Neutral Citation No: [2022] NIQB 40	*Ref:*	HUM11864
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	31/05/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MOORELAND AND OWENVARRAGH RESIDENTS' ASSOCIATION FOR JUDICIAL REVIEW

Ronan Lavery QC and Conan Fegan (instructed by Phoenix Law) for the Applicant
Paul McLaughlin QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent
Stewart Beattie QC and Philip McEvoy (instructed by Tughans) for the first Notice Party
Charles Banner QC (instructed by the Departmental Solicitor's Office) for the second Notice Party

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HUMPHREYS J

Introduction

[1] The proposed redevelopment of Casement Park in Belfast by the Ulster GAA has been the subject of much scrutiny and debate since the announcement in 2009 that the multi-sports facility at the Maze site would not be proceeding. Planning permission was first granted in January 2014 but was ultimately quashed following a successful application for judicial review brought by the same applicant in these proceedings. This is an association made up of residents who live in close proximity to Casement Park ('MORA'). The judgment of Horner J dated 15 December 2014 [2014] NIQB 140 addresses the many issues which were in play at that time and I gratefully adopt his analysis of the background to the application.

[2] A further application for planning permission was submitted in February 2017 and on 28 July 2021 the then Minister, Nichola Mallon, announced that her Department for Infrastructure ('DfI') was granting the application subject to a series of conditions and a Planning Agreement ('the s76 Agreement') arrived at pursuant to section 76 of the Planning (Northern Ireland) Act 2011 ('the 2011 Act').

[3] On 26 October 2021 MORA commenced these judicial review proceedings seeking to quash the grant of planning permission on two discrete sets of grounds. Firstly, it is argued that the Minister acted ultra vires by failing to refer the matter to the Executive Committee for consideration. A connected attack on the Executive Committee (Functions) Act (Northern Ireland) 2020 ('the 2020 Act') was not pursued. The second set of grounds sought to impugn the permission on the basis of a series of alleged errors in the planning process.

[4] The court had the benefit of detailed written and oral submissions from all parties, including the Ulster Council of the GAA and the Department for Communities ('DfC') who were joined as notice parties. I am grateful to all the legal representatives for the focussed and considered manner in which the hearing was conducted.

The Planning Permission

[5] The application sought permission for the demolition of all existing structures on the site and the construction of a new 34,186 seater stadium with ancillary accommodation such as hospitality, conference and community facilities. The proposal expressly contemplated the use of the venue for up to three concerts per year. The site itself is bounded by the Andersonstown Road, a main arterial route into Belfast city centre, and on the other sides by Mooreland Park, Mooreland Drive, Owenvarragh Park and Owenvarragh Gardens, which all comprise residential properties.

[6] The application was 'called-in' by the DfI in March 2017 under section 29(1) of the 2011 Act due to its regional significance. The proposed development represents EIA development and therefore the Planning (Environmental Impact Assessment) (Northern Ireland) Regulations 2015 ('the 2015 Regulations'), which were then in force, applied.

[7] Some 1305 letters and three petitions of objection were received alongside 1584 letters and one petition of support for the development. The body of objectors made it clear, as MORA did in this judicial review, that they welcomed a suitably sized, GAA oriented, development but they did not believe this proposal met those criteria.

[8] An Environmental Statement ('ES')was submitted on 19 April 2017 and Further Environmental Information ('FEI') was provided on four separate occasions in May 2018, December 2018, July 2019 and February 2020. On each occasion the application and the FEI were advertised and representations sought.

[9] The Case Officer tasked with assessing the application, Nola Jamieson, identified a number of relevant material planning considerations to be taken into account including government strategy, planning policies, residential amenity, environmental considerations, fallback and safety. She produced a Development

Management Report ('DMR') but personally was unable to give determinative weight in favour of the proposal in light of the significant adverse amenity impact which the development would cause. Accordingly she recommended that the matter be considered by a Development Management Group. In August 2020 this Group recommended that permission be granted and a Notice of Opinion to that effect issued in November 2020.

[10] Further representations were made by MORA in relation to transport and environmental concerns. The Development Management Group considered that these did not alter its recommendation and the application for planning permission was granted in July 2021.

[11] The grant is subject to a number of conditions including the following:

> "33. The development shall operate in accordance with the Sustainable Travel Plan received by DfI Planning on 16 May 2018;
>
> 34. The development hereby permitted shall operate generally in accordance with the Event Management Plan as detailed in the document received by DfI Planning on 3 February 2020;
>
> 35. A specific Event Management Plan shall be developed and implemented for every event with a forecast attendance of greater than 3100 spectators. For any event with a forecast attendance of greater than 14000 spectators, the Event Management Plan shall be approved by Event Management Group prior to the event taking place.
>
> 36. Within twelve months of the first event taking place, and annually thereafter, a report of the effectiveness of the measures implemented as part of the Event Management Plan during the preceding year and any proposed revisions and measures for improvement shall be produced by the operator, in consultation with the Event Management Group, and submitted to the Planning Authority for agreement in writing. The contents of the report and any proposed revisions and measures for improvement in the Event Management Plan shall be agreed by the Planning Authority within two months of submission. If the report is not considered to be satisfactory and has not been agreed by the Planning Authority within

two months of its submission, or if the required report is not submitted at all, there shall be no further events until such times as the Planning Authority has been provided with, and agreed to, that report in writing.

37. The development shall operate in accordance with the Service Management Plan received by DfI Planning on 11 July 2019."

The s76 Agreement

[12] On 28 July 2021 the DfI, the freehold legal owners of the site ('the Owner'), the Ulster GAA ('the Operator'), the Central Council of the GAA ('the Central Council') and the DfC all entered into the s76 Agreement. This recited as follows:

- The Operator and the Central Council are the beneficial owners of the site under two declarations of trust entered into by the Owner;

- The DfC holds a mortgage over part of the site;

- The deed was entered into with the intention that the site would be bound by the obligations expressed in the deed.

[13] Clause 2 of the deed provides:

> "The covenants, restrictions and obligations contained in the deed are planning obligations for the purpose of section 76 of the Planning Act and are entered into by the Owner, the Central Council and Operator jointly and severally with the knowledge that they bind the interests held by the Owner, the Central Council and/or Operator in the Application Site and their successors and assigns."

[14] The s76 Agreement is registered as a statutory charge pursuant to Part X of the Land Registration (Northern Ireland) Act 1970.

[15] The relevant covenants are contained in Schedule 1 to the Agreement whereby each of the Operator, the Owner and the Central Council covenant to the DfI that:

(i) Prior to the commencement of operations, a suitably qualified Stadium Manager will be in post;

(ii) 12 months prior to the commencement of operations, a suitably qualified Travel Plan Co-ordinator will be in post with responsibility for the Sustainable Travel Plan and Event Management Plan;

(iii) A Major Event (defined as an event of over 3100 spectators) will not be held unless the dedicated off site parking and park and ride locations identified as required have been secured prior to the event taking place;

(iv) Prior to the commencement of operations, a suitably qualified Event Safety Manager will be in post;

(v) The Travel Plan Co-ordinator will convene the Event Management Group which will include representatives from Translink, Belfast City Council, the DfI, emergency services, residents and local businesses;

(vi) Prior to the commencement of operations, suitably qualified Traffic Management Contractors will be in post.

[16] In relation to the residents' representatives, the s76 Agreement prescribes an appointment process whereby the Operator canvasses local residents (those living within a defined area) seeking nominations and a randomised selection then occurs. The representatives appointed will remain in post for five years.

[17] The Event Management Plan, annexed to the s76 Agreement, and prepared by Atkins, seeks to set out the range of events which the stadium will accommodate and the actions required to ensure the satisfactory delivery of traffic and transport to and from the stadium. The stated objectives are to maximise accessibility, provide genuine alternatives to the private motor car, minimise the impact of inconsiderate spectator activity and manage the environmental impacts of spectator travel. To do so, the Plan identifies a range of transport options, including:

(i) GAA supporter coach travel through individual clubs;

(ii) The use of DfI park and ride sites;

(iii) The use of dedicated off-site park and ride sites, including the Maze site and Down Royal racecourse;

(iv) City centre car parking and the use of public transport;

(v) Park and walk from Boucher playing fields; and

(vi) The use of local bus and taxi services.

[18] It is anticipated that the stadium would host one match, the Ulster Championship final, and three concerts each year with a full capacity of 34,186. In

addition there may be two semi finals with around 20,000 in attendance and between two and five All Ireland qualifiers with crowds between 3,000 and 15,000.

[19] The process of event management sets out a number of stages and includes detail in respect of traffic management, signage and wayfinding, stewards, emergency services and contingency planning. When a meeting of the Group is required, it is to take place four weeks before the event and the residents' representatives are obliged to field the views of members of the public affected by the operation of the stadium and share these with the Group.

[20] The Sustainable Travel Plan is geared at reducing private car usage by spectators. It provides more analysis and detail in relation to each of the proposed methods of travel. For instance, in relation to a full house scenario, the plan anticipates that some 9,450 spectators will use the dedicated off-site park and ride facilities and 6,775 will park in the city centre and use public transport. It is recognised that a number of initiatives will have to be undertaken in order to ensure that spectators avail of the alternative transport modes.

[21] On 2 August 2021 MORA requested a copy of the s76 Agreement. On 23 August the DfI replied stating that it had been registered as a statutory charge and was available from Land & Property Services ('LPS'). A copy was duly provided by LPS to the applicant on 21 September 2021.

The Constitutional Ground of Challenge

(i) The Legislative Framework

[22] Section 20 of the Northern Ireland Act 1998 ('NIA') establishes the Executive Committee, made up of the First Minister, Deputy First Minister and the Northern Ireland Ministers. By section 20(3), it has the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement which include:

> "discussion of and agreement on issues which cut across the responsibilities of two or more ministers"

[23] Section 20(4), which was inserted by the Northern Ireland (St Andrews Agreement) Act 2006, provides:

> "(4) The Committee shall also have the function of discussing and agreeing upon—
>
> (a) where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;

(aa) where no such programme has been approved by the Assembly, any significant or controversial matters;

(b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee."

[24] However, as a result of amendments introduced by the 2020 Act, subsections 20(3) and 20(4) are expressly subject to subsections (7) to (9):

> "(7) Decisions may be made by the Department for Infrastructure or the Minister in charge of that Department in the exercise of any function under—
>
> (a) the Planning Act (Northern Ireland) 2011 (except a function under section 1 of that Act); or
>
> (b) regulations or orders made under that Act,
>
> without recourse to the Executive Committee.
>
> (8) Nothing in subsection (3) requires a Minister to have recourse to the Executive Committee in relation to any matter unless that matter affects the exercise of the statutory responsibilities of one or more other Ministers more than incidentally.
>
> (9) A matter does not affect the exercise of the statutory responsibilities of a Minister more than incidentally only because there is a statutory requirement to consult that Minister."

[25] Section 28A of the NIA, again inserted after the St Andrews Agreement, deals with the Ministerial Code:

> "(1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.
>
> (2) In this section "the Ministerial Code" means—
>
> (a) the Ministerial Code that becomes the Ministerial Code for the purposes of this section by virtue of paragraph 4 of Schedule 1 to the Northern Ireland

(St Andrews Agreement) Act 2006 (as from time to time amended in accordance with this section); or

(b) any replacement Ministerial Code prepared and approved in accordance with this section (as from time to time amended in accordance with this section).

(3) If at any time the Executive Committee—

(a) prepares draft amendments to the Ministerial Code; or

(b) prepares a draft Ministerial Code to replace the Ministerial Code,

the First Minister and deputy First Minister acting jointly shall lay the draft amendments or the draft Code before the Assembly for approval.

(4) A draft Ministerial Code or a draft amendment to the Code—

(a) shall not be approved by the Assembly without cross-community support; and

(b) shall not take effect until so approved.

(5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

(6) The Ministerial Code must include provision for a procedure to enable any Minister or junior Minister to ask the Executive Committee to determine whether any decision that he is proposing to take, or has taken, relates to a matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

(8) The Ministerial Code must in particular provide—

(a) that it is the duty of the chairmen of the Executive Committee to seek to secure that decisions of the

Executive Committee are reached by consensus wherever possible;

(b) that, if consensus cannot be reached, a vote may be taken; and

(c) that, if any three members of the Executive Committee require the vote on a particular matter which is to be voted on by the Executive Committee to require cross-community support, any vote on that matter in the Executive Committee shall require cross-community support in the Executive Committee.

(9) The Ministerial Code may include such other provisions as the Executive Committee thinks fit.

(10) Without prejudice to the operation of section 24, a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5)."

[26] In compliance with section 20(3) and (4), section 2.4 of the Ministerial Code reads as follows:

"Any matter which:

(i) cuts across the responsibilities of two or more Ministers;

(ii) requires agreement on prioritisation;

(iii) requires the adoption of a common position;

(iv) has implications for the Programme for Government;

(v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement;

(vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee; or

> (vii) relates to a proposal to make a determination, designation or scheme for the provision of financial assistance under the Financial Assistance Act (Northern Ireland) 2009
>
> shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee."

[27] It is not seriously in dispute in this case that the question of the grant of planning permission for this development was cross-cutting, significant and/or controversial. MORA contends that the decision to grant the permission falls foul of section 28A and the Ministerial Code in that the Minister was obliged to refer the question to the Executive Committee for consideration.

[28] The respondent's answer to this claim is to rely on the new section 20(7) in the NIA, the legislative intention of which was to carve out planning decisions from the requirement in relation to the Executive Committee.

(ii) The Decision in Safe Electricity A&T Limited

[29] The interaction of these statutory provisions and the Ministerial Code was the subject of consideration by Scoffield J in *Re Safe Electricity A&T Limited* [2021] NIQB 93, which arose out of the decision by the Minister to grant planning permission for two developments forming part of the North South Electricity Interconnector.

[30] The particular conundrum which fell for determination by Scoffield J was the impact of the failure to amend the Ministerial Code at the same time as the introduction of the power to act unilaterally in section 20(7) of the NIA. When one reads the amended version of the NIA, it now provides that:

> (i) The Minister for Infrastructure may act without recourse to the Executive Committee when exercising a function under the 2011 Act; and
>
> (ii) A Minister has no authority to act in contravention of the Ministerial Code which requires cross-cutting, significant and/or controversial matters to be brought to the Executive Committee.

[31] Scoffield J described the situation as follows:

> "The resulting mismatch between the statutory regime contained in section 20 of the NIA and the operational machinery of the Ministerial Code designed to give effect to that statutory regime (and itself given statutory force

> by section 28A(1), (5) and (10)) is, without doubt, now somewhat of a mess. The result is that the current Ministerial Code appears to impose obligations of referral to the Executive Committee which go *beyond* those contained in the governing statutory regime." [para 104]

[32] The conflict is evidently enhanced by what Scoffield J described as the 'supercharging' provision of section 28A(10). As a result of this, Ministers are deprived of authority to make any decision which is in contravention of the Code made under section 28A(5).

[33] The learned judge's conclusion was as follows:

> "First, I accept the applicants' submission that the Minister has acted in breach of obligations under the current version of the Ministerial Code. As the Code has not been amended, and as the Minister remains under an obligation to comply with it pursuant to section 28A(1) of the NIA, the court must conclude that the Minister's obligations under that Code have not been properly discharged. In particular, the decision on the planning applications - which was both a significant and controversial matter - was not referred to the Executive Committee to be considered by it in the manner required by section 2.4 of the Code." [para 107]

[34] However, the court accepted that the supercharging provision only applied to matters which, by virtue of section 20(3) and (4) were required to be considered by the Executive. Since section 20 no longer required planning decisions to be so considered, the Minister was not deprived of authority. As a result, Scoffield J in his exercise of discretion declined to quash the planning permission in that case.

[35] In these proceedings, the applicant says that the circumstances are quite different to those which prevailed in relation to the North South Interconnector and that the Minister acted in contravention of the Code and consequently without authority.

[36] The respondent, for its part, has mounted a full-frontal attack on the decision in *Safe Electricity*, contending that it is inconsistent with a number of principles of statutory interpretation and constitutional orthodoxy.

(iii) The Principles of Statutory Interpretation

[37] The respondent contends that the conflict between the statutory provisions should be resolved by an application of the doctrine of implied repeal where a later

statutory provision takes precedence over an earlier one. As explained by Keegan LCJ in *Re Allister* [2022] NICA 15, at para [205]:

> "(i) Parliament cannot bind is successors such that a later Act cannot amend or repeal any earlier Act.
>
> (ii) The question of whether a later Act amends an earlier Act is determined by construing the later Act (an earlier statute yields to the later).
>
> (iii) Any inconsistency between Acts of Parliament must be reconciled by determining whether the later Act of Parliament was intended to modify the former - this intention can be found in express provision (whether free standing or textual amendment) or by implication.
>
> (iv) The constitutional importance of an earlier provision will be relevant in context when determining whether the later provision is intended to amend it, but the overriding question will always be one of determining Parliamentary intent."

[38] Further, it is contended that the role of the court is to give effect to the intention of the legislature by reference to the natural and ordinary meaning of the words of the statute. It is said that the words in section 20(7) are clear and unambiguous – planning decisions may be taken without recourse to the Executive Committee.

[39] The respondent also argues that the Executive must yield to the will of the legislature. The Ministerial Code is a subordinate legal instrument and, if there is a conflict between its provisions and those of the primary legislation under which it is made, the latter must prevail.

[40] Finally, it is said that legislation must be interpreted in a manner which gives effect to its intentions rather than frustrates them. The legislature does not act in vain and, reading the NIA as a whole, the respondent states that section 28A cannot require the Minister to refer a planning decision to the Executive in light of the express terms of section 20(7).

[41] Applying these principles, the respondent's case is that the provisions of the Code which require cross-cutting decisions to be referred to the Executive should be read subject to section 20(7), i.e. as being inapplicable to planning decisions.

(iv) The Principle of Judicial Comity

[42] The doctrine of precedent plays a central role in our system of judicial decision making. Insofar as judges at first instance are concerned, the principle was set out by Robert Goff LJ in *R v Greater Manchester Coroner ex p. Tal* [1985] QB 67:

> "If a judge of the High Court sits exercising the supervisory jurisdiction of the High Court then it is, in our judgment, plain that the relevant principle of stare decisis is the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction…"

[43] Indeed, this principle was recognised by Scoffield J in the *Safe Electricity* case when he expressed some doubt about the analysis of Morgan J in *Re Central Craigavon Limited* [2010] NIQB 73 whereby he found the breach of the Ministerial Code to be 'technical' and did not thereby give rise to a contravention under section 28A(10). However, the learned judge stated that he was not persuaded the reasoning was "clearly incorrect" and therefore would not depart from it [para 110].

[44] Whilst I am not strictly bound by it, in order for me to depart from *Safe Electricity* therefore, I must be convinced the decision is wrong or plainly incorrect.

(v) Consideration

[45] It is noteworthy that, to an extent, Scoffield J recognises the implied repeal or modification of section 28A of the NIA by virtue of the 2020 Act. Paragraph [111} of his judgment states:

> "The result of this analysis is that, in my judgment, insofar as the Ministerial Code now goes beyond what is required pursuant to section 20, it is no longer to be considered as a provision "made under subsection (5)" for the purposes of section 28A(10). Section 28A(5) is designed to ensure that the legal requirements of section 20 are reflected in the Ministerial Code; and section 28A(10) is designed to ensure that there is legal consequence where those legal requirements have not been met. But section 28A(5) only mandates inclusion within the Ministerial Code of such provisions as are necessary to comply with the requirements of section 20. Any decision to go beyond those requirements (whether consciously or, as in this case, by omission) is permissible,

> but will not be backed up by the automatic sanction contained in section 28A(10). In other words, section 28A(10) is properly to be interpreted as meaning that a Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code *which is required to be* made under subsection (5). Where the Code goes beyond this, breach of (or, using the statutory wording, failure to act in accordance with) the Code will be unlawful pursuant to section 28A(1) but will not automatically call into question the Minister's decision-taking authority under section 28A(10)."

[46] The learned judge did not accept the primary submission of the respondent that there was no obligation to refer planning decisions to the Executive Committee in light of section 20(7). At least in part, this was based on a view that the Ministerial Code could only be amended in line with section 20(3) and (4) by the Executive with Assembly approval.

[47] Paragraph 42 of Schedule 3 to the NIA states that any matter falling within section 20 or 28A is a "reserved matter" and the Assembly therefore has competence to legislate in relation to these with the consent of the Secretary of State pursuant to section 8(b). The 2020 Act itself received the requisite consent and Scoffield J held, in *Safe Electricity*, that this Act was within the competence of the Assembly.

[48] The argument that the Assembly could itself amend the Ministerial Code, quite apart from any amendment instigated by the Executive under the statutory provisions, is an attractive one. The Assembly is, after all, the legislative body under the devolved arrangements and it decided that the Minister may make planning decisions without recourse to the Executive. If section 20(7) is not effective, this could potentially subvert the constitutional arrangements since it would be in the hands of the Executive to decide when and to what extent primary legislation would be in force.

[49] If I had been tasked to decide this issue without the benefit of any previous judicial analysis, I may well have found that the NIA must now be read to exclude planning decisions from the application of the section 28A obligation or the Ministerial Code. I am conscious, however, that these are matters of constitutional importance and conflicting judgments of equal standing will not assist those who must take important decisions in this sphere. Equally, I am not convinced that Scoffield J was wrong in *Safe Electricity* and I therefore propose to adhere to the principle of judicial comity and follow this precedent.

(vi) Discretion

[50] The evidence of Alistair Beggs, a senior planning official within DfI, is that the Minister prepared a paper for her Executive colleagues dated 26 May 2020 which

sought agreement to the proposal that the NIA be amended to permit planning decisions be taken by DfI. The paper expressly referenced a number of outstanding applications, including that for Casement Park. Each of the Ministers expressed their support for the amendment proposal. A further paper from the Minister dated 13 June 2020 again made reference to Casement Park.

[51] This was not a 'solo run' by the Minister in that she kept her Executive colleagues informed as to her intentions, which received widespread support, and expressly alluded to regionally significant planning applications such as Casement Park. None of the Ministers concerned raised any issue about this particular application or the proposed approach to it.

[52] There is, however, a distinction between the instant case and that concerning the North South Interconnector in that there is a challenge to the grant of permission in this case on planning-based grounds.

(vii) Conclusions

[53] Accordingly, I find as follows on the constitutional ground of challenge:

(i) The decision whether or not to grant planning permission for Casement Park was cross-cutting, significant and/or controversial;

(ii) The Minister ought, by reason of section 28A(1) of the NIA and the Ministerial Code, have brought the matter to the Executive Committee for consideration;

(iii) The failure to do so did not represent a 'contravention' of the Ministerial Code and therefore the Minister was not deprived of authority pursuant to section 28A(10);

(iv) This conclusion is arrived at as a result of the carve out of planning decisions from section 20(3) and (4) by section 20(7) introduced by the 2020 Act;

(v) The question of whether or not the grant of planning permission should be quashed by reason of the breach of section 28A(1) and the Ministerial Code is a matter of discretion and I will therefore revisit this question after considering the planning grounds of challenge.

The Planning Grounds of Challenge

[54] In approaching this aspect of the case, the court must be conscious of the line of authority which stresses that judicial review of planning decisions does not admit merits based challenges, save where Wednesbury irrationality can be established – see, for example, Treacy J in *Re Newry Chamber of Commerce* [2015] NIQB 65 at para [44].

A major component of the planning grounds relates to the s76 Agreement. It is necessary therefore to set out section 76 of the 2011 Act in detail:

> "(1) Any person who has an estate in land may enter into an agreement with the relevant authority (referred to in this section and sections 77 and 78 as "a planning agreement"), enforceable to the extent mentioned in subsection (4)—
>
> (a) facilitating or restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way;
>
> (d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically; or
>
> (e) requiring a sum or sums to be paid to a Northern Ireland department on a specified date or dates or periodically.
>
> (2) A planning agreement may—
>
> (a) be unconditional or subject to conditions;
>
> (b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and
>
> (c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the agreement is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.
>
> (3) Before entering into a planning agreement, the Department must consult with the appropriate council.
>
> (4) Subject to subsection (5) a planning agreement is enforceable by the relevant authority—
>
> (a) against the person entering into the agreement; and

(b) against any person deriving title from that person.

(5) The instrument by which a planning agreement is entered into may provide that a person shall not be bound by the agreement in respect of any period during which that person no longer has an estate in the land.

(6) A restriction or requirement imposed under a planning agreement is enforceable by injunction.

(7) Without prejudice to subsection (6), if there is a breach of a requirement in a planning agreement to carry out any operations in, on, under or over the land to which the agreement relates, the relevant authority may—

(a) enter the land and carry out the operations; and

(b) recover from the person or persons against whom the agreement is enforceable any expenses reasonably incurred by it in doing so and those expenses shall be a civil debt recoverable summarily.

(8) Before the relevant authority exercises its power under subsection (7)(a) it must give not less than 21 days' notice of its intention to do so to any person against whom the planning agreement is enforceable.

(9) Any person who wilfully obstructs a person acting in the exercise of a power under subsection (7)(a) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(10) A planning agreement may not be entered into except by an instrument under seal which—

(a) states that the agreement is a planning agreement for the purposes of this section;

(b) identifies the land in which the person entering into the agreement has an estate; and

(c) identifies the person entering into the agreement and states what that person's estate in the land is.

(11) If a person against whom an agreement is enforceable requests the relevant authority to supply that person with a copy of the agreement, it is the duty of the authority to do so free of charge.

(12) Any sum or sums required to be paid under a planning agreement and any expenses recoverable by the relevant authority under subsection (7)(b) shall, until recovered, be deemed to be charged on and payable out of the estate in the land in relation to which they have been incurred, of the person against whom the planning agreement is enforceable.

(13) The charge created by subsection (12) shall be enforceable in all respects as if it were a valid mortgage by deed created in favour of the relevant authority by the person on whose estate the charge has been created (with, where necessary, any authorisation or consent required by law) and the authority may exercise the powers conferred by sections 19, 21 and 22 of the Conveyancing Act 1881 (c. 41) on mortgagees by deed accordingly.

(14) In this section "specified" means specified in the instrument by which the planning agreement is entered into."

(15) In this section, and in sections 77 and 78, "relevant authority", in relation to a planning agreement proposed to be made in connection with an application for planning permission, means—

(a) where the application has been made to a council, and the council has an estate in the land to which the proposed agreement relates, the Department;

(b) where the application has been made to the Department, the Department;

(c) in any other case, the council in whose district the land to which the application relates is situated."

(i) Failure to Provide the s76 Agreement

[55] The applicant argues that what is described in the Order 53 statement as the "ongoing failure to publish or provide a full copy of the s76 Agreement" was unlawful as being in breach of the constitutional principle of transparency and a

breach of the Environmental Impact Regulations 2004 ('EIR'). This submission startlingly fails to take account of the fact that the applicant received a copy of the s76 Agreement from LPS on 21 September 2021, a month before the judicial review proceedings were commenced.

[56] In fact, therefore, there was no failure to provide the s76 Agreement. The applicant has had every opportunity to consider the Agreement and take advice on it. It is hard to fathom why the applicant's legal representatives saw fit to pursue this ground of challenge. It is quite simply hopeless.

[57] Even if the applicant had a basis to complain about a failure to comply with the EIR, its remedy was to complain to the Information Commissioner and thence to the First-Tier Tribunal. It chose not to pursue these statutory remedies and it is impermissible to now seek to impeach some alleged failing by way of judicial review.

(ii) The failure to consult on the s76 Agreement

[58] The applicant contends that, as a matter of procedural fairness, it ought to have been consulted on the s76 Agreement prior to its execution in order that representations could have been made. It is said that this duty arises either out of implication from the statute or at common law. Reliance is placed on the authorities of *R (Lichfield Securities) v Lichfield District Council* [2001] EWCA Civ 304 and *R (Wet Finishing Works) v Taunton Deane Borough Council* [2017] EWHC 1837 (Admin).

[59] In *R (Plantagenet Alliance) v Secretary of State* [2014] EWHC 1662 (Admin) Hallett LJ identified that there was no general duty to consult at common law but such a duty may arise in four circumstances:

(i) Where there is a statutory duty;

(ii) Where there has been a promise to consult;

(iii) Where there has been an established practice of consultation; and

(iv) In exceptional cases, where a failure to consult would give rise to conspicuous unfairness.

[60] The statutory duty to consult contained in section 76 is limited to consultation with the appropriate council. It cannot conceivably be the case that a duty to consult more widely could be implied into the legislation, given its express terms. No argument has been advanced in relation to any legitimate expectation which might arise on foot of a promise or established practice. In order to establish any duty in this case, therefore, the applicant must bring itself within one of the exceptional cases where the failure would give rise to 'conspicuous unfairness.'

[61] The cases relied upon by the applicant both concern situations in which the aggrieved parties had direct financial interests in the outcome of planning agreements. In *Lichfield* the financial contribution required in the agreement directly affected the level of contribution required of the applicant for judicial review. In *Wet Finishing Works* the variation of an existing planning agreement resulted in the applicant losing a payment of £780,000 for the restoration of a mill, with the payment going instead to the planning authority. Each of these cases can properly be analysed as instances of conspicuous unfairness being caused by a want of consultation.

[62] The evidence in this case makes it clear that the applicant has had multiple opportunities to make representations and comment upon the planning application. Pre-application community consultation was carried out under ss. 27 & 28 of the 2011 Act and lasted for some 32 weeks. Since it represents EIA development, each time a submission or additional information came forward, there was a requirement to advertise and consult. The applicant had the benefit of professional advice and was able to make its objections on, inter alia, environmental and transport grounds to the proposed development.

[63] There is therefore no basis to contend that any conspicuous unfairness has arisen in the circumstances of this planning application and the negotiation of the s76 Agreement.

(iii) The Need for the s76 Agreement

[64] The applicant says that the respondent must show a need for a s76 Agreement. This requirement arises, it is contended, from both the common law and the respondent's own Development Management Practice Notes.

[65] The leading case in this area is the well-known decision of the House of Lords in *Tesco Stores v Secretary of State for Environment* [1995] 1 WLR 759. The Lords affirmed the earlier decision of the Court of Appeal in *R v Plymouth City Council ex p. Plymouth and South Devon Co-operative Society* (1993) 67 P&CR 78 to the effect that a planning authority was not required to demonstrate the necessity of a planning obligation (i.e. an agreement) as a precondition to the grant of planning permission. The relevant legal test was whether the agreement was material to the planning application. Following *Tesco Stores* therefore, the proper approach is to ask:

- Is the planning agreement for a planning purpose? and

- Is it Wednesbury unreasonable?

[66] Development Management Practice Note 21, published in 2017 by the DfI, addresses the use of s76 Agreements and states:

> "When considering the use of a planning agreement, it is fundamental to assess if the agreement sought or offered is necessary in planning terms, directly related to the development with a functional or geographical link and related in scale and kind to the development." [para 5.2]

[67] Properly understood, the use of the word 'necessary' in this context does not create an obligation to show necessity but rather that the planning terms are satisfied i.e. that it is for a planning purpose and is not Wednesbury unreasonable.

[68] Para 5.3 of the Note goes on to say:

> "Where a planning permission cannot be granted without some restriction then it may be more appropriate to firstly consider whether the restriction can be achieved by the use of a planning condition. The imposition of conditions is often simpler to administer and is subject to appeal. The terms of conditions imposed on a planning permission should not be re-stated in a planning agreement i.e. an agreement should not be entered into which requires compliance with the conditions imposed. Furthermore permission should not be granted subject to a condition that the developer enters into a planning agreement."

[69] This makes it clear to the decision maker that the use of conditions and/or planning agreements is essentially a question of judgement.

[70] In this case, the respondent has granted planning permission with both conditions and a s76 Agreement in play. As can be seen from the extracts above, the planning conditions set out the framework within which the permission can be exercised whilst the Agreement details how those conditions are to be complied with. In arriving at this course, the respondent has exercised planning judgement and, in accordance with well-established principles, this is a matter for the decision maker and cannot be attacked on its merits via the judicial review procedure.

[71] I accordingly find that there is no legal test of necessity in relation to s76 Agreements nor has the respondent breached any policy in granting the planning permission subject to such an agreement.

(iv) The Validity of the Agreement

[72] There are a number of discrete aspects to this ground of challenge. Firstly, it was submitted that the GAA has no estate in the land and cannot therefore enter into a s76 Agreement. Following some judicial intervention and further consideration, this point was abandoned by the applicant. The s76 Agreement clearly binds the freehold owners of the land, who indisputably own a legal estate, and in addition

binds the beneficial owners. The obligations created thereby are expressed to be, and clearly do, run with the land. In the unlikely event that the GAA disposed of its ownership of the lands in the future, any successor in title would be obliged to comply with the s76 Agreement.

[73] The applicant maintains that the s76 Agreement is invalid because no EIA or Habitats Directive screening have been carried out on the Agreement itself. Regulation 4 of the 2015 Regulations requires an EIA to be carried out when the authority is considering "granting planning permission." The s76 Agreement is not a form of permission or consent but represents a means by which restrictions on the grant of permission may be effected. In the words of section 76(1)(a), the Agreement facilitates the use of the land in a specified way.

(v) The Agreement is Void for Uncertainty

[74] In *Trump International v Scottish Ministers* [2015] UKSC 74, the Supreme Court approved Lord Denning's test for uncertainty from *Fawcett Properties v Buckingham County Council* [1961] AC 636:

> "a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents."

[75] The complaint on behalf of the applicant is that planning permission leaves much to be determined in the future via the use of the conditions and the s76 Agreement. The examples given include traffic access and egress and road closures, matters left to be addressed as part of the traffic management plans rather than being assessed as part of the planning application.

[76] The facts of *Trump International* are instructive in this regard. One of the planning conditions required the submission of a design proposal for wind turbines to be approved prior to the commencement of construction. The claim that this was void for uncertainty was emphatically rejected by the Supreme Court.

[77] There is nothing in the conditions or the s76 Agreement in this case which cannot be given a sensible or ascertainable meaning. It is true that a variety of issues are left to be determined at later dates, but only through defined processes and with a variety of legally enforceable obligations. Simply because an issue is not finalised at this stage does not mean that an agreement is uncertain.

[78] In any event, if the requirements imposed by the s76 Agreement are not met, the stadium will not be able to operate for a particular event, a prohibition which can be enforced by way of an injunction under section 76(6).

[79] Accordingly, I find that the s76 Agreement is valid and enforceable.

(vi) The Agreement Usurps the Planning Process

[80] In a related ground of challenge, the applicant contends that the s76 Agreement deals with matters which ought properly to have been addressed in the planning process. This ignores the fact that all the issues which are addressed in the s76 Agreement were themselves the subject of comment and representation during the planning process. It is not that this process has been 'usurped' but rather the respondent, in the exercise of its judgment, has chosen to implement restrictions on the planning permission by use of both conditions and a s76 Agreement. The Agreement is therefore an integral part of the process.

[81] The applicant also sought to argue that the use of the s76 procedure was an abuse of power on the part of the respondent since, it was claimed, members of the public could appeal planning conditions but not planning agreements. There are, of course, no such third party appeal rights in this jurisdiction. The only right of appeal conferred by the 2011 Act is that of an applicant who may appeal to the Planning Appeals Commission. This ground of challenge was therefore wholly misconceived.

(vii) Environmental Impact Assessment

[82] The Order 53 statement alleges that the respondent has acted in breach of regulation 4 of the 2015 Regulations by reason of the failure to screen or assess the proposed park and ride facilities through the EIA process. It is also argued that there has been no adequate assessment of the traffic, travel, parking, congestion and pedestrian management issues relating to the development since it is foreseen that the Event Management Plan will address these matters in the future. Generally, it is said that this is an impermissible approach to the assessment of environmental harm.

[83] The evidence of Ms Jamieson is that following receipt of the planning application and accompanying ES, consultation took place across public authorities including NIEA, DfI Roads and Belfast City Council Environmental Health Department. Following this, a request for FEI was made in relation to, inter alia, noise, air quality and traffic. Once received in May 2018, this was re-advertised and further consultation took place. Clarification was sought and once received in December 2018, it was determined that this represented FEI and another process of advertisement and consultation was triggered.

[84] On 1 April and 15 November 2019 DfI Roads asked for further information in relation to transportation and traffic issues. On each occasion, this was sent and again, re-advertising and consultation took place.

[85] The statutory duty to consult with Belfast City Council on the s76 Agreement was complied with and this led to only a minor amendment being made to the draft.

[86] There is no obligation imposed via the s76 Agreement to use particular park and ride facilities. Rather this is left to be determined on an event by event basis. However, the proposed facilities were identified in the Sustainable Travel Plan which was submitted to the respondent in response to the first FEI request. The analysis of the proposed facilities appears in the addendum to the DMR on foot of the objections raised by MORA. Their suitability clearly formed part of the assessment process. The addendum records:

> "In relation to the Park and Ride facilities, DfI Roads remain content that [they] have been adequately assessed and afford the necessary flexibility and variation in relation to size and location for the different permutations of events that will be required for the proposal"

[87] DfI Roads also declared itself content with the Transport Assessment.

[88] In relation to the Event Management Plan, the unchallenged evidence of Sean Foy, Transport Consultant with Atkins, is:

> "It is common practice for event management plans to form conditions of planning approval. This is the same approach that was taken for stadia at Windsor Park and Ravenhill. I have already mentioned the development at Hillsborough Castle and Gardens, with which I was involved, and in that case an event management plan was a condition of approval."

[89] The law in this area recognises the acceptability of multi-stage processes. Regulation 12 of the 2015 Regulations allows a decision maker to seek FEI with respect to a 'subsequent application' where the ES accompanying the original application is not adequate to carry out a proper assessment. As Lang J commented in *Abbotskerswell Parish Council v SSHCLG* [2021] Env. L.R. 28:

> "…where national law provides for a multi-stage procedure, and the environmental effects are identified and assessed at outline stage, details of the development (including further assessment of environmental effects, if required) may be finalised at reserved matters stage, within the parameters set by the grant of outline

> permission and the conditions attached thereto" [para 134]

[90] Furthermore, the applicant asserts that the ES is defective in material respects:

(i) It does not assess the impact of the creation of a new pedestrian access at Owenvarragh Gardens;

(ii) The transport assessment is based on the assumption that all traffic for Boucher Playing Fields will enter from the Broadway Interchange;

(iii) Other traffic scenarios were not considered.

[91] The relevant legal test for such a challenge was articulated by Sullivan J in *R (Blewett) v Derbyshire CC* [2004] Env. LR 29:

> "The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an [environmental impact assessment] application' (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in R v North Yorkshire County Council, Ex p Brown [2000] 1 AC 397, at p 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations …, but they are likely to be few and far between." [para 41]

[92] This reasoning was expressly upheld by the Supreme Court in *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52.

[93] These criticisms do not take account of the fact that the environmental information is not limited to the material in the ES but includes all representations made by others as part of the consultation process. It is for this reason that Treacy J stated in *Re Newry Chamber of Commerce* [supra]:

> "The consultation process for EIA Development is thus designed by statute to enable the public to inform the decision-maker of all points which they consider relevant prior to the grant of permission so that the decision-maker can then take them into account prior to reaching a decision. It would frustrate that purpose if a member of the public could come to Court after the event and seek the quashing of a planning permission for EIA Development based upon points of which he did not inform the decision-maker during the statutory consultation process. This is precisely what the Applicant seeks to do in the present case." [para 76]

[94] Belatedly, in an affidavit dated 16 March 2022, Martin Hoy, Chartered Engineer engaged on behalf of MORA, identified an error in the traffic modelling data whereby vehicles had been sent down the Donegall Road instead of Glenmachan Street to enter Boucher Road. This would impact on the traffic figures for a Sunday afternoon event. It is startling that Mr Hoy has been engaged in the planning process since at least May 2017, and his identification of the error related to material submitted in April 2018. This is exactly the type of impermissible challenge identified by Treacy J.

[95] The Owenvarragh Gardens issue is a good example of the EI process in action. The GAA did not address the matter in the ES but information emerged from the consultation responses and, as a result, both the noise and amenity impact for the residents in this street were assessed as the results of these are recorded in the noise impact assessment and the DMR.

[96] The criticism of the general approach to traffic modelling is, in reality, an impermissible merits based challenge. DfI Roads was consulted throughout the process and agreed both with the assumptions, on the basis of road signage, and on the management of the impact of traffic. The decision maker was entitled to give considerable weight to the views of the statutory consultee (see, for instance, Beatson J in *Shadwell Estates v Breckland DC* [2013] EWHC 12 (Admin)). None of the points made by MORA in this regard could be said to demonstrate irrationality on the part of the respondent.

[97] For these reasons, none of the EIA grounds have been made out.

(viii) Habitats Directive

[98] The challenge under the Habitats Directive is related in that the applicant says a separate assessment of the impact of the park and ride facilities ought to have been carried out.

[99] The evidence is clear in that the respondent sought and obtained expert analysis from the Shared Environmental Service and concluded that there would be no adverse impact on any protected site. Such assessment (like that under the EIR) is only required in respect of plans or projects in respect of which a decision is to be made to grant consent. No such consent is sought for the park and ride facilities as part of this planning application and therefore the assessment requirement is not triggered.

[100] In any event, it is incumbent upon an applicant to show that there is, in fact, some real, rather than hypothetical, risk to a protected site, per Sullivan LJ in *R (Boggis) v Natural England* [2010] PTSR 725 at [37]:

> "37 In my judgment a breach of article 6(3) of the Habitats Directive is not established merely because, sometime after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned"… a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered."

[101] No evidence whatsoever has been adduced by the applicant of a real risk to a protected site which should have been considered. For these reasons, the challenge based on the Habitats Directive must fail.

(ix) Fallback, Certificate of Lawful Use and Development and Abandonment

[102] These grounds all related to the historical and existing use of the Casement Park site but were rightly not pursued by the applicant at hearing.

(x) Conclusion

[103] For the reasons set out, none of the planning grounds have been made out by the applicant.

Discretion

[104] I therefore return to the question of whether, in the court's discretion, any relief should be granted to the applicant in respect of the technical breach of section 28A(1) of the NIA and the Ministerial Code. This question must now be considered in light of the fact that I have found the applicant's planning grounds of challenge to be without merit. The following factors are in play:

(i) There is no evidence that any Minister disagreed with the decision to grant planning permission for Casement Park. Each was provided with papers from the Minister which referenced the intention to grant permission;

(ii) The New Decade New Approach agreement provided that Casement Park would be brought forward by the Executive;

(iii) The DfC is the majority funder of the development and a signatory to the s76 Agreement and its Minister expressly supported the decision;

(iv) Whilst, unlike *Safe Electricity*, there were challenges to this decision on planning grounds, I have found these to be without merit; and

(v) There has already been significant delay and there is considerable public interest in this project.

[105] As a result, I propose to follow the approach in *Safe Electricity* and decline to grant any relief in all the circumstances prevailing in this case.

Conclusion

[106] For all the reasons set out, the application for judicial review is dismissed and I will hear the parties on the question of costs.

Postscript

[107] In March 2022 MORA served rejoinder affidavits from Tony Dignan, a member of the committee, and Theresa Cassidy, Chartered Town Planner. Each of these was, presumably, evidence adduced in order to assist the case being advanced.

[108] The affidavit of Mr Dignan contained a section entitled 'Pre-Determination', even though this was never a pleaded ground of challenge of MORA's case. It also

makes allegations of bias and conflict of interest, again issues which bore no relevance to the questions which the court had to determine. Put simply, this approach is completely unacceptable. Evidence is only admissible when it is relevant to issues in the litigation. This is a basic proposition. MORA and its advisers should never have placed before the court material the only purpose of which could have been to attempt to influence judicial thinking in its favour.

[109] Similar considerations apply to the evidence of Ms Cassidy who was relied upon as an expert witness entitled to give opinion evidence. Her evidence was replete with allegations that the planning permission was "unlawful", an issue which is demonstrably for the court to determine, not a planning consultant. Language such as "the Department unlawfully cast those Regulations aside" demonstrates only a complete lack of understanding of the role of an expert witness in our legal system. The affidavit also details alleged breaches of planning policy which formed no part of MORA's case. Claims were advanced of errors of law in relation to fall back and existing use which, not only should they never have been the subject of opinion evidence, they were abandoned by the applicant at hearing.

[110] The nature of this evidence is such that little weight could be attached to it. Solicitors and counsel owe obligations to the court to ensure the proper administration of justice and affidavits of this nature should never have been filed.