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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**26/11/2021**

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 MARTIN TRACEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Monye Anyadike-Danes QC and Mark O'Hara (instructed by Phoenix Law) for the applicant
Tony McGleenan QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the proposed respondent
Stewart Beattie QC (instructed by Cleaver Fulton Rankin) for the proposed notice party

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HUMPHREYS J

Introduction

[1] The proposal to commence gold mining operations in the Sperrin Mountains in County Tyrone has been already been the subject of much controversy. In *Re Greencastle Rouskey Gortin Concerned Community Limited's Application* [2019] NIQB 12 McCloskey J rightly observed:

> *"This judicial review challenge may, foreseeably, ultimately prove to be the first major staging post in a lengthy legal struggle on the part of all opposed to Dalradian's proposed gold mining at Curraghinalt. The evidence shows that a former Minister of the Northern Ireland Executive has promised a public inquiry and, irrespective, all objectors have a statutory right to make representations opposing the proposed development and, in certain eventualities, to bring further legal challenges. On one view, the real battle has just begun in earnest."*

[2] The 'real battle' is still yet to begin as no definitive timetable has yet been laid down for the public inquiry to be conducted by the Planning Appeals Commission

('PAC'). As such, the instant application for leave to apply for judicial review represents another staging post.

Background

[3] In November 2017 the proposed notice party, Dalradian Gold Limited ('Dalradian') submitted an application for planning permission in relation to the proposed development, being the underground mining and exploration of valuable minerals, together with associated infrastructure and surface works. The proposals were revised in September 2019 to remove cyanide from any part of the process. Some 40,000 representations have been made in relation to the application. Given that the application is one for major development of regional significance, the decision maker is the Department for Infrastructure, the proposed respondent.

[4] On 29 June 2020 the Minister for Infrastructure announced that a public inquiry would be held which would consider the evidence and views of all stakeholders and the community and which would *"robustly scrutinise the information provided"*.

[5] The applicant himself has lodged five separate objections to the application for planning permission and has made representations which include the submission of expert evidence.

The Application for Leave

[6] The application for leave to apply for judicial review, as originally constituted, sought to challenge two decisions made by the proposed respondent:

(i) The failure to put in place a mechanism to investigate the risk to the applicant's life, health and family life posed by the Dalradian proposal; and

(ii) The appointment of Golder Associates UK Limited ('Golder') by the Department to review Dalradian's waste management plan.

[7] At the leave hearing, any challenge in respect of (i) was abandoned. Senior Counsel on behalf of the applicant confirmed that her client was satisfied that any human rights issues which may arise could be managed through the public inquiry process.

[8] As such, the application proceeded solely on the issue of whether there was an arguable case established that the appointment of Golder was irrational in the *Wednesbury* sense in light of the alleged conflict of interest which existed between Dalradian and Golder.

Delay

[9] The proposed respondent raised the issue of delay in its first position paper in the leave application. It made the point that Golder was instructed on 12 May 2020 and judicial review proceedings were not initiated until 26 October 2020, some 5 months and 2 weeks after the impugned decision.

[10] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> *"An application for leave to apply for judicial review shall be made within three months of 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"*

[11] Proceedings ought therefore to have been commenced by 12 August 2020 and the delay in question is a period of over 9 weeks.

[12] The leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated at paragraph [21]:

> *"The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantial hardship to, or substantial prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding."*

[13] The Court of Appeal also made it clear in that case:

> *"If there has been delay, the application for leave should include (a) an application to extend time stating the grounds relied on and (b) an affidavit explaining all aspects of the delay."*

[14] Neither such an application nor an affidavit explaining all aspects of the delay were present in the instant case, despite the issue being raised and the legal principles averted to in the proposed respondent's position papers.

[15] Insofar as the applicant's evidence addressed the issue of delay, it was deposed as follows:

(i) The applicant became aware of the instruction of Golder and the alleged conflict of interest when contacted by a newspaper. This was some time shortly before an article appeared in the Irish News on 9 June 2020.

(ii) As a result, the applicant states *"I was immediately concerned and confirmed I would seek legal advice"* and that he instructed his solicitors to initiate pre action correspondence;

(iii) This was sent on 14 June 2020 and a response received on 10 July 2020. This made it clear that any claim of conflict of interest in the instruction of Golder was flatly rejected;

(iv) Further correspondence, focussed on the human rights challenge, followed on 15 July and was responded to on 28 July 2020;

(v) Following this, the applicant instructed his solicitors to commence the formal application for funding to seek leave for judicial review. Confusingly, the affidavit states:

> *"I applied for legal aid and was granted legal aid on 7 September 2020 and I was granted funding on 21 September 2020."*

[16] It will be evident therefore that even if the court considers the applicant's lack of knowledge until just before 9 June to be a good reason for the initial period of delay, there is no explanation given as to the time lapse between 28 July and 7 September, during which the relevant time limit expired.

[17] This court cautioned against the expectation of practitioners that applications for public funding alone would given rise to a 'good reason' under Order 53 rule 4 in *Re Watterson* [2021] NIQB 16.

[18] In *Re Fionda (A Minor)* [2018] NIQB 51, Sir Anthony Hart commented:

> *"When a prospective applicant for judicial review is already well outside the three month period within which Order 53 proceedings are to be brought there is a heavy burden on the applicant's advisers to move as rapidly as possible to institute proceedings… If legal aid is being sought in my opinion an applicant should issue the Order 53 summons and then ask the court not to proceed until the legal aid position is resolved."*

[19] There is no evidence in this case that the application for legal aid was made within the three month time period. There is no basis upon which the court could be satisfied that the *'heavy burden'* alluded to by Sir Anthony Hart has been met. In the circumstances, no good reason has been shown to extend time.

[20] The court always retains a discretion to hear cases where there is some public interest in so doing. Although this planning application and the inquiry are matters of intense public scrutiny, the choice of retained expert on behalf of the Department

to advise on the waste management plan does not give rise to such an issue of public interest.

[21] The application for leave to apply for judicial review is out of time and no good reason having been shown for an extension of time, it is hereby dismissed.

The Merits of the Application

[22] Having heard full argument on the issues, I nonetheless propose to consider the merits of the applicant's leave application.

[23] The applicant asserts variously that there is a conflict of interest in the instruction of Golder and/or that this gives rise to an appearance of bias. Following the publication of Golder's technical review of Dalradian's Waste Management Plan in August 2021, the applicant instructed Mr David Worthington of Pragma Planning to provide an expert report.

[24] Golder was instructed by the Department to review the Waste Management Plan as part of the planning process. It concluded:

> *"Golder considers that the WMP presented to it for review is technically acceptable, able to be presented for consideration to Public Inquiry and fit for purpose to be used as a basis for assessment of the issues to be addressed"*

[25] Mr Worthington states that he was instructed by the solicitors for the applicant *"to examine and assess the planning application to provide an opinion on the link, if any, between Golder's work and Dalradian's planning application which Golder has now been employed to assess"* [para 2.1.1 of his report].

[26] Despite this seemingly limited instruction, Mr Worthington saw fit to opine on the issue of 'apparent bias' which is manifestly a legal question not falling within his professional competence as a planning consultant. There are two principled objections to the applicant adducing such evidence:

(i) It is not a question upon which expert testimony is admissible; and

(ii) The witness is not possessed of the necessary expertise to answer the question.

[27] The evidence of prior dealings between Golder and Dalradian can be summarised as follows:

(i) In 2011 Golder was engaged by Dalradian to provide a 'Tailings Management Facility Site Selection Study';

(ii) In 2012 Golder conducted a series of audits for Dalradian, unrelated to the subject planning application;

(iii) In 2013 Golder provided professional services to Dalradian relating to a waste licence exemption, again in an unrelated matter;

(iv) In 2015 and 2016 Golder carried out testing on tailings for the purpose of the 2017 environmental statement submitted as part of the subject planning application. As a result of the 2019 amendment, additional testing was required which was carried out by parties other than Golder and this was used for the input parameters for the analysis.

[28] In support of his claim that the appointment of Golder could be impeached on the ground of apparent bias, the applicant prays in aid in the cases of *Porter v Magill* [2001] UKHL 67 and *Re Duffy* [2008] UKHL 4. The former is, of course, the leading authority on this question. Its subject matter was the certification by a local government auditor of sums due to Westminster City Council by certain councillors and officers whom had been adjudged guilty of wilful misconduct. In his oft-cited speech, Lord Hope reviewed the authorities on apparent bias and concluded:

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

[29] In *Re Duffy*, the House of Lords considered whether the appointments of two individuals to the Parades Commission could be impugned on the grounds of the appearance of bias. The Commission's role in addressing contentious parades involves both the mediation of disputes and, where this is not successful, the making of determinations. Lord Carswell held:

> *"In my opinion the central and determinative question in this appeal is that of perceived bias arising from conflict of interest. Actual or perceived bias on the part of the members of a tribunal will make their decision unlawful and liable to be set aside on judicial review. It is now very firmly established, to the point of being trite law, that, even if no actual bias on their part is shown to exist, the decision of a tribunal will be set aside if the circumstances are such that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that it was biased: see Porter v Magill [2002] 2 AC 357, para 103, per Lord Hope of Craighead."*

[30] Notably, each of these cases concerned the apparent bias of a decision maker. Whilst in *Re Duffy* the court quashed appointments to the Commission, it did so on the basis that the proposed appointees could appear to be biased in their decision-making role. It is quite a different proposition to say that the appointment

of an expert witness to review a waste management plan, and provide evidence to a public inquiry, could be quashed on the grounds of perceived bias.

[31] No authority was cited to the court which suggested that a judicial review court, exercising its supervisory jurisdiction, should intervene in the appointment of an expert witness by a public body. The proposed respondent has considered the previous connections between Golder and Dalradian and declared itself satisfied that there is no conflict of interest. This issue can, of course, be explored in evidence at the public inquiry. The PAC, as a specialist independent planning tribunal, can make determinations about the admissibility and weight of evidence which is adduced before it. If there is an issue in relation to the independence of Golder, the correct forum to explore that is the PAC inquiry.

[32] In order to pass the threshold for leave, the applicant must show not only that its grounds are arguable but also that the application has a *"realistic prospect of success"* – see *Re Omagh District Council's Application* [2004] NICA 10.

[33] The applicant's case is based solely on the grounds that the decision of the proposed respondent to instruct Golder can be impeached on the basis of *Wednesbury* unreasonableness. The evidence adduced by the applicant demonstrates antecedent dealings between Golder and the proposed notice party but that must be seen in the context of the specialised nature of major mining projects and the type of the advice which Golder was instructed to provide to the proposed respondent. It is simply unarguable to contend that these antecedents mean that no reasonable government department could have instructed Golder to review the applicant's waste management plan.

[34] The *Porter v Magill* line of authority is concerned with adjudicative bodies. In this case, Golder has been asked to provide expert advice in the context of a major planning application which will form part of the evidence to be presented to a public inquiry. The PAC will carry out its statutory function of considering all the relevant evidence relating to the application and then prepare a report containing recommendations to the Department. It will be evident therefore that Golder has no adjudicative function. It was tasked with providing advice on a discrete part of the planning application which will be robustly scrutinised at a public inquiry before recommendations are made to the decision maker. There is no realistic prospect of a judicial review court invoking this line of authority to impugn the decision to instruct Golder.

[35] Furthermore, it is a well-established principle that judicial review is a remedy of last resort. The applicant can seek to undermine the evidence of Golder at the forthcoming public inquiry by arguing that it ought not to be admitted or that little weight should be attached to it. This is the appropriate forum in which to seek to carry out that exercise.

Conclusion

[36] For these reasons, the application for leave to apply for judicial review is dismissed. I make no order as to costs *inter partes*.