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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 JAMES ALLISTER AND ROBERT AGNEW FOR JUDICIAL REVIEW

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McCLOSKEY J

[1] It is trite to observe at what is required of the court at this stage is a balancing exercise. The court is obliged to take into account a series of factors which are enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature 1980 ("the Rules"). This provision begins with the rather vague and opaque statement that: *"The overriding objective is to enable the court to deal with cases justly."*

[2] However, the rule goes on: *"Dealing with a case justly includes"* - so it is inclusive, it is not exhaustive - "… so far as is practicable", and all of the list that follows resonates in these proceedings, "… *ensuring the parties are on an equal footing, saving expense; dealing with the case in a way that is proportionate; having regard to, inter alia, the importance of the case and the complexity of the issues; ensuring that the case is dealt with expeditiously and fairly; allotting to the case an appropriate share of the court's resources, by taking into account the need to allot resources to other cases."*

[3] I am enjoined by what follows, namely paragraph 3 of the rule, to seek to give effect to what is called the overriding objective, with all of those ingredients and such further ingredients as the court may identify in any given litigation context. I have drawn attention to this at a previous stage of these proceedings and it is timely and appropriate to do so once again at the stage which the proceedings have now reached.

[4] I have, for the purposes of today's listing, reminded myself of what the court has pro-actively and expeditiously done in the history of these proceedings. First of all, within two working days of the application for leave to apply for a judicial review being filed, I drew up a comprehensive initial order, dated 11 June 2018. I am reminding myself as much as everyone else of what I said then, in that order about the timetabling:

> *"The substantive hearing will be conducted during the early stages of the - I leave aside the legalese - the forthcoming term. To this end the parties' representatives are hereby advised that for an inevitably limited period, they have, at this stage, for a two day hearing, a choice of 24 and 25 September and 3 and 4 October*."

The Order further cautioned that I would not be able to hold those dates provisionally available beyond 15 June and certain ancillary directions were duly made.

[5] By the court's second order, issued on 27 June, I granted leave to apply for judicial review and I affirmed the following: *"The matter shall be listed for hearing on two days, namely 8 and 9 October 2018."* Those two dates were finalised after I had considered representations from the parties. In addition, from the earliest stage of these proceedings, as this brief review has reminded me, the issue of the formulation of the Applicants' case has been a live one and that has been one of the recurring themes ever since. The listing on 27 June 2018 was the first of what ultimately became 22 listings in this court, spanning a period of one year.

[6] The next order which was drawn up was that of 8 October 2018, when I was required, in specified circumstances, to promulgate that the hearing dates which were to be 8 and 9 October were vacated for the reasons which materialised unexpectedly at that stage. I drew up a further timetable in the same order. Allied to the terms of that order was a further direction which made provision for the hearing dates, which at that stage had to be deferred to November 2018. Five days of substantive hearing then ensued. Those who have access to the ruling which I made on 10 December 2018 will be aware of the various unexpected events which then materialised. I described that in this detailed *ex tempore* ruling as an unexpected event which took the form of an affidavit sworn by one of the Respondent's Councillors, Mr Padraig McShane, which was sent by a solicitor then representing him to the office of the Attorney General on 7 December 2018 - the fifth substantive day of hearing, from recollection.

[7] We reconvened on 10 December 2018 for the purpose of continuing and completing the hearing and, for the reasons set out in my ruling, that was not possible. At that stage, I drew attention to the duties which were imposed upon the court by the various provisions of the Rules , quite separate from and independent of the overriding objective and my inherent jurisdiction, stating:

> "*The combined effect of these provisions requires the court to ensure that formal notice of these proceedings is given to certain non-parties ... [*inexhaustively*] ... Mr David Jackson, Mr Hunter, Mr Baker" [*and pointing out that there could be others and observing*] These persons plainly having sufficient interest in these proceedings to be given notice."*

[8] I stated with reluctance that it would not be appropriate to continue with the presentation of the Applicants' case at this juncture, that time was needed for absorption and reaction on all sides and further, the court must now pro-actively take certain steps. The most important of those steps were the directions which the court then made to ensure that the newly identified interested parties were given all of the due process rights which devolved on them.

[9] I observed further:

> *"There are several imponderables arising out of this highly unexpected development ... including, inter alia, the involvement of other agencies who have their own statutory functions and responsibilities, Public Services Ombudsman, the Local Government Standards Ombudsman and so forth, [*inexhaustively*]."*

I posed the following rhetorical question:

> *"What does all of this mean for the future conduct of the judicial review proceedings? The answer is, the court is unable to make any confident prediction at this stage. However, flexibility and imagination may well be required, with a view to providing the maximum certainty to those who have a direct interest in the judicial review challenge and I then listed the applicants, respondent counsel and the interested party, CV Developments. The court was to consider mechanisms for providing the maximum and swiftest certainty to these four judicial review protagonists at the earliest possible date and I invited the parties' proposals to do that. Absent a crystal ball, it is not feasible to say anything further at this stage."*

[10] I have reflected also on the succession of case management direction orders which followed - on 10 December, 14 December, 20 December and multiple other dates. Pausing, any external observer might be forgiven for thinking that this court was involving itself in no other case but this at that stage: and that is not very far from the truth. This case was dominating this court's agenda and, I wish to add to that, it then had another phase of equal dominance, about three months later, when my strenuous efforts to resume the hearing and complete the hearing were thwarted by a series of events outwith the court's control. These surrounded, in particular but not exclusively, Councillor McShane as the order of the court, dated 15 February 2019, that is order No. 9, made clear and further orders have followed.

[11] The court said more than once that the resumed hearing dates of this case, for this week, were set in stone. While this message had a greater impact in some quarters than others, it has been achieved, following much judicial travail and struggle with one qualification [** below]. I have energetically endeavoured to bring

the case to finality by today, the fourth of these allocated further hearing dates and once again, this case has absolutely dominated this court's agenda, which involves more than 200 other cases in the system at present.

[12] **The foregoing rather lengthy preamble, brings me to the here and now. The submissions of Mr Lockhart QC on behalf of Mr Tweedie's firm, as I will call that interested party now, very quickly, for me, threw into sharp relief the position into which this new cohort of interested parties finds themselves thrust in these proceedings. It is fair to say that the proceedings lacked shape and direction during the phase which was initiated by the unexpected developments in the middle of December 2018. The reason for that is an entirely prosaic one: as the orders of the court stated repeatedly, there was simply no way of predicting what that entirely unexpected development would generate. The only clear and coherent course which the court could pursue was to take appropriate steps to ensure that the due process rights of the newly involved interested parties were fully observed and, secondly, to allow everyone to assemble substantial quantities of further evidence.

[13] All of that was undertaken without any adjudication by the court of the relevance of the evidence or how it fitted into the grounds of challenge. The court has drawn attention to the grounds of challenge umpteen times, as these proceedings have progressed. We are left with a case which has experienced growth which may variously be described as organic, totally unexpected, unpredicted and exponential. One might understandably lose sight of the fact that there are but three litigation protagonists, the two Applicants and the Respondent Council.

[14] Having considered the written submission and the oral submission concerning Mr Tweedie, it became crystal clear to the court that a formulation of the essential particulars of the case which the Applicants are making against the interested parties was an absolute necessity. That gave rise to the oral order which I pronounced yesterday and which stimulated a letter in response from the Applicants' solicitors. That, in turn, gave rise to an immediate written response on the part of the court. Once again, I wish to emphasise to everyone in the courtroom the priority accorded to and the endless efforts which the court has invested in these proceedings at every stage. Counsel will no doubt have alerted their clients to receiving directions and emails from the court at ungodly hours, at various stages of these proceedings: 11 pm, midnight, 1 am – a frequent occurrence.

[15] In this context it is appropriate to reiterate what I wrote, therefore, in formal terms at 8 o'clock yesterday evening:

> *"I have noted today's letter from the applicants' solicitors. There is an evident misconception. I wish to be absolutely clear: supporting evidence, cross-references, analysis, submissions and page references and so forth are not required, emphatically so. I have simply requested what I called "the bottom line", to be formulated in basic but sufficient terms".*

And I then provided what I considered might be a helpful illustration.

[16] Thus compliance with the order that I made yesterday, which I reiterate this morning could, for example, take the form of the following and I quote from what was written*:*

> *"As regards AB (for example, Mr Tweedie) the Applicants contend that the court should make the following findings: (i) he did X; (ii) he did Y; (iii) he, together with XY… engaged in specified and particularised behaviour"... (iv) Mr Tweedie failed or omitted to .....*
>
> *I cannot emphasise sufficiently how simple and basic, but clear and coherent, the written formulation which the court is requiring of the Applicants' legal representatives is to be. It will not take the form of a submission, an analysis, references to evidence, cross-references, references to submissions, oral or written - none of that will be contained. It will take the basic form which I have indicated. It will be something akin to a straightforward indictment, something of that nature. Nothing further - absolute basic but clear and coherent particulars of the findings which the Applicants invite the court to make, in respect of each member of this cohort of interested parties. In the case of Mr Tweedie's firm, there are two individuals and as regards the remainder, there are three individuals."*

[18] I observed further in the written communication that it would have been essential, in counsels' closing, to address this topic from this concrete perspective in any event. There can scarcely be any surprise. Although I could have approached this matter in a number of ways, it seemed to me that the clearest and fairest mechanism was that of what findings are the Applicants inviting the court to make, in respect of each of the five persons concerned. I wish to reiterate, as I did in the draft order of yesterday evening, what are the drivers of this exercise namely (i) the overriding objective, the court's powers, the inherent jurisdiction; and (ii) elementary fairness to the persons concerned.

[19] I said the following and I repeat*:*

> *"Their positions, plight, exposure and due process rights and so forth have been thrown into sharp relief only at this stage. None of them is on notice in any considered, coherent or orthodox way of the case against each."*

The combined experience of the lawyers and the judge in this courtroom is probably 400 years plus. If we extract from that one simple, but vital, principle which we have all learned it is the right to know the case against oneself and the corresponding

right to respond to it. Neither of those rights has been fully vindicated on behalf of each of these interested parties at this stage. No-one belonging to this cohort is on notice in any considered, coherent or orthodox way of the case against each. I then identified the third driver in these terms:

> *"The acute difference between assembling a mass of evidence on the one hand and making a focused, resulting case against the persons concerned on the other ... [including] ... the sharp distinction between the litigation axis… involving the Applicants and the Respondent on the one hand … and the litigation axis involving the Applicants and these interested parties on the other. They are very different indeed."*

[20] Finally, I draw attention to the judicial review ethos and procedure. First, this is a court of supervisory superintendence. Second, it has long been recognised that the judicial review court is normally ill-suited to the exercise of fact finding. Third, linked to this, in the vast majority of judicial review cases the facts are not in dispute. Fourth, there has been no cross-examination of any of the multiple deponents who have sworn a near record number of affidavits in this case. Fifth, as highlighted in the judgment which I gave in the Court of Appeal last week, in the case of *JG v UTIAC*, the distinctive character of judicial review proceedings does not exclude the basic rules of evidence. Thus there is an onus on every judicial review litigant to make good its case, according to the civil standard of the balance of probabilities. This, sixthly, engages a further principle, namely that the more serious or improbable the allegation, the more cogent and compelling will the necessary supporting evidence have to be. I drew attention very briefly yesterday to some leading authorities on that principle. While I could probably have added further judicial review governing principles to this list it seems to me that these are the most important ones in the present context.

[21] Balancing everything, I come to the very reluctant conclusion that the course which the court should adopt this morning, is to order that the Applicants' legal representatives complete all of the steps which they have been required to take by close of business on Tuesday of next week, that is 18 June. I don't think I need to repeat them. Two, in particular, have emerged during yesterday's and today's proceedings. The first is the exercise which I directed orally yesterday and then expanded in written terms overnight and which I have endeavoured to further explain and illuminate in the course of this *ex tempore* ruling this morning. I hope I can say with confidence that it should be abundantly clear what is required on that front.

[22] The second is the rather important matter as regards the Applicants, what I shall call the "FOI exercise". I explained in court yesterday what the rationale of this new necessary free standing exercise is. It will be necessary in complying with this direction to reflect on the following: first, what Mr Allister was seeking in his FOI requests addressed to the council; second, what those requests yielded; third, what, in retrospect, as of midday on 24 of January 2018 those requests should have yielded.

In complying with this direction, it will be necessary to bear in mind, that Freedom of Information Act rights have to be exercised/invoked: there is no automatic process of granting free access to information, rather the prescribed procedure has to be followed. That is the reason why I draw attention to the terms in which the requests under that legislation were formulated by Mr Allister.

[23] Next to be borne in mind, it in the abstract, seems quite unlikely that the totality of the new documentary materials which Mr Allister has received through the vehicle of these proceedings and, in particular, during what I've called phase two belongs to the realm of what he should have received by midday on 24 January 2018. However, beyond that observation I decline to venture because I do not have the tools at this moment in time, or the resources, to undertake the analysis that is required. But in completing this important exercise on the applicants' side, the legal team will have to be alert to a potentially important distinction between (a) what Mr Allister should, enjoying the statutory rights conferred on and invoked by him, have received by midday on 24 January 2018; and (b) everything else: the latter will not form part of the booklet I have requested. The booklet will comprise only those materials which Mr Allister's legal representatives contend he ought to have received by the time and date which I have emphasised. It will, in the first place, be a contention. That will also have to be provided also by close of business next Tuesday.

[24] That, in turn, will trigger a free standing interaction between the Applicants and the Respondent on this discrete issue. This will require the Respondent to evaluate whether it agrees with the Applicants' contention. If this notional box is ticked 'yes', hallelujah. In the rather more likely event that it isn't, then the Respondent will make its reply and we will have an issue which may require determination by the court. I will have to allow the Respondent two working days for that purpose and, therefore, that will trigger a time limit of close of business on 20 June.

[25] That brings me then to the further steps required to bring the proceedings to completion. The court will have to reconvene one last time. The purpose of the relisting will be for counsel representing all members of this cohort of interested parties to present their clients' case to the court in summary form. That will be undertaken in the context of what I stated in the draft order which I circulated to everyone last night:

> *"Long months of personal and professional anxiety cannot be permitted to continue in this forum."*

I underlined those three words *"in this forum"*, because I have absolutely no control over what might happen in some other forum or some other for a which, as I observed in my ruling of mid-December 2018, could conceivably be engaged as a result of the unexpected developments.

[26] I have determined that the court, in bringing these proceedings to finality, will endeavour, within the acute time and calendar constraints and pressures prevailing, to sever the issue of the case made against the cohort of interested parties and provide them with a judicial determination in writing, with the absolute minimum of delay. Whether this course proves feasible and expeditious remains to be seen.

[27] That brings me then to the party which was, for a very long time in these proceedings, the only properly interested party (as the rules label them) namely the developer, CV Developments. The court has referred to the interests and the position of CV Developments at every turn of these proceedings, beginning with its very first order, issued 12 months ago. The developer has become a victim in its own right, caught up in the litigation crossfire between the Applicants and the Respondent Council. This, regrettably, is a feature of planning and environmental challenges in judicial review proceedings. It is one of the reasons why such cases are routinely given priority in this court. It is another of the reasons why, when I overhauled extensively the Judicial Review Practice Direction in recent months, I devoted a bespoke, free standing new chapter to environmental and planning judicial reviews.

[28] I hope that this court has done all that it can in the unprecedented circumstances of these proceedings to recognise the intense interest which the developer, CV Developments, has in this litigation. The further case management order which I have pronounced this morning is drawn up with much reluctance and with that interest acutely to the forefront of the court's mind.

[29] If any of the representatives considers that the order which I have pronounced orally should contain some further provision, other than the critical one of the next and final listing date, or any revision of the provisions which I have endeavoured to articulate extensively, then I will deal with that. The order will also be completed in the usual way with the provisions of reserving costs and liberty to apply.

[Final Re-listing date of 24/06/19 confirmed subsequently]