APPENDIX

Neutral Citation No: *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* MOR11189 *Delivered:* 22/01/2020

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY RURAL INTEGRITY (LISBURN 01) LIMITED FOR JUDICIAL REVIEW

Before: Morgan LCJ, Maguire J and Colton J

MORGAN LCJ (*ex tempore)*

[1] This is an appeal from an Order of McCloskey J dismissing the appellant's judicial review application by reason of its failure to provide security in the sum of £10,000 for costs. As appears below the appellant limited company was established by its promoter and sole shareholder, Mr Duff, for the purpose of conducting environmental litigation. The company is entirely dependent on the contributions made by Mr Duff to support its activities and has no other source of income.

[2] The appeal concerns an application for planning permission granted on appeal by the Planning Appeals Commission on 11 December 2018. The hearing was conducted by Commissioner Pamela O'Donnell. At the hearing the appellant contended that the site in question situated at 50-52 Ballee Road West, Ballymena was ribbon development. The contention on behalf of the developer was that such development fell within Policy CTY8 of PPS21 and that the developer was entitled to a site described as an infill site sufficient to accommodate up to a maximum of two houses within an otherwise substantial and continuously built up frontage. The council, which had refused the application, stated that the site did not represent a gap site within a substantial and continuously built up frontage and that the proposal would result in ribbon development. They argued further that the site acted as a visual gap which provided relief from the developed appearance of the locality and therefore maintained the rural character of the area.

[3] The applicant company Rural Integrity Lisburn 01 Ltd lodged an application for judicial review on 9 March 2018 and in that judicial review

contended that the Commission in making its decision had left out of account the importance of the intervention of a strategic policy statement which the applicant contended significantly enhanced the protection in respect of development within the countryside. In particular the strategy document tightened the rules in relation to development that was put forward as ribbon development and in support of that relied upon certain examples within Building on Tradition, an appendage which set out the circumstances in which infill development might be considered appropriate.

[4] The matter came on for leave before Sir Ronnie Weatherup on 6 June 2018 and having regard to the submissions that were made at that stage he concluded both that the appellant company had standing and that leave should be granted. He noted that there was an issue of general policy involved that might be of some importance about the use of a limited company vehicle to avoid a liability for costs.

[5] On 5 July 2018 the appellant company submitted a costs protection application. In his leave application Sir Ronnie had recognised that there were costs issues arising from the involvement of the company and the position was that a further amended application was submitted on 24 September 2018. Shortly thereafter on 15 October 2018 the respondent lodged a summons seeking security for costs based on a grounding affidavit and bundle. There was a general hearing of the case on 18 December 2018 and there was a costs hearing before Mr Justice McCloskey on 6 March 2019. There was a listing of the costs matter on 10 April 2019 when McCloskey J made an order that security in the sum of £10,000 should be lodged. There was some debate within the papers about the form of the order but effectively that was the substance of the order that was made. By that stage it had become apparent that there were a number of companies bearing the Rural Integrity appendage or title in various forms which had been utilised by the promoter, Mr Duff, to raise issues of policy in relation to ribbon development in a number of different locations within Northern Ireland but principally in the area of the Lisburn and Castlereagh District Council area. The papers disclosed that there were approximately 33 such cases. It is not clear whether in all of those cases, as in this one, Mr Duff was the sole promoter and sole shareholder in relation to the company and it may be that in some others different arrangements applied.

[6] The company failed to comply with the Security for Costs Order and on 25 June 2019 the respondent served a summons seeking dismissal for failure to comply with the Order for Security of Costs. It is of some importance that there was no attempt by the company to appeal the Security for Costs Order which of course it could have done within the 21 day period. On 27 June 2019 the court dismissed the case and awarded costs against the applicant by reason of the failure to comply with the Security for Costs Order. The Notice of Appeal on behalf of the company was served on 22 July 2019.

[7] As indicated above the background to this case is that the company was the vehicle that was chosen for litigation. A company conducts its affairs, of course, in

accordance with the will of its members and, in particular, determines whether there should be a limit to the the liability of its shareholders or members. In this case there is a single member and that member is Mr Duff. The court is entitled, therefore, to look at the reality of the situation which is that Mr Duff examined the way in which he could conduct his affairs in relation to this environmental litigation and determined that he should do so by way of the utilisation of the company format rather than utilising his own legal persona.

[8] One of the issues which arose in the case was the question of the entitlement to costs protection as a result of the implementation of the Aarhus Convention requirements through regulations passed both in 2013 and 2017. It is clear from the 2013 regulations that if the applicant has stated on the application to the court that it is an Aarhus Convention case Regulation 3 applies unless the respondent has stated that it is not an Aarhus Convention case and set outs the respondent's grounds for arguing why that is the case. Once the grant of leave was made there was no suggestion from the respondent that this was not an Aarhus Convention case. There had been an assertion by Mr Duff that it was an Aarhus Convention case and in those circumstances Regulation 4 of the 2013 Regulations makes it clear that we should approach this on the basis that it is an Aarhus Convention case. The Convention establishes that where we are dealing with such a case the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or individual applying the name of a legal entity or unincorporated association. It is clear therefore that the Convention itself makes a distinction between the liabilities that should fall upon a single human being or person who seeks to raise environmental issues and takes a different approach in relation to those legal persons who may consist of a company formed by its members or indeed an un-incorporated association which may be comprised of a number of individuals.

[9] The determination to utilise the structure of the company format carries with it both pluses and minuses. The plus, of course, is that the company itself is limited in terms of the liabilities. The company format means that the liability of the members of the company is limited by the terms of the articles of association of the company and the degree of investment that each of the members has made. This was a company which had a total shareholding of 100 of which one share had been issued to Mr Duff. The Rules of Court have recognised that there are issues around the company persona which are different from those in relation to individuals and deals with the right to initiate proceedings in Order 5 Rule 6 of the Rules of the Court of Judicature. Rule 6.1 provides that:

> **"Subject to paragraph 2 any person may begin and carry on proceedings in the High Court by a solicitor or in person."**

[10] That Rule makes it clear that Mr Duff would have been entitled to carry on litigation on his own behalf pursuant to Rule 6.1 without the need to instruct a solicitor and would have been entitled to conduct this environmental litigation in

that way. We raised that matter with him today and he has made clear that he does not wish to go down that route. Rule 6.2 states:

> **"Except as provided by paragraph 3 or under any other statutory provision a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor."**

[11] In respect of the interpretation of "any other statutory provision", Mr Duff in his submission seeks to establish that he is entitled to represent the company by reason of the Aarhus Regulations. We see nothing in those Regulations which constitutes another statutory provision for the purposes of Rule 6.2. Rule 6.3 states:

> **"A body corporate may begin and carry on such proceedings by an employee, if:**
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> **(a) the employee has been authorised by the body corporate to begin and carry on proceedings on its own behalf; and**
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> **(b) the court grants leave for the employee to do so."**

[12] Mr Duff has accepted that there is no contract of employment between him and the company. One needs to look at the background to this Rule. The Rule has chosen to limit the persons who can act on behalf of the company to employees. A director or shareholder could of course be an employee of the company but did not necessarily have to be. If it had been the intent of the rule makers that the right to begin and carry on proceedings was to be given to directors or shareholders as well as employees the rule would have said so. The distinction is, of course, that employees are required to act in accordance with the wishes of the company as a whole. As I have said a Director or shareholder could of course be an employee and if such a position was contended for the court would have to satisfy itself that the employment contract was intended to effect legal relations. That does not arise in this case. Prima facie therefore the rules indicate that Mr Duff has no entitlement to pursue this matter on behalf of the company.

[13] We are conscious of the fact, however, that it is necessary for us to take into account that the Aarhus Convention and the European Convention on Human Rights indicate that there should be access to justice in relation to the determination of disputes in relation to matters such as this. Section 3 of the Human Rights Act 1998 indicates that where an interpretation would lead to a breach of the Convention the court should exercise the interpretative obligation to ensure where it can that the Convention is not breached. We have therefore examined the Rule to see whether or not in the circumstances a wider interpretation should be applied to the interpretation of employee. We are satisfied however that on the facts of this case Mr Duff determined and resolved that he would pursue this matter in a particular way through a particular vehicle.

We see no impediment and nor has any impediment been brought forward by Mr Duff to him pursuing this litigation on his own behalf taking advantage of the Aarhus Convention. That would ensure that at worst a Security for Costs liability would arise but only insofar as it was both £5,000 or under and not prohibitively expensive. Despite our encouragement he has indicated that he does not wish to do that. This is not, therefore, a case where it can be said that there is no other option open to Mr Duff as to how this matter can be litigated. We have borne in mind that there is a serious issue to be tried in respect of which leave has been granted but it seems to us that in order to pursue it Mr Duff could have done so with the protection of the Aarhus Convention. He chose to use the vehicle of an impecunious company but cannot establish that he falls within Order 5 Rule 6. The acceptance of the invitation to Mr Duff to substitute himself for the company on the appeal would have provided a proportionate way of recognising the balance between the interests of environmental protection and the interests of developers and the public being protected from oppressive litigation. He declined to take up the offer. In those circumstances there is no reason to seek a strained interpretation of the Rule. Accordingly there is no one here to pursue this appeal on behalf of the company.

[14] Accordingly we are obliged to dismiss the appeal because it has not been pursued by anyone entitled to do so on behalf of the company.