified during the period between their last consultation and the date on which permission was granted. The issue then becomes whether it was reasonable for Planning Service to rely on a consultation dated 23 July 2007 for the grant of the permission on 1 August 2008 when Planning Service had subsequently received an e-mail dated 12 September 2007 confirming that Northern Ireland Water would be refusing foul sewer connections for future planning applications affected by capacity problems.

[13] The cases make clear that issues of general public importance and the need that they should be resolved in the public interest should be examined flexibly in the application of this jurisprudence. I consider that this case falls on the borderline and that it is appropriate for me to consider making some order in relation to it. Insofar as reference to the Planning Service Management Board is concerned this appears to be a matter of the evaluation of significance and it does not seem to me that it passes the public interest test set out as the first two conditions in paragraph 74.

[14] The applicant clearly has a private interest in the outcome of this case but in light of the observations of the Court Of Appeal in McHugh I do not consider that this should markedly weigh against her. Although the applicant is a person of limited means it is clear that she is supported by a wider community. The extent of that support and the circumstances of those involved have not been disclosed. The evidence before me indicates, however, that exposure to unlimited costs would make it inevitable that the applicant could not proceed. This is not a case where the applicant's representatives are acting pro bono although it is said that they are not charging commercial rates.

[15] The substantive hearing of this application should not take more than one day. For the reasons that I have given I consider that there is one issue of general public importance in the locality in which the applicant resides and that the public interest requires that the issue should be resolved. I consider that what is fair and just is recognised by me making an order that any award of costs against the applicant in respect of the hearing at first instance should not exceed £10,000.