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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY
BALLYCLARE DEVELOPMENTS LIMITED

AND IN THE MATTER OF A DECISION BY NORTHERN IRELAND WATER LIMITED

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Mr S Shaw KC with Mr Brown (instructed by MacCorkell Legal & Commercial Ltd, Solicitors) for the Applicant
Mr McGleenan KC with Mr Fletcher (instructed by Tughans LLP, Solicitors) for the Proposed Respondent

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McBRIDE J

Introduction

[1] The applicant, Ballyclare Developments Ltd applied for leave to judicially review a decision by Northern Ireland Water Limited ("NIW") not to execute an agreement ("Article 161 Agreement No. 2") pursuant to the provisions of Article 161 of the Water and Sewerage Services (Northern Ireland) Order 2006 ("the 2006 Order") - ("the impugned decision").

[2] The applicant was represented by Mr Shaw KC and Mr Brown of counsel. The NIW, the proposed respondent, was represented by Mr McGleenan KC and Mr Fletcher of counsel. I am grateful to all counsel for their considered and focused skeleton arguments and concise oral submissions.

Background

[3] As appears from the grounding affidavit of Eamonn Burns, Construction Director of Neptune Group Ltd, sworn on 22 June 2023, Ballyclare Development Ltd is a subsidiary of Neptune Group Ltd and is engaged in property development,

specifically development of lands at Ballyclare, which are the subject of this application.

[4] NIW is a non-departmental public body, sponsored by the Department for Infrastructure, and is responsible for the supply of water and the provision and maintenance of public sewers.

[5] Article 161 of the 2006 Order provides that NIW may enter into an agreement with any person constructing or proposing to construct a sewer or drain, to adopt that sewer or drain at a future date.

[6] When a person wishes to construct a drain or sewer with the intention that it will ultimately link into the public sewer system that person normally approaches NIW and agrees design and construction specifications. Thereafter that person, usually a developer, applies to NIW for an Article 161 Agreement. NIW issues an Article 161 Agreement setting out the terms under which NIW will, upon completion of the work, at some specified date or on the happening of some future event, declare that the sewerage infrastructure is vested. Under Article 161 NIW has a wide discretion in respect of the terms it may impose in the Article 161 agreement and, in particular, may require adjoining landowners to be made parties to the agreement.

[7] If the applicant is agreeable to the terms set out in the Article 161 Agreement and can provide the necessary security the applicant signs and returns the Article 161 Agreement to NIW for execution. Thereafter, when, all the conditions set out in the Article 161 Agreement are met, NIW will adopt the sewer or drain in question and will issue the final Certificate of Adoption (Vesting Declaration).

[8] After agreeing design specifications with NIW, the applicant built the sewerage infrastructure under a new road running from Rashee Road to the north of Ballyclare to the Doagh Road to the south, in order to service the proposed new housing development it was constructing at Ballyclare. The intention of the applicant was that this sewerage infrastructure would connect with the public sewers situated to the south of the development which are maintained by NIW.

[9] The sewerage infrastructure built by the applicant was divided into three sections referred to as Phase 1, Phase 2 and Ramore. Phase 2 is situated to the north side, Ramore is situated on the south side and Phase 1 is situated between Phase 2 and Ramore.

[10] Originally all the lands within which the sewerage infrastructure was built were owned by Ballyclare Developments Ltd. In October 2003 it sold the section on the south side known as "Ramore" to Ramore Investment Ltd.

[11] The gradient of the land is such that water flows from north to south and, therefore, the Ramore lands are "downstream" from the Phase 1 and Phase 2 lands.

[12] On 25 May 2022, NIW and the applicant entered into an Article 161 Agreement in respect of Phase 1 sewerage infrastructure.

[13] Subsequently, the applicant applied for an Article 161 Agreement in respect of Phase 2. On 17 August 2022, NIW issued an Article 161 Agreement (No.2) to the applicant. The applicant signed the agreement on 1 February 2023 and returned it to NIW on 10 February 2023 for execution.

[14] On 19 December 2022, by email, NIW's solicitors advised the applicant's solicitors as follows:

> "1. Northern Ireland Water Limited ("NIW") are not in a position to enter into the Article 161 Agreements in question with Neptune because Ramore/Lotus have failed to enter into Article 161 Agreements in respect of their "downstream" portion. Therefore, there is no guarantee that the sewers covered by the proposed Article 161 Agreements with Neptune will ever be able to connect to the public sewer network.
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> 2. All upstream agreements (including the Article 161 Agreements in question with Neptune) must also be signed by Ramore/Lotus as third party landowners (as they "own" the receiving infrastructure including pump and station). …"

[15] On 22 December 2022, the applicant's solicitors emailed NIW's inhouse solicitor seeking written confirmation that NIW would proceed to execute the Article 161 Agreements issued or in the alternative would provide a written response with specific reference to the statutory basis for not doing so.

[16] NIW's solicitor did not reply to the email dated 22 December 2022 but following this email correspondence various conversations took place between the parties.

[17] On 29 March 2023 the applicant's solicitors emailed NIW's inhouse solicitors stating as follows:

> "We have not had a substantive reply to (our email dated 22 December 2022) … albeit we agree that there have been constructive discussions … The 161 documents have not yet been returned executed by NIW. It had been verbally indicated that these were being held pending discussions … however, this has never been stated in writing …

> Accordingly, … we request return of the fully executed Article 161 Agreement provided to NIW by our clients on 10 February 2023, or a confirmation of the imminent provision of same, or a specific refusal to provide same with an explanation in the terms sought in our email … dated 22 December 2022."

[18] Tughans LLP, Solicitors, acting on behalf of NIW responded by email dated 20 April 2023 by inviting a new Article 161 Application which was to be accompanied by proposals to address the downstream section owned by Ramore as this was not currently adopted to the satisfaction of NIW.

[19] On 5 May 2023, the applicant issued its pre-action protocol letter and proceedings were issued on 23 June 2023.

The application

[20] The applicant contended that the impugned decision was unlawful on the basis that it breached a substantive legitimate expectation and was irrational. The applicant contended that it had a substantive legitimate expectation that NIW would execute the Article 161 Agreement (No.2) engendered by the fact the design/specification of the infrastructure was agreed with NIW; the Article 161 Agreement No. 1 was executed and Agreement No. 2 was drafted and issued by NIW in circumstances where there was no material change in the facts or circumstances and where there was no requirement in the Article 161 Agreement (No.2) issued by NIW for "downstream" landowners to sign. The applicant submitted that it relied on the legitimate expectation to its detriment by expending time and effort in entering into third party contracts and had otherwise incurred significant costs. Therefore, in the absence of an overriding interest to justify departure, the applicant submitted that NIW's action constituted an abuse of power.

[21] Secondly, the applicant contended that the decision was irrational for the same reasons and was contrary to good administration and established industry practice. The applicant submitted that the threshold for leave had been met and that the court should therefore grant leave.

[22] The applicant seeks in its Order 53 statement (of the Rules of the Court of Judicature (NI) 1980, "the 1980 Rules"), inter alia, an order of certiorari quashing the decision together with various declarations as to the unlawfulness of the decision and an order of mandamus that the proposed respondent execute the Article 161 Agreement (No.2).

[23] The proposed respondent, NIW, has refused to enter into the Article 161 Agreement (No.2) unless and until there is a corresponding Article 161 Agreement with Ramore Investments Limited ("Ramore"), the owners of the downstream lands. The downstream lands intervene between the lands owned by the applicant and the

public sewers. NIW submit that in the exercise of its discretion it is entitled to seek continuity between the applicant's sewerage infrastructure and that of Ramore to ensure that the standard of the entire sewerage infrastructure flowing into the public sewers are of an adequate standard thereby ensuring NIW is not left needing to expend funds upgrading the sewers in the Ramore section.

[24] NIW submit that leave should be declined on the following grounds:

(a) The application for judicial review is out of time and no extension of time should be granted.

(b) The applicant enjoys two alternative remedies. Firstly, the statutory right of appeal pursuant to Article 162 of the 2006 Order and, secondly, a private law right against Ramore to compel it to enter into an Article 161 Agreement with NIW based on a contractual arrangement.

(c) The grounds of challenge have no realistic prospect of success.

Consideration

Has there been delay?

[25] Order 53, rule 4 of the Rules of the Court of Judicature (Northern Ireland) Order 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[26] NIW submitted that the grounds for the application first arose when NIW's inhouse solicitor advised the applicant's solicitor by email dated 19 December 2022 that NIW was not in a position to execute the Article 161 Agreement (No.2). As the proceedings were not issued until 23 June 2023 the proposed respondent submits that the applicant is out of time and further submits that there is no basis for the court to exercise its discretion under Order 53 rule 4 of the 1980 Rules as there is no application to extend time.

[27] In contrast, the applicant submits that the email dated 19 December 2022 referred to Article 161 Agreements in plural and it understood, that this correspondence related to other Article 161 Agreements relating to internal drains rather than the Article 161 Agreement (No. 2). Accordingly, through its solicitors it sought clarification from NIW. This clarification was not provided until 20 April 2023 when NIW's solicitors made it clear a new application was required which

included a proposal to deal with the downstream owner. Accordingly, time runs from this date and, therefore the application is not out of time.

[28] On the basis of the evidence available to the court, at this stage, I consider that there is a lack of clarity about the date when the grounds for the application first arose. The email dated 19 December 2022 was in response to the applicant's solicitor's email dated 15 December 2022. Both these emails refer to Article 161 Agreements in plural and, therefore, I consider, in the absence of further evidence, there is some ambiguity about whether the decision by NIW not to issue Article 161 Agreements in plural related to the Article 161 Agreement (No.2) or whether it related to other Article 161 Agreements which related to internal drains and sewers.

[29] Secondly, it appears from the applicant's correspondence dated 29 March 2023, that it believed NIW had not executed the Article 161 Agreement (No.2) at that stage because that agreement was being "held" pending discussions between the parties. In circumstances where the decision relates to a failure to do an act (in this case execute an agreement) and there is no deadline date for the carrying out of that act and where it is contended that the agreement was being "held" pending those discussions, I consider that I am not able to determine the date on which the decision was made by NIW without further evidence from the parties in respect of these factual matters.

[30] Accordingly, I would not refuse leave based on delay but would rather allow the matter to proceed to trial on the basis that delay be further considered at the full hearing, after receipt of further evidence from the parties in respect of this issue.

Has the applicant an alternative remedy?

[31] It is well-established that judicial review is a remedy of last resort and, therefore, leave will be refused where other means of redress are "conveniently and effectively available" – see *R(ex parte Watch Tower Bible) v Charity Commission* [2016] EWCA Civ 154. In that case Lord Dyson MR also stated that:

> "This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and action taken to refer the matter to a specialist tribunal."

[32] Article 162 of the 2006 Order enacts such a statutory appeal mechanism. It provides as follows:

> "(2) A person who has entered into or wants to enter into an agreement under Article 161 may appeal to the Authority about any matter concerning the agreement (including whether it is concluded, its terms and its operation).

…

(4) On the hearing of an appeal under this Article, the Authority may—

…

(b) in the case of an appeal under paragraph (2)—

(i) uphold the refusal of the undertaker to grant the application or to modify the terms offered; or

(ii) on behalf of the undertaker, refuse the application or enter into any agreement into which the undertaker might have entered on the application;

and any declaration made under sub-paragraph (a) shall have the same effect as if it had been made by the undertaker in question …

…

(6) Where the Authority makes an agreement under paragraph (4)(b) on behalf of a sewerage undertaker, it may do so on such terms as it considers reasonable or, as the case may be, on the terms offered by the undertaker subject to such modifications as the Authority considers appropriate for ensuring that the terms of the agreement are reasonable.

(7) The Authority, in deciding on an appeal under this Article whether any declaration or agreement should be made, shall have regard to all the circumstances of the case and, in particular, to the considerations specified in Article 159(5); and for the purposes of this paragraph, in its application in relation to an appeal under paragraph (2), sub-paragraphs (a) to (e) of Article 159(5) shall have effect with the necessary modifications."

Article 159(5) provides:

"(5) A sewerage undertaker, in deciding whether a declaration should be made under this Article, shall have regard to all the circumstances of the case and, in particular, to the following considerations, that is to say—

(a) whether the sewer or works in question is or are adapted to, or required for, any general system of sewerage or sewage disposal which the undertaker has provided, or proposes to provide, for the whole or any part of its area;

(b) whether the sewer is constructed under a road or under land reserved by a planning scheme for a street;

(c) the number of buildings which the sewer is intended to serve …

(d) the method of construction and state of repair of the sewer…; and

(e) in a case where an owner objects, whether the making of the proposed declaration would be seriously detrimental to him."

[33] The Authority is the Northern Ireland Authority for Utility Regulation (the "UR"). This is a specialist regulatory body tasked with overseeing the utility providers in Northern Ireland including NIW.

[34] I am satisfied that the statutory appeal mechanism set out under the statute provides a convenient and effective remedy to the applicant for a number of reasons.

[35] Firstly, Parliament has enacted the statutory appeal route to enable the applicant to appeal to the UR who has specialist knowledge and expertise relating to the water utility industry.

[36] Secondly, the appeal mechanism is framed in the widest possible terms. There is no time limit in respect of appeals. Its remit extends to "any matter concerning the agreement including whether it has concluded, it terms and its operations." The remedies available to the UR are much wider than those available to the court in a judicial review as the UR has power to enter into an Article 161 Agreement on behalf of NIW (see Article 4(b)(ii)). In deciding whether any declaration or agreement should be made, the UR "shall have regard to all circumstances of the case" and, in particular, shall consider the matters specified in Article 159(5). Accordingly, it has wider jurisdiction than a court in a judicial review which cannot look at merits but is limited to considering procedural defects or errors of law. Further, the UR can deal with the matter more expeditiously than judicial review proceedings as the UR seeks to issue a final determination within two months of the application. Even if the court were to quash NIW's decision it is not conceivable that judicial review proceedings and a fresh decision could be made within a two month time-frame.

[37] Mr Brown submitted that the Article 162 appeal mechanism was deficient in comparison to judicial review as Article 162 of the 2006 Order only permitted an appeal to the regulator about "any matter concerning the agreement" and he submitted the regulator could not, therefore, consider the manner in which NIW exercised its powers and, in particular, could not consider whether there was a breach of a legitimate expectation or perversity in its decision making. He further submitted that the fact the Article 162 appeal mechanism did not contain an express provision stating the regulator could consider whether the decision was wrong in law (which some other statutory schemes specifically provided for) meant it was not an effective remedy.

[38] Mr Brown further submitted that the existence of the specialist statutory scheme did not oust the court's jurisdiction to set down general principles of administrative legality which is a central feature of the maintenance of government according to law, in appropriate cases. He submitted that considering the issues raised in this case, the court should exercise its jurisdiction to review the administrative legality of NIW's actions given the effect NIW's policy would have upon the broader public interest and, in particular, the destabilising effect it would have on the whole development industry.

[39] I do not accept the submission that the Article 162 appeal route is in any way deficient in comparison to an application for judicial review.

[40] Firstly, I consider the expressed powers of the UR enable it to address all the issues raised by the applicant. The applicant's case is that NIW breached a substantive legitimate expectation, and further its decision was perverse.

[41] In *R(Bibi) v Newham LBC* [2002] 1 WLR 237 at para [19] the court held:

> "[19] In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself? The second is whether the authority has acted or proposes to act unlawfully in relation to its commitment? The third is what the court should do? …
>
> [20] The answer to the first is a question of analysing the evidence – it poses no jurisprudential problems."

I consider that the third question concerns remedy and the second question concerns the lawfulness of the decision.

[42] I consider the UR is uniquely placed to deal with question one set out in *Bibi* as the UR can determine the factual issues before it and can, if necessary, hear

evidence from witnesses. It is therefore better placed than the court to determine whether there has been breach of a legitimate expectation and can more widely consider the merits of the case and determine if there has been perversity in the decision making.

[43] Secondly, the UR can provide a remedy as it has power to grant an Article 161 Agreement on behalf of NIW. This is effectively the remedy which the applicant seeks as appears from the Order 53 statement wherein the applicant seeks an order of mandamus. Such a remedy is rarely granted by the court upon judicial review as the court is reticent in granting this as it is not fully cited on all the issues including collateral impacts. Accordingly, the threshold for the grant of mandamus is rarely passed by an applicant. In the contrast the UR has power under the statutory scheme to grant in effect such a remedy and therefore is better placed than the court to grant a remedy if it finds that there is breach of a substantive legitimate expectation.

[44] Thirdly, although Article 162 of the 2006 Order does not expressly state that the UR can consider whether the decision is wrong in law, I do not consider this prevents the UR considering the processes adopted by NIW. Under the UR can take into account all the circumstances of the case. Further, as a public body itself, the UR's decision on an appeal under Article 162 would be judicially reviewable. Accordingly, I consider the UR can consider the lawfulness of NIW's decision. I am therefore satisfied that the UR can deal with all three questions posed in *Bibi* in respect of a legitimate expectation challenge. Further, as it can consider merits it is in a position to determine whether the decision is irrational or not.

[45] Finally, I do not consider that this is a case where the court should, notwithstanding the availability of the specialist statutory appeal mechanism, exercise its jurisdiction to review the administrative legality of NIW's actions. This is not a case involving statutory interpretation or human rights. The arguments are based on legitimate expectation and irrationality. These are not hard-edged questions of law, but rather relate to fairness and perversity. I consider the UR, given its specialist knowledge and wide statutory powers on appeal, is better placed to decide these questions in the wider context of the industry than a court in a judicial review.

[46] Accordingly, I consider that there is a suitable alternative remedy open to the applicant. In light of my view that there is a suitable alternative it is unnecessary to consider whether the applicant also has in addition a private law remedy open to it.

[47] It is also unnecessary and, in circumstances where the UR will consider merits, inappropriate for this court to determine whether the challenge passes the merits test at this leave stage.

[48] Accordingly, I refuse leave on the basis that there is a suitable alternative remedy open to the applicant.

[49] I will hear submissions from the parties in respect of costs.