2012 No. 138402/01

Affidavit of Dean Blackwood (2nd)

Dated: 4 September 2013

For Applicant

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RIVER FAUGHAN ANGLERS LIMITED FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE) ON 13TH SEPTEMBER 2012 TO GRANT PLANNING PERMISSION

AFFIDAVIT OF DEAN BLACKWOOD

I Dean Blackwood, aged 18 years and upwards, of [redacted] make oath and say the following:

Introduction

1. This is the second affidavit I have made in these proceedings. I make this affidavit in response to matters raised in the affidavits of Adrian Brown (2nd) and Malachy McCarron, sworn by them on 5 July and submitted to the Honourable Court upon the direction of the Judge made on 18 June 2013.

Affidavit of Mr Brown

2. In paragraphs 5-7, Mr Brown sets out the evidence contained in his first affidavit regarding the justification for not imposing the condition suggested by NIEA. Dr O'Neill and I have explained elsewhere in our evidence the fundamental difficulties with that approach. The level of environmental information available to the NIEA in August 2012 for A/2008/0408/F was inadequate for evaluating and mitigating against environmental damage to the River Faughan SAC during the decommissioning of the existing lagoons and construction and operation of the new lagoons. The HRA identified the need for NIEA's proposed condition 3 in order *"to*

prevent pollution of the River Faughan and Tributaries SAC/ASSI" and to *"…reduce the risk of potentially catastrophic collapse"* of the existing highly contaminated lagoons during the decommissioning/decontamination process [KF19, page 843]. Had the information at that time been adequate, including that which appeared on the submitted plans, NIEA would not have requested a detailed lagoon management plan (LMP) to mitigate against the risks of decommissioning the existing lagoons and implementation of the impugned permission.

3. In paragraph 8 of his second affidavit, oddly, Mr Brown feels the need to stress *"that at times some of the suggested conditions amount to a wish list but cannot be imposed as they are not supported by valid planning reasons…"* The reason for imposing NIEA's condition 3 was *"to prevent pollution of the adjacent River Faughan and Tributaries SAC/ASSI."* [KF20, page 850]. To me this not only is an obvious and *"valid planning reason"* to impose NIEA's required condition, but also an imperative if the Habitats Directive is not to be violated.

4. At paragraphs 10-12 of his affidavit, Mr Brown addresses the change between the first draft of his affidavit and the version submitted to the Court. Mr Brown now claims that he was advised to remove the last sentence in his draft affidavit, as detailed at paragraph 10 of his second affidavit; and that he *"…accepted that final sentence to be unnecessary for the purpose of responding to Gerry Quinn's particular complaint in paragraph 33 of his 1st affidavit."* He makes these averments in the context of an admission (at paragraph 13 of his affidavit) that the final sentence betrayed an error of law and that *"the Department was in principle empowered to impose a condition to manage the existing lagoons despite the fact that the PAC deemed those lagoons to be immune from enforcement action."*

5. The Department now therefore accepts that before the impugned decision was taken, its rationale for not imposing condition 3 was, at least in part, mistaken in law. It is clear that this informed the omission of condition 3, notwithstanding the HRA and advice from NIEA. It is surprising that this was neither conceded nor explained in the first affidavit.

6. In paragraph 12 he adds that *"however, as Chambers had volunteered a lagoon management plan on submitted drawing 07 Rev 3, it had been appropriate for the Department to include condition 3 on the planning permission requiring compliance with that drawing".* Nonetheless, it is not credible for Mr Brown to claim that the "volunteered" LMP was sufficient when NIEA had concluded through the HRA process, that *"that drawing"* was not sufficient to afford protection to the River Faughan SAC.

Affidavit of Mr McCarron

7. Paragraphs 2-4 of Mr McCarron's affidavit simply reinforce NIEA's view that it was necessary and appropriate for it to seek mitigation and an LMP by way of its proposed planning conditions. This recommendation followed a request from the Department on 31st May 2012 for a "*detailed phasing and method condition, which would clearly set out when and* ***how*** (my emphasis) *the current lagoons would be de-commissioned*" [MMcC2, p. 1324]. NIEA plainly considered that notwithstanding the imposition of conditions 1 and 2, and the information which was already before them on the submitted plans, further information was necessary in the form of a LMP, in order to comply with the Habitats Directive.

8. Paragraphs 5-6 refer to a discussion which has previously not been raised by the Respondent and of which no record exists on file. Mr McCarron's understanding of the discussion with the Area Planning Manager (APM) indicates that the APM was content that *"NIEA and Rivers Agency had given sufficient consideration and provided adequate mitigation measures to ensure that the existing lagoons are decommissioned and the new lagoons are constructed correctly"* [MMcC6, page 1343 – last sentence]. This statement clearly suggests that the *"sufficient consideration"* and *"adequate mitigation measures"* included the imposition of NIEA's condition 3. Indeed, the Development Management Group (DMG) planning report dated 24 August 2012 [MMcC6, pages 1331-1345] contains no justification for the decision to omit NIEA's condition 3. Rather it considers that NIEA has provided *"adequate mitigation measures"*, which would have included its proposed condition 3 based on the latest response of NIEA.

9. I also note the difference between the DMG report's consideration of the proposed mitigation measures [MMcC6, page 1343] and what Mr McCarron now states in his affidavit. As I have mentioned, in his planning report Mr McCarron records his satisfaction with NIEA's consideration of the application, suggesting acceptance of the necessity of NIEA's planning conditions, including condition 3. However, his affidavit is now stating at paragraph 7 that *"the recommendation to approve was based on the understanding that adequate mitigation measures could be imposed on the approval by way of condition and these conditions* ***could be informed by the recommendations of NIEA*** [my emphasis] *and Rivers Agency. I kept a record of this on file in the form of a Deferred Application consideration dated 24 August 2012."*

10. The DMG report does not state that the recommendations of NIEA would simply inform the Department's consideration of adequate mitigation (and certainly not that NIEA's proposed condition 3 was unnecessary and was to be omitted). If NIEA's

condition 3 (formulated after HRA) was to be omitted, I would have expected the decision to be discussed and with clear reasons for the omission recorded at the DMG meeting on 24 August 2012. This did not occur, suggesting that at that stage, it was considered to be a necessary planning condition. As is normal practice, the report is signed off by three officers, giving corporate endorsement to this recommendation.

11. The erroneous decision not to include condition 3 was only taken in the final week before the decision issued and after the statutory consultation with the Council. This is confirmed by Mr McCarron in paragraph 9 of his affidavit where he states *"on a date after 4 September I met with Ms Helena O'Toole, Area Planning Manager and Mr Adrian Brown, Senior Enforcement Officer to discuss the issue of the decision and in particular the composition of the conditions."*

12. Mr McCarron states *that "it is normal practice for the case officer to discuss the content of the planning decision notice with senior planners and in this case particular attention was given to the suggested conditions by NIEA in the 8 August response"*. The long-established forum for this is the DMG meeting, which Mr McCarron confirms took place on the 24 August 2012. Mr McCarron confirms that the decision not to impose NIEA's proposed condition 3 was taken after the DMG meeting and after statutory consultation with the Council. From my experience of auditing the decision making procedures within the Department, this is not *"normal practice".* It is unclear from the note the extent to which the "senior planners" who were not involved in the DMG but nonetheless took part in this later discussion were aware that NIEA's HRA had recommended a condition even after seeing the information on the submitted plans.

13. Mr McCarron's averment (paragraph 9) that *"it was decided that condition 3 in the NIEA response was not necessary"* does not fully reflect the content of his note [MMcC7, page 1346] which includes the mistaken conclusion that *"the Department could not impose a condition for the maintenance and management of the existing lagoons as they have been deemed lawful."* It is not tenable to claim that NIEA's condition 3 was not necessary, when NIEA, after conducting an HRA in a "…*logical, systematic and scientifically robust manner…"* in August 2012 [Page 642 – para 20 of Mr Finegan's affidavit] considered it an essential part of the mitigation to satisfy the requirements of the Habitats Directive; or when his own report on 24 August 2012 considered NIEA to have provided adequate mitigation measures which included its condition 3.

SAVE AND EXCEPTING AS where otherwise appears, I depose to the foregoing from facts within my own knowledge, information and belief.

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SWORN at

this day of

before me, a Solicitor empowered

to administer oaths

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This affidavit is filed on behalf of the Applicant by its solicitors, Tughans, Marlborough House, 30 Victoria Street, Belfast, BT1 3GG.