Neutral Citation No: [2021] NICA 63 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* *ICOS No:* *Delivered:*	**McC11705** **16/31836/03** **16/12/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF ARDS

BETWEEN:

ARDS AND NORTH DOWN BOROUGH COUNCIL

Complainant/Respondent:

-and-

WILLIAM YOUNG

Defendant/Appellant:

Representation

Appellant: **Self-representing**

Respondent: Mr Jonathan Dunlop, of counsel, instructed by Carson McDowell Solicitors

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Before: McCloskey LJ and Huddleston J

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] In this judgment, the unanimous decision of the court, we describe Ards and North Down Borough Council as "*the Council*" and William Young as "*the appellant.*"

[2] A listing before this court for substantive hearing on 11 November 2021 did not proceed in the event and, for reasons which are immaterial at this remove, dissolved into a case management directions hearing. If and insofar as the Council's legal representatives were not privy then to everything that had (and had not) been provided to the court by the appellant, this would have been due to a lack of communication which, regrettably, is a feature of many cases in which one party is unrepresented. Both parties, commendably, accepted the court's suggestion that upon compliance with a series of further case management directions the

adjudication of the court would require no further substantive *inter-partes* listing. This judgment is provided accordingly.

Some History

[3] The appellant's application to this court materialises in the context of a veritable litigation saga of unprecedented dimensions reflecting credit on no-one. The appellant and the Council have been in dispute for almost 20 years in relation to the construction by the appellant of a dwelling house in the area of 39 Carrowdore Road, Greyabbey (the "*impugned development*"). This was the impetus for an enforcement notice (the "EN") on the part of the Council's statutory predecessor, dated 09 January 2004. It is not the function of this court to attempt to trace either the preceding history or the protracted course of events following upon the Notice.

[4] While this court's concern is confined to the most recent phase of events, it is a matter of obvious concern to learn from the limited papers available that on 23rd February 2005, the appellant was convicted of the offence of failing to take the steps required by the Notice, the appellant's ensuing appeal to the County Court was dismissed, an appeal by case stated to the Court of Appeal followed and a different constitution of this court, in substance, affirmed the correctness of the decision of the County Court Judge: see *Planning Service of Northern Ireland v Young and Young* [2013] NICA 29.

[5] Some eight years later the saga rumbles on. In its more recent phase, which is the sole focus of this court, the following material events are identifiable:

(a) The Council initiated a fresh prosecution of the appellants for an offence contrary to section 147(2) of the Planning Act (NI) 2011 (the "*2011 Act*").

(b) On 13 November 2018 the District Judge made a ruling determining a preliminary issue.

(c) By his reserved judgment dated 25 January 2019, District Judge King convicted the appellant and his spouse.

(d) These convictions were appealed to the County Court. In that forum the appellant raised a preliminary issue which Judge McGurgan, on 28 June 2021, resolved in favour of the Council (see *infra*).

(e) The appellants responded by applying to the County Court Judge to state a case for the opinion of the Court of Appeal.

(f) By its formal certificate dated 30 July 2021 the judge refused this application.

(g) By their Notice dated 02 August 2021, the appellants applied to this court for an order directing Judge McGurgan to state a case.

By the foregoing route, this court has become involved in this elderly dispute once again.

The Underlying Proceedings

[6] It is possible to deduce from the papers that the preliminary issue of law which Judge McGurgan determined in favour of the Council was, at least in part, that the EN dated 09 January 2004 consists only of the single page of text and does not incorporate a map to which reference is made in the text and which accompanied it, the relevant passage being that which specifies the asserted breach of planning control, in the following terms:

> "*The unauthorised construction of a dwelling in the approximate position indicated* ***hatched blue on the map attached*** *…*"
>
> [Our emphasis.]

The asserted points of law in respect whereof the judge was then requested to state a case for the opinion of this court are these:

> "*(a) Having determined that the Enforcement Notice served by the complainant on 9th January 2004 consists of one page only … was the County Court correct in determining that* [this] *complies with the requirements of section 140 of* [the 2011 Act] *and is unchallengeable in a court of law? And*
>
> *(b) Was the appellant misled by a reference to a map in the content of the Notice and the service of a map served alongside the Notice which the complainant now states was not the map originally served? And*
>
> *(c) In light of points (a) and (b) have the appellant's rights under Article 6, Article 8 and Article 1 First Protocol been infringed? And*
>
> *(d) Was the County Court correct in dismissing the appellant's challenge to the lawfulness of the Enforcement Notice served on 9th January 2004?*"

[7] While these are the four supposed questions of law contained in the appellant's application to this court, it is evident from the certificate issued by the County Court Judge that the application to him was confined to the first and second only. This certificate enshrines his decision, stating in material part:

"*Now I, being of the opinion that:*

1. *The applicant's proposed question A, while ostensibly raising a matter of law, deals exclusively with the court's findings on the facts and does not raise a legal issue but, in the alternative, if it does raise a point of law it is a matter of such settled or trite law as does not require further amplification.*

2. *The application as it relates to question A Is frivolous and as it relates to question B, which clearly raises no point of law, is both frivolous and unreasonable.*

Accordingly, I hereby certify that such application is refused."

Relevant Statutory Provisions

[8] At this juncture it is necessary to consider the statutory provisions governing the application to the County Court Judge, his determination thereof and the application now made to this court. These are all to be found in the County Courts (NI) Order 1980 (the "*1980 Order*").

[9] Part (VI) of the 1980 Order regulates the topic of "Appeals from and Cases Stated by County Courts." The subject matter of Article 60 is "Ordinary Appeals from the County Court in Civil Cases." Article 60 County Courts (NI) Order 1980 provides:

"*60.-(1) Any party dissatisfied with any decree of a county court made in the exercise of the jurisdiction conferred by Part III may appeal from that decree to the High Court.*

(2) ***[REPEALED]***

(3) The decision of the High Court on an appeal under this Article shall, except as provided by Article 62, be final."

The alternative appellate mechanism of an appeal by case stated to the Court of Appeal is provided by Article 61. This provides:

"*61.-(1) Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal on the point of law involved and, subject to this Article, it shall be the duty of the judge to state the case.*

(2) An application under paragraph (1) shall be made in writing by delivering it to the chief clerk within a period of 21 days commencing on the date on which the decision was given and a copy shall be served on the other party.

(3) Within a period of fourteen days commencing on the date on which the chief clerk dispatches to the applicant the case stated (such date to be stamped by the chief clerk or by a member of his office staff on the front of the case stated) the applicant shall transmit the case stated to the Master (Queen's Bench and Appeals) and serve on the respondent a copy of the case stated with the date of transmission endorsed thereon.

(4) If the county court judge is of opinion that an application under paragraph (1) is frivolous, vexatious or unreasonable he may, subject to paragraphs (5) and (6), refuse to state a case and, if the applicant so requires, shall give him a certificate stating that the application has been refused on the grounds stated in the certificate.

(5) The county court judge shall not refuse to state a case upon an application made to him by or on behalf of the Attorney-General with respect to any question arising on or in connection with any appeal or application to which Article 28 applies.

(6) Where a county court judge refuses to state a case or fails to state a case within such time as may be prescribed by county court rules, the applicant may apply to a judge of the Court of Appeal for an order directing the county court judge to state a case within the time limited by the order, and the judge of the Court of Appeal may make such order as he thinks fit.

(7) Except as provided by section 41 of the Judicature (Northern Ireland) Act 1978, the decision of the Court of Appeal on any case stated under this Article shall be final."

Issue Joined

[10] The County Court is not a court of record. Furthermore, the judge did not provide a written ruling. He was not, of course, under any obligation to do so. This court is able to identify the evidential framework within which Judge McGurgan's preliminary ruling was made from the materials presented by both parties. These consisted of extensive written submissions and three affidavits with accompanying exhibits. A review of these materials serves to identify the central battle lines between the parties. It suffices for present purposes to highlight the following features of these materials.

[11] The first of three affidavits was that sworn by the appellant William Young on 24 February 2020. This exhibits what Mr Young claims to be the EN dated 9 January 2004 served on both appellants. It also exhibits correspondence between the parties. This includes a letter dated 8 July 2019 from the Council enclosing a map which, per Mr Young:

> "*... was not the same map attached to the original Enforcement Notice …*"

This is followed by an unqualified accusation that the planning manager:

> "*... has deliberately falsified the map attached to the Enforcement Notice to strengthen the Council's position.*"

Mr Young then avers that another version of the map was enclosed with the letter dated 21 August 2019 from the Counsel's Chief Executive. This prompts the further averment:

> "*It is clear there is now a dispute between the parties as to which version of the Enforcement Notice was served on myself and my wife on 9th January 2004.*"

[12] The Council's response was made in an affidavit sworn by one of its Principal Planning Officers which, *inter alia*, exhibits the EN with accompanying "*illustrative map*" which, the Council asserts, is a file copy of what was served on the appellants on 09 January 2004. The deponent further deposes to a letter of 7 September 2019 from the appellant to the Council attaching a copy of the map alleged by him to have accompanied the EN. In this context she avers [**paras 12-16**]:

> "*1. On 7 September 2019, Mr Young wrote to the Council attaching a copy of the map he alleges was with the enforcement notice. Having reviewed the file, I can confirm that this is a map that was submitted with Mr Young's initial planning application (reference X/2000/0370/O). I refer to documentation at Tab 9 of the bundle.*
>
> *2. As a result of this correspondence a further review of the file and papers generally took place. I would advise that on 26 September 2019 Mr Darren Toombs of Carson McDowell LLP, the Council's solicitors in this matter, confirmed to me that the original summons did issue with the correct map but that another map has since been used for illustrative purposes since that time for other summonses issued at later dates. The map was added to the summons simply to illustrate the location*

at which the offence took place. All summonses issued by the Council on planning matters have a map attached where practicable simply to illustrate the location of the offence. Where we prosecute for example a signage offence we still add an illustrative map. In this case an illustrative map was used in later summonses (including the present summons), which was, we accept not the enforcement notice map. This does not invalidate the original Notice nor the present prosecution.

3. *On 3 October 2019 land and property services sent through what it retained in their records in relation to the statutory charge. I refer to documentation at Tab 10 of the bundle.*

4. *I can further confirm that following the review of the file and the papers generally, a planning report dated 24 June 2010 and prepared by a Ms Gemma Jobling, upon which Mr and Mrs Young have relied in various proceedings relating to the enforcement notice, specifically referred to the location map and the enforcement notice map as served. I refer to the "Elevate" planning report at Tab 11 of the Bundle marked "CB1".*

5. *In light of the above, I believe that:*

    a) *The Enforcement Notice upon which this prosecution is founded is valid and in compliance with the legislation;*

    b) *Mr. Young is, in any event, not entitled to challenge the validity of the Enforcement Notice in these proceedings;*

    c) *There was no discrepancy in the illustrative map attached to the Enforcement Notice;*

    d) *Mr and Mrs Young were in receipt of the illustrative map attached to the Enforcement Notice;*

    e) *Mr and Mrs Young have clearly known to what property the Enforcement Notice related, what the breach was, what was required to be done to remedy the breach, when the breach had to be remedied and what their rights were under the Notice."*

[13] A 13 page rejoinder affidavit from the appellant followed. In this he repeats his allegation of deliberate falsification of the EN, evidently referring to a more recent version thereof. In later averments the appellant casts aspersions on the professional conduct of the Council's solicitor and counsel. In further averments the appellant raises the issue of a third map (at para 15). There are also averments relating to specified aspects of one of the historical prosecutions which, the appellant asserts, was abandoned at a court hearing. In a related written submission (his first), which followed, the appellant describes the affidavit of the Principal Planning Officer as "*simply not credible*" and repeats his claim of deliberate substitution of one map by a later version.

[14] The response to each of the foregoing was a written submission prepared by counsel on behalf of the Council. This, while dealing largely with legal issues, also referred to certain averments in the Council's affidavit for the purpose of rebutting Mr Young's claims about the existence of different maps. A rejoinder submission of Mr Young, largely repetitive of his affidavit and earlier submission, followed.

The Hearing Below

[15] By the protracted – and far from scenic – route traced above, one reaches the hearing before Judge McGurgan. It is apparent that this took the form of an *inter-partes* listing at which the appellant was self – representing and the Council was represented by counsel. There is no indication that any sworn oral testimony was adduced. It would appear that the listing before the County Court was the substantive listing of the conjoined appeals against the convictions made by District Judge King and that, in this context, an issue of law evidently characterised "preliminary" was canvassed by the appellant. While the matter is not free of doubt, the orientation of the papers presented to this court suggests that the terms of this issue are as set forth in point (A) of the appellants' application to this court, reproduced in [6] *supra*. This court does not have the benefit of either a recording of the hearing before the County Court Judge or a judgment or an agreed account of what unfolded. What is clear is that the judge determined the issue in favour of the Council.

The Appellant's Submissions Summarised

[16] It is convenient to reproduce verbatim the appellant's summary of his case (dated 14 December 2021):

> *"1. The Affidavit of Ms Barker as exhibited at pages 28-88 of the current bundle is the complete affidavit as was served on myself and before the county court. There was never a coloured map enclosed with the affidavit.*

2. The Map at pages 47 and 55 of Ms Barker's affidavit was not served as part of the Enforcement Notice issued in January 2004.

3. The Map at page 51a of Ms Barker's affidavit and again at page 21 of the current bundle was the map served with the Enforcement Notice in January 2004. At all times the map was in black and white format.

4. The summonses issued in all three prosecutions to date included the Enforcement Notice and map as per No3 above.

5. Copies of the Summonses and Enforcement Notices in all three prosecutions to date were lodged directly with the courts by the prosecution. All the documents lodged with the courts are identical to the appellant's copies and as per point 3 above. (I believe the prosecution accept this, at least in relation to the last two prosecutions).

6. Paragraph 13 of Ms Barker's affidavit (page 29A of the bundle) appears to confirm that the map before the courts had been substituted for 'illustrative purposes' during the prosecutions. This explanation is not even remotely rational.

7. I have … received a copy of a letter from the prosecution to the court dated 8th December 2021 along with enclosed documents. I take exception to the comments made in the letter. However, the important matter is a copy of an Enforcement Notice and coloured map which was allegedly lodged with land Registry in March 2004. It is my position that this version of the Notice was not served on me in January 2004 nor did if form part of any of the three subsequent prosecutions. The Enforcement Map which was served as per point 3 above could not have been filed with Land Registry as it covered two Folio numbers and the owner of the laneway had not been served with a copy of the Notice. Mr James Brady, the Enforcement Officer who served the Notice in January 2004, confirmed under oath during the first prosecution, that the Map served was as point 3 above, and that the Planning Service were unaware at the time of issue that the enforcement site consisted of an additional owner as well as the two defendants.

> *8. My understanding is that in 2004, Land Registry did not hold coloured copies of the map as now produced by the Prosecution, although I have not had time to verify this."*

Conclusions

[17] The following matters are clear to this court:

(i) The appellant's appeal against his convictions under section 147(2) of the 2011 Act (and, seemingly, that of his spouse) is extant.

(ii) As a result of (i), the County Court Judge has heard no evidence from either appellant sounding on their defence to the charge. In particular and more specifically no evidence bearing on the statutory defence enshrined in section 147(3) has been adduced.

(iii) Point (A) of the appellant's application to this court attributes two "*determinations*" to Judge McGurgan. The first of these is couched in purely factual terms and must be considered in the context of the root and branch factual contest between the parties relating to EN maps, as outlined in [11]-[14] and reinforced in [15] above. Purely factual questions are the antithesis of points of law.

(iv) As regards the second of the asserted "*determinations*" of the judge, there is no evidence before this court, nor any agreement between the parties, that the judge determined "*… that the one page Notice complies with the requirements of section 140 of the* [2011 Act] *and is unchallengeable in a court of law.*" If this is actually what the judge determined (*inter alia*) the ground work for demonstrating this has not been laid before this court.

As rehearsed in (iii) and (iv) immediately above, there are two substantial flaws in the Appellant's application to this court.

[18] These are not the only flaws. The terminology in Judge McGurgan's refusal certificate includes the phrase "*settled or trite law.*" This court construes this as a reference to the proposition that the validity of an enforcement notice cannot be raised as a defence to a prosecution for failure to comply therewith. This proposition is based on a decision of the House of Lords, *R v Wicks* [1997] 2 All ER 801. This decision was binding on Judge McGurgan and is also binding on this court. Its binding nature at this level is illustrated in the earlier decision of this court in *Planning Service v Young* noted above. It follows that this discrete aspect of Judge McGurgan's refusal certificate is unimpeachable.

[19] Given the analysis in [17]–[18] above Judge McGurgan's certification that the application to him to state a case in respect of question (A) is frivolous is unassailable.

[20] Separately, Judge McGurgan's certification that the issues raised in question (B) are "*frivolous and unreasonable*" is equally unimpeachable. Question (B) is couched in exclusively factual terms, raising no semblance of any point of law.

[21] Before this court there are two further supposed questions of law: see [6] above. Neither formed part of the appellant's application to the County Court to state a case. This *per se* is dispositive. However, for the avoidance of any doubt, this court's response is the following:

(i) Question (C) is couched in opaque and unparticularised terms which raise no issue at this stage of the uncompleted County Court appeals against conviction, albeit the appellants will be at liberty, subject to the presiding judge, to attempt to formulate submissions based thereon before those proceedings are terminated. Independently, this question is, by its terms, expressly wedded to questions (A) and (B) and crumples accordingly in any event.

(ii) Question (D) fails to identify any point of law. Construed as generously as possible it is embraced by, and raises no issue additional to, question (A), which this court has determined above.

[22] This court would add the following. If there had been any identifiable substance in any of the supposed points of law canvassed by the appellants, this court would nonetheless have affirmed Judge McGurgan's refusal certificate on the grounds of prematurity and incompatibility with the overriding objective, within the compass of the statutory grounds of "frivolous" and, further, "unreasonable", per Article 61(4) of the 1980 Order, having regard to the uncompleted state of the underlying proceedings and the appeal options which will be available to the appellants upon the conclusion of their appeals against conviction.

Conclusion

[23] For the reasons given the appellant's application to this court for an order compelling Judge McGurgan to state a case for the opinion of this court is devoid of merit and is dismissed accordingly.

[24] The preliminary issue mechanism adopted in the court below was doubtless both seductive and attractive at the time but, as so often occurs, has proven to be a treacherous short cut, to borrow the language of Lord Scarman in *Tilling v Whiteman* [1980] AC 1. The better course is almost invariably to find the facts first.

[25] The court will consider the parties' submissions on (a) costs and (b) any other ancillary issue before finalising its order. It is almost otiose to add that the case for swift completion of these appeals against conviction is compelling. There is absolutely no reason why Judge McGurgan should not, subject to administrative considerations, remain seized of them.