

# ANNEX II

Joan MacElhatton  
Department of Finance and Personnel  
Departmental Solicitors Office  
Centre House  
Chichester Street  
BELFAST BT1 3JE

Our Ref: AR/JM/3RIV0125  
Your Ref: LIT 35931/2012/JMacE  
Date: 28 March 2014

Dear Joan

**IN THE MATTER OF AN APPLICATION BY RIVER FAUGHAN ANGLERS LIMITED FOR JUDICIAL REVIEW  
AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 13<sup>TH</sup> SEPTEMBER 2012 TO GRANT PLANNING PERMISSION**

**OUR CLIENT: RIVER FAUGHAN ANGLERS LTD**

We refer to the above matter, written judgment for which was received on 14 March 2014.

In light of the circumstances under which the challenge was brought and the wider public interest in the grounds of challenge, the Department should consider whether it is appropriate to bear its own costs in the action to date.

You will be aware, as set out in the affidavits submitted by our client to the proceedings, of the long history of complaints both in relation to the site that was the subject of the proceedings and the Department's failures to properly enforce development at that site, as acknowledged in the Department's affidavits. Further, in its letter of 2 August 2012, the Department invited our client to commence judicial review proceedings as its only recourse against the impugned decision.

You may also be aware that the Aarhus Convention Compliance Committee has accepted a complaint made by our client (reference ACCC/C/2013/90) which includes, *inter alia* submissions regarding the costs incurred by it in these proceedings. The matter was suspended by the Compliance Committee pending the outcome of these proceedings and we would anticipate that the outcome will have significant bearing on the Compliance Committee's consideration of the matter in due course.

The Court has yet to make any ruling as to costs. You will note that at the decision hearing, and in advance of the handing down of the written judgment, the Court invited the Department to consider whether it would seek costs against the applicant and whether such action would be appropriate. Accordingly it is open to the Department decline to seek an award of costs.

In the circumstances we would respectfully propose that the above course of action would both be equitable and would reflect the public interest in the matters properly raised in the proceedings and, as a not for profit organisation tasked with protecting the River Faughan, the Applicant's motivation for bringing them.

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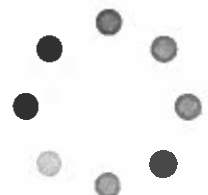
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We look forward to your urgent consideration of this matter.

Yours faithfully



TUGHANS

Messrs Tughans  
Solicitors  
Marlborough House  
30 Victoria Street  
BELFAST  
BT1 3GG

Our Ref: LIT 35931/2012/JMacE

Date: 23<sup>rd</sup> May 2014

Dear Sirs

**RIVER FAUGHAN ANGLERS LIMITED -V- DOE**

1. In your letter of 28 March 2014 written following the full judgment of the Court, you invite the Department to consider whether it is appropriate for it to bear its own costs of the action to date. You base that invitation on what you describe as the public interest in the matters properly raised in the proceedings and, as a not for profit organisation tasked with protecting the River Faughan, the Applicant's motivation for bringing them.
2. Having carefully considered your invitation, the Department is willing to agree to an order that the Applicant should pay the Department's costs of the proceedings to date, limited to the sum of £5,000 (excluding VAT). The Department is not willing to agree to an order that absolves the Applicant, as the unsuccessful party, from all liability for the Department's costs of the proceedings.
3. The Department's reasons for its proposal are—
  - (1) The established principle is that costs follow the event. The unsuccessful applicant expects to incur liability to pay the reasonable costs of the successful respondent.
  - (2) Since the commencement of these proceedings, The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 [2013 No. 81- 'the Regulations'] have come into force.
  - (3) The Regulations set out the protective costs regime that applies to an application for judicial review of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention (regulation 2(1)) – 'an Aarhus Convention case'. The subject matter of the present proceedings (i.e. a screening decision under the EIA Directive and an appropriate assessment under the Habitats Directive) brings it within that

statutory definition.

- (4) The Regulations are strictly inapplicable to the present proceedings, which were commenced prior to 15 April 2013 (regulation 1(2) of the Regulations). Nevertheless, the Department is willing to agree to address the question of costs on the assumption that the present proceedings are subject to the special statutory regime laid down under the Regulations.
- (5) On that approach, the Applicant would ordinarily expect to be liable to pay the Department's costs up to a limit of £10,000. See regulation 3(2) of the Regulations. However, the Department is willing to agree to an order limiting the Applicant's liability to pay costs to the sum of £5,000 (exclusive of VAT), in effect treating the Applicant as an individual.
- (6) The Regulations give effect to the United Kingdom's treaty obligations, under the Aarhus Convention, to enable public participation in environmental decision by affording appropriate costs protection for judicial review applications to the High Court, in cases that engage (inter alia) the EIA Directive and the Habitats Directive. Such protection is achieved through limiting the unsuccessful applicant's exposure to costs, rather than through absolving the unsuccessful applicant from such liability altogether.
- (7) The Department's proposal thus both embraces and gives effect to the Applicant's asserted motivation for bringing the present proceedings, in a manner that is completely consistent with the statutory arrangements that now apply in Northern Ireland.
- (8) There is, in the Department's view, no proper justification for absolving the Applicant from all responsibility for the Department's costs of these proceedings. The Department has answered the Applicant's criticisms of its alleged 'failures' in enforcing planning control at the site in the Affidavits before the Court. In any event, the planning history of the site forms no material part in the Court's reasoning in dismissing this application for judicial review. The Department's letter of 2 August 2012 was a reasonable response to the Applicant's then complaint, since by that date the Department had concluded its determination of the question whether the then current application for planning permission required the submission of an environmental statement.
- (9) In the present proceedings, the Applicant initially made, but did not pursue, an application for a protective costs order. Nevertheless, that implies the Applicant's acceptance that it must expect to incur a modest exposure to costs in the event that it was unsuccessful in its application for judicial review.
- (10) The Department also draws attention to the very considerable costs that the Applicant has been willing to incur in pursuing these proceedings to date.

The sum of £156,000 is mentioned in Mr Blackwood's letter of 22 February 2014 to Ms Marshall of UNECE. It is plainly reasonable that the Applicant as the unsuccessful party should also incur a modest liability to contribute towards the costs of the Department, which costs will otherwise fall to be met from the public purse.

4. I hope that we shall be able to reach agreement on the proposal set out in paragraph 2 above. Meanwhile the Department reserves its right to make application to the Court. I look forward to hearing from you as soon as possible.

Yours faithfully

**JOAN MacELHATTON**  
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for The Solicitor  
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Tughans

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Our Ref: AR/JM/3RIV0125  
Your Ref: LIT 35931/2012/JMacE  
Date: 30 May 2014

Dear Joan

**IN THE MATTER OF AN APPLICATION BY RIVER FAUGHAN ANGLERS LIMITED FOR JUDICIAL REVIEW  
AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 13<sup>TH</sup> SEPTEMBER 2012 TO GRANT PLANNING PERMISSION**

**OUR CLIENT: RIVER FAUGHAN ANGLERS LTD**

We refer to the above matter and your letter of 23 May 2014.

We can confirm that, whilst our client reserves its position with regard to the Department's reasoning, it is willing to accept the Department's offer of costs in the proceedings to date being limited to £5,000 (excluding VAT).

We would be grateful if you could notify the Court of the parties' agreement to an Order to that effect and payment will then be arranged in due course.

Yours sincerely

  
TUGHANS

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