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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

GORDON DUFF

Appellant

and

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

Respondent

and

ALEX McDONALD

Notice Party

The appellant appeared as a litigant in person
Mr Kevin Morgan (instructed by Causeway Coast & Glens Borough Council Legal Services) for the Respondent
The Notice Party appeared in person

Before: Keegan LCJ and Treacy LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an application by Mr Gordon Duff ("the appellant") to appeal orders made by Mr Justice Scoffield ("the judge"). The first order was made on 25 March 2024 pursuant to his application for leave to apply for judicial review of a decision of Causeway Coast and Glens Borough Council ("the Council"). The judge refused certiorari and granted declaratory relief only. By virtue of a subsequent order of 8 October 2024 the judge made no order as to costs between the parties.

[2] The impugned decision at issue was one granting planning permission in relation to a site between 51 and 53 East Road, Drumsurn made on 26 August 2021. The judge found the appellant did not have sufficient interest in the subject matter of the proceedings for leave to be granted. That decision was quashed by this court for reasons given in a judgment reported at [2023] NICA 22.

[3] Our rationale for finding that the appellant had standing has subsequently been approved by the Privy Council in *Eco-sud and others v Minister of Environment, Solid Waste and Climate Change and another* [2024] UKPC 19. Paras [78] and [79] refer as follows:

> "78. In *Duff v Causeway Coast and Glens Borough Council* [2023] NICA 22 the Court of Appeal in Northern Ireland applied *Walton v The Scottish Ministers* to the question of whether or not an applicant for judicial review had standing to challenge the grant of planning permission. At para 21 Keegan LCJ distilled the following principles from *Walton v The Scottish Ministers*:
>
> > '(i) A wide interpretation of whether an applicant is a 'person aggrieved' for the purpose of a challenge under the relevant Scottish statutory provision is appropriate, particularly in the context of statutory planning appeals (para 85).
> >
> > (ii) The meaning to be attributed to the phrase will vary according to the context in which it is found, and it is necessary to have regard to the particular legislation involved, and the nature of the grounds on which the applicant claims to be aggrieved (para 84).
> >
> > (iii) A review of the relevant authorities found that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made (para 86).
> >
> > (iv) The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be 'aggrieved': where for example

an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry (para 87).

(v) Whilst an interest in the matter for the purpose of standing in a common law challenge may be shown either by a personal interest or a legitimate or reasonable concern in the matter to which the application relates, what constitutes sufficient interest is also context specific, differing from case to case, depending upon the particular context, the grounds raised and consideration of, 'what will best serve the purposes of judicial review in that context.' (paras 92 and 93).

(vi) Para 94 also refers to the need for persons to demonstrate some particular interest to demonstrate that he is not a mere busybody. The court was clear that 'not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.'

(vii) The interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded (paras 95 and 103).

(viii) Lord Hope added at para 52 that there are environmental issues that can properly be raised by an individual which do not

> personally affect an applicant's private interests as the environment is of legitimate concern to everyone and someone must speak up on behalf of the animals that may be affected.
>
> (ix) Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity (para 53).
>
> It will be for the court to judge in each case whether these requirements are satisfied.'

> 79. In *Mussington v Development Control Authority* Lord Boyd, giving the judgment of the Board, stated, at para 47, that Keegan LCJ's summary needs little addition. He added that '[i]t is however clear from Lord Reed's judgment [in *Walton v The Scottish Ministers*] that there is little, if any, difference between the concept of 'person aggrieved' in the Roads (Scotland) Act 1984 and standing for judicial review purposes.' Accordingly, he said that "the attributes that are ascribed to the 'person aggrieved' in sub-paras (i), (ii), (iii) and (iv) of Keegan LCJ's summary apply with equal force to standing in judicial review." He also added that "the reference to 'speaking for animals' in sub-para (viii) applies to all aspects of flora and fauna as well as other environmental factors, such as perhaps geological or archaeological features."

[4] We also point out that the appellant obtained standing and was successful in another judicial review in relation to a site at Glassdrumman Road, Ballynahinch, in a decision reported at [2024] NICA 42. In that case the court stated as follows:

> "[94] We are conscious that the appellant does not live in the affected area, nor does he have a direct interest in the site, although we do accept that he like other citizens is directly affected by issues such as biodiversity loss and environmental management. However, he did object to this planning application, and he has exposed significant matters in this case in relation to rural planning policy which exhausts the argument that he says arises in many

> other cases. Ultimately, his intervention also highlights the fact that planning permission was unlawfully granted. Therefore, the appellant as the only applicant is entitled in these circumstances to relief. We consider that the appropriate relief to remedy this unlawfulness is an order quashing the planning permission."

[5] The *Glassdrumman* case concerned a planning development application that was presented to and decided by the Council on the basis that it came within the infill 'small gap' housing exception within Policy CTY 8. However, the court concluded for the reasons set out at paras [28]-[48] that the Council's decision that this was a small gap site cannot stand.

[6] In doing so the court explained at para [96] that "the primary focus of Policy CTY8 is on avoiding ribbon development, save where one of the two exceptions is engaged. Since Policy CTY8 is referred to in Policy CTY1 of PPS21 as being one of those policies pursuant to which development may in principle be acceptable in the countryside, there may be a temptation to view it primarily as a permissive policy." Also, "unlike the other policies, CTY8 does *not* begin by setting out that planning permission "will be granted" for a certain type of development. On the contrary, CTY8 begins by explaining that planning permission "will be refused" where it results in or adds to ribbon development. This is an inherently restrictive policy such that, unless the exception is made out, planning permission must be refused."

This case

[7] This case also concerns rural infill development and the application of Policy CTY8. As far back as 4 November 2021 the judge indicated that he would quash the planning permission as no objection was raised by the Council. That order did not issue as the appellant flagged the fact that the notice party should be heard. The notice party was then heard and the judge ultimately decided that he should grant declaratory relief rather than quashing the order for the reasons given in his judgment reported at [2024] NIKB 31.

[8] Having found in favour of the appellant on standing in our previous judgment we remitted the matter back to the judge. Truth be told we rather thought that we might not see this case again. However, the judge's ruling is appealed in substance and in relation to costs by the appellant on the basis that the judge made an error of law in not granting certiorari having found illegality and that the judge should have made an order for costs in favour of the appellant.

[9] Replying to these appeal points before us, Mr Morgan, clearly and unequivocally stated that he had no objection to the court reversing this decision and making a quashing order although he objected to costs. Mr McDonald ("the notice party") represented that he wanted to maintain the declaratory relief and costs order made by the judge.

[10] At the hearing we announced our decision reversing the judge's order and said that we would provide reasons. These are the ensuing reasons of the court.

Factual background

[11] Given the protracted litigation and numerous judgments in relation to this subject matter, the background may be simply stated. The grant of planning permission was to the notice party for an 'infill' dwelling in a gap between numbers 51 and 53 East Road, Drumsurn, near Limavady. An infill dwelling is a dwelling which is considered permissible under Policy CTY8 of Planning Policy Statement 21 as filling a small gap in an otherwise substantial and continuously built-up frontage in the countryside.

[12] This planning application was the third in sequence by the notice party. None of the applications have had the support of the planning officer. None of the applications were objected to. The first application was refused in 2012. The second application was withdrawn by the notice party. The third application was brought 16 days after the withdrawal.

[13] The matter was considered by a planning committee of the Council. There was a site visit in advance of the decision that was made. Ultimately, in adjudicating on the application the planning committee voted by six votes to five with one abstention not to refuse the application. This meant that the planning approval was granted against the recommendation of the planning officer.

[14] The Council's reply to the pre-action correspondence bears repeating as it unequivocally accepted the appellant's standing to bring a judicial review. Further, and again in unequivocal terms, the Council stated that it would concede the case and invited the appellant to bring a judicial review to quash the planning decision. Para [5] of the reply encapsulates the Council's position as follows [with our emphasis]:

> "5. **Response to the Proposed Application**
>
> We have now had the opportunity to consider your letter, speak with the member of the Planning Committee and take legal advice in relation to the issue. It has been decided that given the specific facts and circumstances of this particular planning permission application that your application will be conceded in full to avoid the incurring of costs. On that basis the proposed respondent accepts your proposal expressed at paragraph 6 of your letter and will consent to your application that the subject planning permission is quashed.

> To effect this, we would invite you to issue your stated judicial review application to the court inviting it to quash the decision of 25 August 2021 granting planning permission for the subject site. The proposed respondent will consent to such application.
>
> Please provide your draft application on the proposed respondent prior to it being lodged with the court so that we may consider it in advance of provision of our written consent. We will consider same, and your application can then be progressed without further delay."
>
> "The *locus standi* issue should normally be decided at the leave stage: *Lancefort Ltd v An Bord."*

The above position of the Council frames this case.

Our analysis

[15] Scoffield J has produced a comprehensive judgment which we adopt in some respects. From the judgment we can see that the judge accepted the genuineness of the appellant's environmental concerns in particular his passion for the countryside and his frustration at the lack of other challengers taking on what he perceives to be an unduly relaxed and harmful approach to piecemeal development in the countryside. The judge also observed that the appellant does not have any personal substantive interest in the grant of the planning permission involved stating that "He does not live nearby. His amenity will not be affected. No property interest of his will be affected nor are any of his private law rights engaged."

[16] At paras [37]-[42] the judge discussed the appellant's request for a quashing order. These paragraphs bear close reading given the range of issues and the evidence relied on. It is fair to say that the judge agreed with the appellant on many of the points he raised.

[17] At para [37] the judge expressly stated that; " Although this is not a case of the Council itself applying to set aside its own decision … Mr Duff is right to identify that the usual course where a public authority admits such a flaw in its decision-making is that the court will grant an order of certiorari to quash the resultant decision."

[18] At paras [38]-[40] the judge referred to highly significant material from the Northern Ireland Audit Office (NIAO) and Public Accounts Committee (PAC) which plainly provided support to the appellant's case in the following respects:

> "[38] Mr Duff also made a number of interesting submissions based upon work carried out by the Northern Ireland Audit Office (NIAO) and the Public

Accounts Committee (PAC) of the Northern Ireland Assembly. The NIAO published a report by the Comptroller and Auditor General and the Local Government Auditor in February 2022 entitled, 'Planning in Northern Ireland.' Part Three of the report dealt with variance in decision-making processes. It expressed a number of concerns which resonate with the present case. These included a finding that the type of applications being considered by planning committees within councils, rather than simply being dealt with on a delegated basis by councils' professional planning officers, were not always appropriate. Elected members were calling in for consideration applications which were not always the most significant and complex; and, indeed, some council planning committees appeared to be "excessively involved in decisions around the development of new single homes in the countryside." The NIAO considered that the evidence highlighted a disproportionate use of committee time and focus on such applications.

[39] The NIAO report also considered the extent to which planning committees within local councils overturned the recommendations of their professional planning officers. Everyone accepts that this is an entirely proper and permissible outcome in certain cases, with the proviso that decisions to depart from officers' recommendations should be supported by clear planning reasons. Some planning committees have a higher rate of overturning their officers' recommendations than others, however, with the Council in this case being towards the top of the league table (see Figure 7 in Part Three of the NIAO report). The vast majority of cases (90%) where the officers' recommendations were overturned was where a planning committee granted planning permission against the officers' advice. Of even more direct relevance in the present case is that almost 40% of decisions made against officer advice related to single houses in the countryside. In all of these instances the recommendation to refuse planning permission was overturned and approved by the committee. It does not appear that a committee has disagreed with a recommendation to approve in such a case, thereby taking a stricter view of the planning issues than the professional officers. The NIAO expressed the following concerns as a result of this analysis: "In cases where the planning committee grants an application contrary to official advice, there is no third party right of

> appeal. The variance in overturn rate across councils, the scale of the overturn rate and the fact that 90 per cent of these overturns were approvals which are unlikely to be challenged, raises considerable risks for the system. These include regional planning policy not being adhered to, a risk of irregularity and possible fraudulent activity. We have concerns that this is an area which has limited transparency.
>
> [40] In the usual way, the NIAO report was considered by the PAC in the exercise of its scrutiny functions. It too issued a report, on 24 March 2022, entitled 'Planning in Northern Ireland' (NIA 202/17-22). The PAC expressed concern about how the planning system was operating for rural housing. In particular, based on the evidence presented to it, the Committee said that it was concerned that "there appears to be an increasingly fine line between planning committees interpreting planning policy and simply setting it aside." The PAC was also concerned about inconsistent application and interpretation of the relevant planning policies across Northern Ireland. It concluded that the operation of the planning system for rural housing "is at best inconsistent and at worst fundamentally broken", recommending that the Department ensure that policy was agreed and implemented equally and consistently."

[19] At para [41] the judge expressly said that these findings and conclusions by public bodies "chime with the view" he himself provided in a previous decision of *Glassdrumman* where he said:

> "… in this and a range of other cases … I consider that one can discern a somewhat relaxed and generous approach to the grant of planning permissions under the infill exception in Policy CTY8 which may be thought to have lost sight of the fundamental nature of that policy as a restrictive policy with a limited exception. In the words of the Department's Planning Advice Note of April 2021, there is a case that decisions have been taken which "are not in keeping with the original intention of the policy' which will then 'undermine the wider policy aims and objectives in respect of sustainable development in the countryside.'"

[20] Finally, at para [42] the judge records that no suggestion of fraud was made by the appellant. However, the judge records the very clear proposition put forward

by the appellant in terms of a concern that some councils were being lax about the requirements of Policy CTY8 and were granting planning permission, purporting to do so in the exercise of planning judgment, where it was plainly inappropriate to do so. The judge knew that the appellant counted this case as one of those because the judge records his position; thus:

> "As a result, he urged the court to put down a marker that, where a council unlawfully granted planning permission in this way, that permission would be quashed on a successful application for judicial review."

[21] At para [43] the judge also records the notice party's fourfold submission as follows:

> "[43] Mr McDonald opposes the grant of a quashing order essentially on four grounds. First, he contends that, since relief in judicial review is discretionary, the primary relief Mr Duff seeks should be refused to him because he is an undeserving applicant. This is a variation on a 'clean hands' argument, namely that an applicant seeking public law relief should not themselves have shown disregard for the law (in this case, planning law). Second, he contends that a quashing order should be refused in the exercise of the court's discretion because of the prejudice this will now cause to him. Third, and relatedly, he contends that it would be unfair for his planning permission to be quashed in light of the Council's role in all of this. Fourth, he maintains that, notwithstanding the Court of Appeal's ruling on standing, Mr Duff should nonetheless be viewed as a "busybody" and should not be considered to enjoy standing."

[22] Continuing, the judge commented at para [49] that the absence of a direct personal interest is not a determinative factor on its own, particularly given the wide access to the courts which is generally required in the field of environmental law. We agree.

[23] Then the judge referred at paras [50]-[51] to three factors which led him to refuse the primary relief sought namely certiorari. First, he found that there has been a complete failure on the part of the appellant to participate in the planning process which led to the decision which he now seeks to challenge. Second, he found in favour of the notice party's submission that the environmental harm at stake in this case was modest, given the limited nature of the development proposal and in addition that Mr Duff had a lead case challenging policy which militated against bringing myriad applications on the same point. Third he found that the

balance fell in favour of the planning applicant who had the benefit of planning permission.

[24] The judge then referred to the discretion he retained to refuse relief. *Walton v Scottish Ministers* [2012] UKSC 44, is correctly cited in this regard, para [95] which states:

> "95. At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy."

[25] In addition, Lord Carnwath's concurring judgment at para [103] reiterates the fact that a reviewing court needs to maintain an overall balance between public and private law interests. In this case the balancing exercise needs to be conducted in the context of the case as a whole. We have set out the factors that are in play from the judgment at first instance above.

[26] Of course a striking feature of this case is that there was a clear concession of illegality on the part of the Council in relation to the impugned decision. The judge records this in his order of 25 March 2024 in two parts:

(a) The respondent erred as to a material fact, misinterpreted planning policy and/or reached a view that was irrational in concluding that there was a substantial and continuously built-up frontage in which the application site (which was the subject of the application for planning permission giving rise to the permission impugned in these proceedings) formed a gap site; and

(b) The respondent reached an irrational conclusion in determining that the presence of the laneway at the location ensued that "ribboning does not take place."

[27] The judge's ultimate conclusion is found as follows at para [57]:

> "Taking all of the above into account, I have concluded that a quashing order should be refused in this case on the basis of standing, taking into consideration the prejudice that would be caused to Mr McDonald if a quashing order was granted and Mr Duff's lack of direct interest in the proposal for which permission has been granted and non-participation in the planning process. Mr Duff had standing to bring the proceedings (as the Court of Appeal held) on the highly fact specific basis that the Council had invited him to do so. He has succeeded in establishing illegality on the respondent's part, which will be reflected

> in a declaration. However, as the Court of Appeal explained, his standing to bring this case – notwithstanding his non-participation in the original planning process and the fact that he has no direct interest in the proposal – was exceptional. In my view, it is not sufficient to entitle him to the primary relief which he seeks in all of the circumstances of this case."

[28] The appellant's appeal which is found at para [10] of his helpful speaking note is as follows:

> "The weighing exercise carried out by the court was therefore flawed because on one side of the balance was the prejudice to the notice party of quashing a decision notice which was unlawfully made both procedurally and on merit. On the other side of the balance there was not simply my weak standing to be granted relief through lack of personal interest; but other factors that the court did not sufficiently weigh or at all and these were:
>
> (a) My strong standing bestowed on me by the respondent inviting me to quash the impugned decision;
>
> (b) The administrative interests which require the quashing of an unlawful decision;
>
> (c) The administrative need identified by the NIAO and PAC to bring back good order to planning officer overturns in relation to single houses in the countryside by planning committees.
>
> (d) The need to address the procedural flaws of the respondent's standard practice and its standing orders.
>
> (e) The failure to weigh the cumulative impact on the environment of another unsustainable housing development in the countryside; and
>
> (f) The impact on rural character, the lack of integration and the unacceptable addition to ribbon development which would take place."

[29] We extract three key points from the above all of which have merit. The first is that the Council <u>invited</u> the appellant to proceed and obtain a quashing order at

every stage of this litigation. The second point is that it would offend public law and administrative interests if the quashing relief were not granted. The third point is that it would set a dangerous precedent in relation to rural development of single storey dwellings in the countryside if the admitted illegality were overlooked and not effectively addressed.

[30] The appellant also made the case that the costs should follow the event if a quashing order is made. Whilst there was some indication that he would not seek costs in an early stage after the Court of Appeal decision in his favour, the Order 53 statement was amended in that regard. The appellant has also applied for an extension of time although no issue was taken with this as it was accepted that the appellant was awaiting the costs decision before deciding whether to appeal the substantive decision and there was a delay in orders being issued.

Conclusion

[31] An appellate court is slow to interfere with a lower court's exercise of discretion. However, on proper consideration of the particular factual matrix of this case discussed herein the judge's exercise of discretion was wrong for the following core reasons:

(a) Whilst rightly identifying competing private and public interests, the judge failed to pay any real regard to the fact that the Council invited Mr Duff to apply to have the decision quashed.

(b) The judge failed to properly consider the significant impact on good administration and proper application of the planning policies on rural development which would ensue if a planning decision, which was clearly unlawful, should nonetheless be allowed to proceed as a permissible windfall. This would set a dangerous precedent.

(c) Also, the judge erroneously found that Mr Duff's lack of direct interest and non-participation in the planning process was a factor of any weight given our previous decision on standing which was based on the exceptional circumstances that the Council have asked him to quash the decision.

(d) Furthermore, the judge's conclusion is inconsistent with his analysis of systemic issues highlighted by previous judicial review cases and NIAO and PAC as regards rural development and the "cautionary words" he provided at the end of his judgment.

[32] This case exposes many issues in relation to rural development not least the danger if elected representatives proceed against the recommendations of experienced planning officials and planning officer's reports without good reason. The suggestion that a policy for a single house development in the countryside is considered in a more relaxed way, which was the judge's observation is a cause of

great concern to us. This judgment should reiterate the point that planning policy exists to protect the rural environment and should not be underestimated or considered in any relaxed way.

[33] We have previously said that the litigation conduct of the Council was poor in this case. The approach taken on appeal is further evidence of how this case was misjudged and protracted with consequent costs in what was a very simple matter. From the word go, the Council specifically stated that the decision should be quashed. If it had applied itself for this relief the decision would have been quashed at a much earlier stage. However, having invited the appellant to bring the application, the Council should not have remained neutral or tried to hedge its bets.

[34] It also appears to us that the notice party was not properly kept in the loop by the Council, as it was the appellant who put him on notice of this application. We have sympathy for the notice party but cannot condone an unlawful planning windfall in the circumstances of this case which we have already described as exceptional.

[35] In so far as it is necessary, the application for an extension of time to appeal is granted. The appeal is allowed on both grounds. We will quash the planning permission. We grant costs to the appellant based on the agreed protective costs order of £5,000 plus VAT. We will hear from the parties as whether the notice party should recover any costs against the Council in these proceedings.