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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 JOANNA TONER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF LISBURN AND CASTLEREAGH CITY COUNCIL MADE ON 20 OCTOBER 2020

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Mr Steven J McQuitty BL (instructed by Campbell & Caher Solicitors) for the Applicant
Mr Paul McLaughlin QC with Ms Denise Kiley BL (instructed by Tughans Solicitors) for the Proposed Respondent

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RULING ON COSTS

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COLTON J

Introduction

[1] The applicant issued judicial review proceedings against a decision of the proposed respondent, Lisburn and Castlereagh City Council, ("the Council") on or about 9 August 2021. That impugned decision was the Council's decision of 27 October 2020 not to carry out any remedial works to remove, raise and re-lay kerbs through Lisburn City Centre. The case was listed for a leave hearing on 7 October 2021. Prior to the hearing the applicant had filed a skeleton argument on or about 26 September 2021 and filed a bundle of authorities. The applicant therefore had fully prepared for a contested leave hearing.

[2] Prior to the leave hearing on or about 3/4 October 2021 the Council advised it intended to reconsider the impugned decision at a meeting of its Development Committee on 7 October. There were discussions between counsel for the parties and it was agreed that it would be prudent to adjourn the leave application for a

short period to see what was decided at that meeting. In the event the Committee agreed to formally rescind the impugned decision at its meeting. This decision was subsequently ratified by the full Council on 26 October 2021. As a result the parties agreed that these proceedings could be dismissed.

[3] The only outstanding dispute is in relation to the costs of these proceedings.

[4] The applicant invites the court to make an order for its costs against the respondent. It was agreed that the parties would make written submissions on this issue.

[5] The court is grateful to counsel for their able and helpful written submissions.

Factual Background

[6] The applicant was involved in a previous successful judicial review against the Council arising from its failure to carry out remedial works to the kerbs in the city – see *Toner* [2017] NIQB 49. As a result of that judgment the Council had to reconsider its position but this resulted in the impugned decision of October 2020. There was some delay in issuing these proceedings. A detailed pre-action letter was sent to the proposed respondents on 29 April 2021 and the Council responded on 4 June 2021 concluding:

> *"The Council does not propose to quash or set aside its decision as the Council considers the proposed applicant's claim is without merit and will strenuously defend that judicial review proceedings now commenced."*

[7] The applicant identified a further issue from the Council's response in relation to how it had approached the question as to who might pay for any remedial works. As a result the applicant wrote again to the Council to indicate that she also intended to challenge that specific issue by way of these proceedings and on a variety of standard public law grounds.

[8] The new issue was stated in the following way:

> *"The question that arises is why the Council did not approach their decision as an 'in principle' decision and on the basis that such a decision could or would be conditioned on grant funding?"*

[9] In this follow-up letter the applicant invited the Council to agree to set aside its decision and by return.

[10] The Council sent a further reply dated 7 July denying any illegality arising from the further issue. As a result the proceedings which form the subject matter of this application were issued on 9 August 2021.

[11] In essence the applicant contends that costs ought to be awarded against the proposed respondent because she "has secured a successful outcome" and has "achieved the substantive relief … she set out to achieve." She refers to the history of the pre-proceedings steps outlined above which gave the proposed respondent's ample opportunity to take the steps which were taken by the Committee on 7 October and the Council on 26 October 2021.

[12] The applicant points out that the Council has indicated by letter of 1 November 2021 that it now intends to engage with the relevant departments to explore the possibility of further grant funding to carry out additional works on the kerbs in the city. The applicant points out that this is precisely what was suggested in her addendum PAP letter.

[13] The applicant contends that she should recover costs against the Council on the application of ordinary cost principles.

The court's conclusion in the issue of costs

[14] This court is regularly confronted with this exact issue. The starting point is that the court has a broad discretion in relation to the issue of costs.

[15] The powers of the High Court to deal with costs of and incidental to proceedings are set out in the Rules of the Supreme Court and, primarily, in Order 62. The general rule is the unsuccessful party should normally pay the costs of the successful party. Order 62 Rule 3(3) provides:

> *"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

[16] There is no particular rule in relation to costs for proceedings in judicial review applications, although the matter has been considered in a number of decisions.

[17] The almost invariable practice of the court in this jurisdiction is not to grant costs if leave to apply for judicial review is refused. In paragraph 16.05 of Scoffield and Larkin - Judicial Review in Northern Ireland the authors say:

> *"The reason for this is that the leave application is technically an **ex parte** application, without their being any need for the*

proposed respondent to participate at the leave stage by lodging any form of acknowledgment of service, still less attending on an oral hearing."

[18] In this case whilst the application is to be dismissed by agreement this occurred in circumstances where the matter was listed for a leave hearing and the proposed respondent changed course largely in accordance with the action requested by the applicant in these proceedings.

[19] The court has not made any determination on the merits of the substance of the application and the proposed respondent points out that the issue of funding which the Council is exploring further is only one of several grounds of challenge raised by the applicant. The proposed respondent also contends that the steps it proposes to take as set out in the correspondence of 1 November actually goes beyond the relief originally sought.

[20] When faced with determining the issue of costs where a judicial review has been dismissed the courts in this jurisdiction tend to adopt the principles set out in the case of *R(Boxall) v London Borough of Waltham Forest* [2000] All ER (D). In the *Boxall* case Scott-Baker J set out the relevant principles as follows:

"(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial where the parties have not agreed about costs.

(ii) It will ordinarily be irrelevant that the application is legally aided.

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs.

(iv) At each end of the spectrum there will be cases where it is obvious which side who would have won had the substantive issues been fought to a conclusion. In between the position will, in differing degrees, be less clear.

(v) How far the court was prepared to look into the previously unresolved substantive issues will depend on the circumstances of a particular case, not least the amount of costs at stake and the conduct of the parties.

(vi) In the absence of a good reason to make any other order the fall back is make no order as to costs.

(vii) The court should take care to ensure that it does not discourage parties from settling the judicial review proceedings

for example by a local authority making a concession at an early stage."

Application of the principles to this case

[21] The court is conscious that it has not granted leave in this case and had not formed any view about the merits of the application. Such an exercise would involve consideration of extensive material in what has been a long running and complex issue between the parties. This is not a case where it is obvious which side would have won and on what issues had the substantive issues been fought to a conclusion. As in the exercise of any discretion the overriding objective for the court is to do justice between the parties. In the circumstances of this case I consider that the court should adopt the "fall back" decision as it was described in *Boxall*, that is to make no order as to costs.

[22] The court is keen to encourage and welcomes circumstances in which public bodies engage with leave applications constructively, which has happened in this case. The court welcomes the decision taken by the proposed respondent. By doing so it has saved the court and the parties significant time and resources. The court therefore has decided that the proposed respondent should not be penalised on costs in the circumstances where it has constructively dealt with the issues raised in the application.

[23] Accordingly, as per the agreement between the parties the court makes a final order dismissing the applicant's claim.

[24] The court makes no inter parties order in relation to costs.

[25] Since the applicant is legally aided the court makes the usual order that her costs be taxed in accordance with the second Schedule of the Legal Aid Order.