Neutral Citation No: ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McB10386** ***Delivered: 29/09/2017***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY WILLIAM DONNELLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND MADE ON 27 JULY 2015

McBRIDE J

Introduction

[1]In the foothills of the Southern Sperrins, County Tyrone it has been known for many centuries that, "There's gold in them thar hills". It has however never been commercially mined until Omagh Minerals Limited ("the Notice Party"), whose parent company is Galantas Gold Corporation, a Canadian company, applied for and was granted planning permission on 23 May 1995 for the extraction of gold, silver and associated minerals from an open cast pit. Subsequently on 27 July 2015 the Department for the Environment ("the Department") granted planning permission ("the 2015 permission"/"impugned decision") for underground mining and associated surface level works. The 2015 permission is the subject of challenge by the applicant.

The application

[2]The applicant seeks to judicially review the decision of the Department to grant the 2015 permission to the Notice Party for mining development at 56 Upper Botera Road, Cavanacaw, Omagh ("the mine").

[3]On 27 July 2015 the Department granted the Notice Party planning permission ("the 2015 permission") pursuant to application number K/2012/0373/F for "underground mine and associated surface level works to include car parking area, ancillary buildings (including fan room, miners' dry room, ore storage building, mill building, general storage compound) plant (including conveyor belt, material transfer station) and equipment and removal of rock off-site. Non-compliance with Condition No. 37 of planning approval K/1992/0713/F; to allow the extension of mine operations beyond the eight year limit as per condition number 37". The planning permission was subject to 59 conditions.

[4] On 1 February 2016 Deeny J granted leave in respect of the application for judicial review and also made a protected costs order.

[5]The applicant, Mr William Donnelly, appeared as a litigant in person with the assistance of his wife as his McKenzie Friend. Mr Tim Mould QC appeared with Mr Philip McAteer of counsel on behalf of the Department and Mr William Orbinson QC and Mr Scott Lyness of counsel appeared on behalf of the Notice Party.

[6] I am grateful to all counsel for the considerable industry each has expended in the preparation and presentation of very detailed, careful and comprehensive written skeletons and oral submissions. I am also grateful to Mr William Donnelly, the applicant, for his detailed and comprehensive submissions and for the courteous manner in which he conducted himself at all times. In addition I commend his wife who conducted herself at all times as a model McKenzie Friend.

Background

[7]The mine is situated 5 kilometres southwest of Omagh in the foothills of the Southern Sperrins, an area of outstanding natural beauty.

[8]The applicant and his wife run a bed and breakfast business from their home which is situated close to the mine.

[9]On 18 December 1992 the Notice Party applied for planning permission for a 60 hectare site seeking permission for an "open cast pit for the extraction of gold and silver and associated minerals, with associated plant and storage".

[10]The 1992 application included a number of approved drawings and was supported by an environmental statement. The application was then considered at a public inquiry after which the Planning Appeals Commission recommended to the Department that permission be granted. On 23 May 1995 the Department granted planning permission subject to 40 conditions ("the 1995 permission").

[11]For the purposes of this challenge the following conditions attaching to the 1995 permission are relevant namely:

1. Condition 2 which provided as follows:-

> "The development shall be carried out in accordance with the drawings and details bearing the Department's Drawing Number stamp, with the reference K/92/071301-09. The processing of the mineral extracted shall be as set out in the Environmental Statement (Section B5) received by the Department on 18 December 1992 and the additional information (Section 2) received by the Department on 18 May 1993".

The approved drawings which were submitted show the location of the Kearney pit which was to be progressively quarried and then backfilled, areas of rock storage, a 'tailings beach', pond and dam.

2. Condition 10 which provided as follows:-

> "The tailings dam shall be constructed generally in accordance with the details shown in cross-sections depicted in figure B8 of the Environmental Statement. The tailings basin and polishing pond shall be lined throughout with material of a maximum permeability of 10-9mm/sec. The completed design for the dam structure and impoundment area shall be submitted to the Department for approval prior to construction".

3. Condition 11 which provided as follows:-

> "Linings of the tailings area shall not be carried out with any material other than on site till until the Department has been provided with information on the type of material to be used, the amount required, its permeability and its source and has given its written approval."

4. Condition 37 which provided as follows:-

> "The extraction and processing hereby permitted shall be discontinued within 8 years from the date when the plant becomes operational".

5. Condition 39 which provided as follows:-

> "Within 5 years of the date of commencement of this development, or within 3 months of a written request from the Department, the operator shall provide for the agreement of the Department, a Closure Plan for the development; such a plan to be implemented within 6 months of cessation of ore processing and to include the following matters:- … (b) the refilling of the trench with waste rock to the level of surrounding land the disposal of surplus rock … (g) an assessment of the potential for post-closure acid rock drainage from the site and control of such drainage if it exists.
> Reason: To ensure the satisfactory restoration of the site."

[12]The 1995 permission also contained 14 informatives. Number 14 states as follows:

> "When making this decision the Department has taken into consideration environmental information within the terms of the Planning (Assessment of Environmental Effects) Regulations (Northern Ireland) 1989 (as amended)."

[13]Although planning permission was granted in 1995 open cast mining did not commence at the site until 2007. Therefore, in accordance with the Condition 37 of the 1995 permission, processing on the site was required to have ceased by 26 June 2015, subject to any further permission granted.

Background to the impugned decision

[14]On 6 July 2012 the Notice Party applied for planning permission for an underground mine and associated surface level works within the area of the existing open pit mine. The application was accompanied by an environmental statement and associated drawings. Subsequently an amended application was made on 30 July 2012. The environmental statement was revised and reissued in October 2012. Further environmental information was then provided by way of an addendum in November 2014.

[15]As appears from the affidavit of Stephen Hamilton, Principal Planning Officer, sworn on 6 June 2016, the Department advertised the application and issued consultations on the application and the environmental statement and further environmental statement. The Department received various written responses including one from the applicant objecting to the proposal together with written responses from the various statutory consultees.

[16]The 2015 permission was granted on 27 July 2015. It was granted subject to 59 conditions. For the purposes of this challenge the following conditions are relevant namely:-

Condition 4 which provided:-

> "A survey detailing the extent of mining and its relationship to surface features, shall be submitted to the Department each year for the duration of the development, the first of which shall be submitted on an annual basis giving one year from the date of commencement of underground extraction and the final survey shall be submitted on completion of development hereby approved. The survey shall detail any backfilling that has taken place."

Condition 5 which provided:-

> "Prior to the commencement of the development hereby approved a Monitoring and Action plan for Controlled Water shall be submitted to the Department for agreement in writing…"

Condition 11 which provided:-

> "No rock or sand shall be removed from the site until backfilling of the Kearney trench has been completed and details agreed in writing with the Department."

Condition 12 which provided:-

> "No more than 9 heavy goods vehicles shall exit the site in any one day during the period Monday to Friday inclusive. No heavy goods vehicles shall exit the site on Saturdays, Sundays or public holidays. Reason: To control traffic levels on the local road network in the interests of road safety and amenity."

Condition 22 which provided:-

> "A rock stockpile shall be retained in the position shown in green to the east of the processing area on drawing number 03, date stamped received by the Department on 26 January 2015 and labelled 'rock storage area'. The stockpile shall be maintained at a minimum height of 10 metres above the floor level of the new mill building and shall not exceed a height of 190mRL. Reason: To provide noise attenuation in the interests of amenity."

Condition 57 which provided:-

> "Post and wire fencing with exclusion sign shall be erected along the boundaries between the blanket bog and the existing opencast mine, as marked on Drawing Number 19, date stamped received by the Department on 26 January 2015 by DOE Planning. No works, infill, storage or construction activity associated with the development, including the removal, dumping or storage of materials, or tree planting shall take place within these blanket bog areas. A fence shall be retained along this boundary until all works have been completed and the site is restored. Reason to minimise the impact of the proposed non-blanket bog associated flora and fauna on site".

Condition 58 which provided:-

> "All trees to be retained on site … Reason: To protect existing trees and woodland".

Informative number 1 provided that the planning permission relates to a number of drawings. The drawings which were submitted and approved delineate the site of the permission and include details of the proposed development including east and western settlement lagoons, tailings management facilities, the Kearney pit excavation and rock storage areas.

Informative number 2 states:

> "when making this decision the Department has taken into consideration environmental information within the terms of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015.

Grounds of challenge

[17]The Order 53 statement, as amended, seeks an order of certiorari to quash the impugned decision. The grounds upon which relief is sought are, in summary, as follows:-

1. Ground 1

The Department acted unlawfully by:-

1. retrospectively granting approval for development which was unauthorised and had not been assessed pursuant to:-

    1. the Environmental Impact Assessment Directive and the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 ("the EIA Regulations") and

    2. The Habitats Directive and the Conservation (Natural Habitat etc) Regulations (Northern Ireland) 1995 ("the Habitat Regulations"),

2. Not applying the precautionary principle

2. Ground 2

The Department failed to retain its discretion in respect of its duties pursuant to the EIA Regulations, the Habitat Regulations and The Planning (Management of Waste from Extractive Industries) Regulations (Northern Ireland) 2010 ("The Waste Regulations") as it accepted at face value the classification of waste rock provided by contractors acting for the Notice Party.

3. Ground 3

The Department failed to retain its discretion in relation to its duties under the Waste Management Directive/ Regulations, by approving Annex J Waste management Plan for the site.

4. Ground 4

The Department acted in breach of the EIA and Habitats Regulations and the precautionary principle by approving inaccurate drawings which show the application boundary encompassing approximately 81 hectares and not 60 hectares as applied and assessed.

5. Ground 5

The Department acted in breach of the EIA, the Habitats and the Waste Regulations, by accepting a requirement for acidic rock testing every 25 vertical metres, as part of a monitoring plan post-approval, which had not been assessed prior to the grant of permission.

6. Ground 6

The Department failed to comply with the precautionary approach required by Article 191 of the Treaty on the Functioning of the European Union.

7. Ground 7

The Department failed to consult with the public in breach of the EIA Directive and Articles 1 and 3(2) of the Aarhus Convention.

Legislative framework

[18]The statutory provisions relevant to the various grounds of challenge are:-

- The Planning Act (Northern Ireland) 2011.
- Council Directive 92/43/EEC of 21 May 1992 ("the Habitats Directive") which was transposed into domestic law by The Conservation (Natural Habitats etc) Regulations (Northern Ireland) ("the Habitats Regulations").
- Council Directive 2014/52/EU, formerly Council Directive 2011/92 ("the EIA Directive") which was transposed into domestic law by The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012 ("the EIA Regulations").
- EU Directive 2006/21/EC ("the Waste Management Directive") which was transposed into domestic law by The Planning (Management of Waste from Extractive Industries) Regulations (Northern Ireland) 2010, ("The Waste Regulations").

[19]It was common ground that the provisions of the various EU Directives are reflected in the domestic Regulations.

Planning Act (Northern Ireland) 2011

[20]This is the relevant framework statute in respect of planning matters. Section 24 provides that:

> "planning permission is required for the carrying out of any development of land".
>
> "Development" is defined in section 23 (1) as meaning "the carrying out of … mining … in, on, over or under land".

In accordance with Section 23(1) mining constitutes development and therefore requires planning permission.
[21]Section 40 sets out the form and content of applications for planning permission and Section 45 deals with the determination of planning applications.

[22]Section 51(1) deals with the assessment of environmental effects and provides:

> "The Department may by regulations make provision about the consideration to be given, before planning permission for development of any class specified in the regulations is granted, to the likely environmental effects of the proposed development.
>
> (2)The regulations may make the same provision as, or provision similar or corresponding to, any provision made for the purposes of any Community obligation of the United Kingdom about the assessment of the likely effects of the development on the

> environment, under section 2(2) of the European Communities Act 1972."

[23]Section 55 deals with the grant of planning permission for development already carried out.

EIA Directive/EIA Regulations

[24]The relevant provisions of the EIA Directive, in accordance with Section 51 of the Planning Act (Northern Ireland) 2011, have been transposed into domestic law by the EIA Regulations.

[25]All the parties agreed, in accordance with the definition set out in Regulation 2(2), this was EIA development.

[26]Regulation 4 prohibits the granting of planning permission for EIA development unless the Department has first taken the environmental information into consideration.

[27]Regulation 2(2) provides that environmental information means,

> "the Environmental Statement, including any further information and any other information, any representations made by any body required by these regulations to be consulted and any representations duly made by other person about the likely environmental effects of the proposed development".

The environmental statement is defined as meaning:

> "a statement that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but which includes at least the information referred to in Part 2 of Schedule 4".

Schedule 4 sets out "Matters for Inclusion in the Environmental Statement".

Part 1 refers to:- description of the development; outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice taking into account the environmental effects; a description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets including the architecture and archaeological heritage, landscape and inter-relationship between the above factors; a description of the likely significant effects of the development on the environment which should cover the direct effects on any indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects of the development; a description of the measures envisaged to prevent, reduce and where possible off-set any significant adverse effects on the environment and a non-technical summary of all these matters.

Part 2 refers to:- a description of the development comprising information on the site, design and size of the development,; a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; the data required to identify and assess the main effects which the development is likely to have on the environment; an outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice, taking account of the environmental effects and a non-technical summary of all the above matters.

[28]Regulation 19(1) provides:-

> "Where the applicant has submitted a statement which he refers to as an environmental statement and the Department is of the opinion that the statement should contain further information in order to be an environmental statement, it shall require the applicant, by notice in writing to submit such further information."

[29] Regulations 16 to 21 deal with publicity requirements. Regulation 16 provides:

> "Where an environmental statement is submitted, the developer shall make it available to the public…"

[30] In accordance with Regulation 19(4) any addendum environmental statement shall also be made available to the public by the Department.

Habitats Directive/Habitats Regulations

[31]The Habitats Directive provides for the conservation of natural habitats of wild flora and fauna. It was transposed into domestic law by the Habitats Regulations.

[32]Article 6 (3) of the Habitats Directive provides:-

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

[33] The requirements of Article 6(3) are reflected in Regulation 43(1) of the Habitats Regulations which provides:

> "A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –

1. Is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and

2. Is not directly connected with or necessary to the management of site,

shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2)A person applying for any consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for purposes of the assessment.
…
(4)The competent authority shall, if it considers it appropriate, take such steps as it considers necessary to obtain the opinion of the general public.

(5)In the light of the conclusions of the assessment, and subject to Regulation 44, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.

(6)In considering whether a plan or project will adversely affect the integrity of the site, the authorities shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposed that the consent, permission or other authorisation should be given."

[34] Regulation 49(2) further provides:

"Where Regulations 43 and 44 apply the Department or, as the case may be, the Planning Appeals Commission may, if it considers that any adverse effects of the plan or project on the integrity of a European site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as the case may be, take action which results in planning permission being granted subject to those conditions or limitations."

[35] Under Regulation 9 the definition of a European site as includes a special area of conservation ("SAC").

Waste Management Directive/Waste Regulations

[36]The Waste Regulations transpose the requirements of the Waste Management Directive into domestic law. Regulation 4(1) (a) provides,

> "planning permission for relevant development shall not be granted on or after the date of coming into operation of these regulations unless a waste management plan has been submitted and approved by the Department in accordance with regulations 6 and 7."

All the parties were agreed that the mining operation in question was relevant development.

[37] Regulation 5 (4) provides;-

> "The requirement in regulation 6 [preparation and submission of a waste management plan]…shall not apply to relevant development where the extractive waste is –
>
> (a)Inert waste…, or
>
> (b)…
>
> Unless deposited in a Category A waste facility."

[38] Schedule 3 sets out the criteria for classification of category A waste facilities. This includes a waste facility which contains waste classified as hazardous or dangerous.

Relevant legal principles

Generally in respect of judicial review of planning decisions

[39]In *Re Bow Street Mall Limited and Others' Application for Judicial Review)* [2006] NIQB 28 Girvan J at paragraph [43] set out a number of clearly established principles governing the role of planners and the role of the courts in planning cases. In particular he noted that:

> "The Judicial Review Court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstrable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge."

Further in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754, Lindblom J held at paragraph [19](3) as follows:

> "The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into Wednesbury irrationality' to give material considerations 'whatever weight [it] thinks fit or no weight at all' (as per Lord

> Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H)."

[40]*In the Matter of an Application by Newry Chamber of Commerce and Trade for Judicial Review [2015] NIQB 65* Treacy J reviewed the authorities referred to in paragraphs [38] and [39] above and accepted the principles set out therein and added at paragraph [44] the following principle:-

> "Planning authorities are obliged to collect the information they need to be able to exercise their discretion in a rational way. A court must be satisfied that the planner has asked himself the right question when addressing his task and that he took reasonable steps to find the information required to answer the question correctly."

[41]Thus the Judicial Review Court's function is not to conduct an appeal on the merits of the planner's decision but rather to review the procedural propriety, legality and rationality of the Department's decision-making process.

Habitats Directive/Regulations – Relevant Legal Principles

[42]The interpretation of the provisions of Article 6 (3) of the Habitats Directive and Regulation 43 of the Habitats Regulations have been considered in a number of leading cases both in this jurisdiction and in England and Wales. In particular they were considered in *Sandale Developments [*2010] NIQB 43*, In the matter of Newry Chamber of Commerce and Trade for Judicial Review* [2015] NIQB 65*,* S*myth v Secretary of State for Communities and Local Development* [2015] EWCA Civ. 174 , *An Application for Judicial Review by the National Trust for Places of Historic Interest or Natural Beauty* [2013] NIQB 60*, Champion v North Norfolk District Council* [2015] 1 WLR 3710*, Hart District Council v Secretary of State for Communities and Local Government* [2008] EWHC 1204 *and R (Boggis) v Natural England* [2010] PTSR 725. In addition the provisions of Article 6 (3) have also been considered, in light of the precautionary principle in *Waddenzee* [2005] All ER (EC) 353. I find that the following principles, relevant to the determination of this application, emerge from the authorities:-

> 1. Regulation 43 of Habitats Regulations, which reflects the requirements of Article 6(3) of the Habitats Directive, provides for a two stage test. Stage 1 is a screening assessment where the appropriate authority must ascertain whether the plan or project is "likely to have a significant effect on a protected site". This is often referred to as the test of likely significance ("Tols"). If the test at stage 1 is met, stage 2 is triggered and the appropriate authority must then carry out an "appropriate assessment".
>
> 2. The stage 1 test is met and stage 2 triggered when there is, as Weatherup J in *Sandale Developments* [2010] NIQB 43 noted at paragraph [19]:
>
> > "…the mere probability that such an effect attaches to the plan or project, a probability or a risk that the plan or project will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it

> cannot be excluded on the basis of the objective information that the plan or project will have significant effects on the site concerned. In case of doubt as to the absence of significant effects such an assessment must be carried out. Thus any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded on the basis of objective information that it will have a significant effect on that site."

3. The Tols is linked to the site's conservation objectives. As noted by Weatherup J in *Sandale* at paragraph [20],

> "[20] The significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. Thus where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by such a plan or project."

4. 'Appropriate' in respect of the assessment is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" – as per Lord Carnwath paragraph [41] in *Champion v North Norfolk District Council.*

5. The plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan and project being considered, the competent authority will have to refuse authorisation – see *Waddenzee*, paragraphs [56] and [57].

6. The competent authority can take mitigation measures into account – see *Hart District Council v Secretary of State for Communities and Local Government* [2008] EWHC 1204.

7. A relevant competent authority is entitled to place considerable weight on the opinion of Natural England as the expert national agency with responsibility for oversight of nature conservation and ought to do so – as per paragraph [85] of S*myth*. In Northern Ireland that expert role is undertaken by the Northern Ireland Environment Agency Natural Environment Division ("NIEA").

8. An applicant 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 evidence" must produce credible evidence that there was a real, rather than hypothetical risk which should have been considered – see paragraph [37] *R (Boggis) v Natural England* [2010] PTSR 725 per Sullivan LJ.

9. Although the legal test under each limb of Article 6(3)/Regulation 43 is a demanding one, requiring a strict precautionary approach, it also requires evaluative judgments to be made having regard to the many varied factors and considerations. The assessment under each limb is primarily one for the relevant competent authorities to carry out and the relevant standard of review is the Wednesbury standard – as per paragraph [78]-[80] of *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA 174.

EIA Directive/Regulations – Relevant Legal Principles

[43]The interpretation of these provisions was considered by Weatherup J in *An Application for Judicial Review by the National Trust for Places of Historic Interest or Natural Beauty* [2013] NIQB 60 who summarised the principles in relation to environmental assessment as follows:

> "[40] In relation to environmental impact assessments the Directive finds its domestic form in the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. The scheme provides first of all that projects that are likely to have significant effect must be subject to an environmental impact assessment; secondly, that the developer should produce an 'Environmental Statement' with the content being defined by the Regulations; thirdly, the adequacy of the contents of an Environmental Statement is a matter for the Department, subject to the Wednesbury rule that the decision must be rational, take into account relevant considerations and leave out of account irrelevant considerations; fourthly, it is for the Department to assess whether the proposal is likely to have a significant impact on the environment, again subject to the Wednesbury rule and fifthly the Department must take into account 'environmental information' before granting planning permission. …
>
> [55]…The environmental statement is but a part of the environmental information that the decision maker must take into account. …
>
> [57]… As well as the environmental statement and further information from the developer the Department will also be able to rely on the environmental information obtained from consultees and others. For this purpose the representatives of the Northern Ireland Environment Agency are consultees. Secondly, it is for the Department to decide if there are likely significant effects, that is, if there is an effect, if it is significant and if it is likely. Thirdly, the Department can take into account mitigation measures, thus concluding that what would otherwise be a likely significant effect will, by reason of mitigation, not be so. In

> order to so conclude the mitigation measures should be clearly established and easily achievable. Fourthly, the Department cannot postpone the decision on likely significant effects or on whether mitigation measures will mean that there is no likely significant effect. If a conclusion on likely significant effects requires a survey then the survey must be done. Nor can the Department impose conditions instead of making the assessment. Fifthly, there must be sufficient information for the Department to decide on the likely significant effects and mitigation. It is for the Department to decide if there is sufficient information and the Department may require further information from a planning applicant, with the required publicity for such further information, and may obtain additional information from consultees or from members of the general public."

[44]*R (Padden) v Maidstone Borough Council* [2014] EWHC 51 at paragraph [60] accepts that retrospective permission for EIA development (with the environmental assessment carried out after the development has started) is permitted only in exceptional circumstances and if the developer does not obtain any improper advantage from the pre-emptive development.

Ground 1 – Consideration

[45]The applicant alleges that the 2015 Permission effectively regularises and condones extensive unauthorised EIA development which had already taken place at the site. In doing so the Department, he submits, was in breach of the EIA Regulations, the Habitats Regulations and the precautionary principle.

[46]To determine whether this ground of challenge is made out it is necessary to determine the following questions:-

(a)Was there unauthorised EIA development at the site?

(b)If so, did the 2015 permission retrospectively authorise this pre-existing unlawful development?

(c)Has the development been subject to proper assessments as required by the Habitats Regulations and the EIA Regulations and has the precautionary approach been applied?

Alleged unauthorised EIA development

[47]In his affidavits sworn on 21 October 2015, 14 March 2016 and 19 July 2016, and as appears from his skeleton argument and submissions to the court the applicant alleges that the following unauthorised EIA development took place at the site:-

(a)Exportation of ore.

(b)Removal of rock.

1. Establishment of a tailings system which included the construction of paste cell No 7.

(d)Construction and operation of settlement lagoons and

(e)Relocation of stockpiles.

[48]In his original skeleton argument the applicant also alleged that the Notice Party had mined the veins in reverse order. This ground was not pursued at trial.

[49]I intend to deal with each of the alleged unauthorised activities in turn.

(a)Exportation of Ore

[50] The applicant alleged that during the 1990s and particularly from 1998 onwards a large volume of mineralised ore was extracted and removed from the site for off-site processing without planning permission. Mr Stephen Hamilton, Principal Planning Officer in the Strategic Planning Division of the Department in an affidavit sworn on 6 June 2016 states that the Department had no knowledge of this alleged activity. The Notice Party submits that the 1995 permission authorised extraction of ore.

[51] I have considered the provisions of the 1995 permission and I am satisfied that it did not give specific consent for this activity. Further the environmental statement submitted said nothing about off-site processing of ore. I am also satisfied that the Notice Party carried out this activity because in its "Message to Shareholders" dated 17 May 2001 it stated that a sample of 100 tons of ore was extracted off-site and plans were advanced for extracting an additional 300 tons. In all the circumstances I am satisfied that there was unlawful removal of ore and this amounted to unlawful EIA development.

(b)Removal of rock

[52]The applicant avers that between 2008 and 2009 half a million tons of rock was removed from the site, involving up to 145 truck movements per day despite the fact there was no planning permission in place for removal of rock. He avers this activity continued for some seven to eight months. The applicant made a complaint to the Ombudsman about the Department's failure to take appropriate and timely action against the Notice Party in respect of its alleged unlawful activity. The Ombudsman reported that the Department had "failed to take appropriate timely enforcement action" and concluded that the Department had demonstrated "a complete failure to protect the public interest".

[53] The Department confirms that it issued a Planning Enforcement Notice on 30 June 2009 requiring the Notice Party to cease this activity within 24 hours. According to the Department the activity ceased after service of the enforcement Notice.

[54]The Notice Party contended that its activity was not unlawful as under Condition 39 of the 1995 Permission it was permitted to remove rock off-site.

[55] I am satisfied that the Notice Party removed rock as alleged by the applicant. I am further satisfied that this activity was not authorised by the 1995 permission. I therefore find that this activity amounted to unlawful EIA development.

(c)Tailings system

[56]The applicant alleges that the tailings dam which was approved in the 1995 permission was never built and the Notice Party instead built a redesigned, substantially larger, multiple cell tailings system comprising 8 paste cells. The paste cells were constructed in phases. Paste cells one, two and three were constructed between 2007 and 2010. Paste cells four, five, six, seven and eight were constructed between 2010 and 2012. The applicant submits that the multi-cell tailings system was neither assessed nor approved as part of the 1995 permission and therefore is unlawful EIA development. He further submits that this redesigned tailings system was carried out to serve not only the open cast mining operation but also the future underground mining operations now approved under the 2015 permission and the Notice Party should therefore have submitted a new planning application for this development and a new environmental assessment of the project should have been undertaken. He submits that the impugned decision is unlawful as it regularises this unlawful development. The granting of retrospective permission is only permitted where there are exceptional circumstances and where no unfair advantage is gained by the contractor in failing to comply with the relevant Directives and regulations. He submits that as there are no exceptional circumstances and as the Notice Party gained an unfair advantage the impugned decision is unlawful insofar as it retrospectively gives permission for this unlawful development.
[57]The Department and Notice Party both submit that the multi-cell tailings system, which was ultimately built, was authorised and approved in accordance with the provisions of condition 10 of the 1995 permission and was therefore authorised and approved under the 1995 permission. As the 1995 permission was subject to environmental assessment in accordance with the EIA Regulations the construction of the multi-cell tailings system, which includes Paste cell No. 7, is not unlawful development as alleged. The Notice Party submits that the new system is in fact a more environmentally friendly alternative to the original single unit tailings dam.

[58]The 1995 permission approved drawings which included a tailings pond and dam. Condition 10 of the 1995 permission required the tailings dam to be constructed "generally in accordance with details shown at cross-section depicted at Figure B8 of the Environmental Statement". It further required the Notice Party to submit a completed design for the dam structure and impoundment area to the Department for approval prior to construction.

[59] The applicant submits that the multiple cell tailings system does not comply with the requirements set out in condition 10. In particular he submits the drawings depict a whole new concept of tailings management and is not therefore "generally in accordance" with what was previously approved. Secondly, he submits the "completed design" was not approved prior to construction. In support of this proposition he relies on a report from SRK Consulting consultants engaged by the Notice Party, dated June 2007, which states at section 3.2, "A documented design is required to accord with the terms of the planning consent" and concludes "ordinarily the fully documented design would be produced prior to any construction activities". Thirdly he submits there is no record of the drawings being

approved by the Department prior to construction. He submits that neither the Notice Party nor the Department can produce stamped approved drawings. Mr Hamilton's evidence at paragraph 261 of his affidavit sworn on 6 June 2016 states, "Discussions with Gavin Harris (General Manager Omagh Minerals Ltd [OML]) on Wednesday 18th May 2016 alluded to OML being unaware or unsure if the drawings submitted on 5 October 2005 constituting the final design were approved as they had not received a stamped approved version. The applicant states this demonstrates that the construction took place without drawings ever being approved as required under Condition 10. Fourthly the applicant seeks to rely on findings of the Ombudsman's report as to the layout of the site differing from the approved drawings. This report however was not admitted as part of the evidence before the court and therefore I have not had regard to its contents.

[60] The evidence of the Department and Notice Party is that following the 1995 Permission the Notice Party engaged SRK Consulting to prepare drawings of the proposed dam structure and impoundment area. When the Notice party submitted details of a redesigned tailings management system the Department indicated it had no objection in principle to such a proposal but requested detailed drawings of the scheme to be filed. Detailed drawings were then submitted to the Department on 5 October 2005 which set out the new designed multiple cell tailings system comprising eight paste cells. These drawings were approved by the Department and the paste cells were built in accordance with the approved drawings.

[61] The Department submits that Condition 10 only required the tailings dam to be constructed "generally in accordance with details shown in figure 8B". It did not however place any restriction on the design of the paste cells and therefore their design is uncontrolled by Figure 8 B and Condition 10. Condition 10 only required the completed design for the dam structure and impoundment area to be submitted to the Department for approval prior to construction. Secondly Mr Mould submitted that the completed design was submitted to the Department and approved by the Department prior to construction. The evidence of the Department is that discussions took place in 2005 between the Notice Party and Department to amend the design of the tailings area to a multiple tailings cell system. SRK, on behalf of the Notice Party produced a report which presented an outline /conceptual design for the tailings system. Within this 2005 report there was reference to the inclusion of a HDPE liner in the construction of the tailings cells. On 9 May 2005 the Department confirmed it had no objection in principle to the amended scheme but requested that detailed drawings be submitted prior to construction. On 5 October 2005 the Department received detailed drawings. These drawings made reference to lining with till. After initially lining cell one with till there was a concern that insufficient quantities were available and SRK were commissioned to consider alternatives. It produced a report dated June 2007 in which it suggests the use of HDPE liner in absence of till. Mr Hamilton at paragraph 261 of his affidavit states that the 2007 report from SRK would appear to "Represent the applicant's provision of details further to condition 11 for the Department's written approval of the change from till to HDPE and supply of the final design of the tailings system further to condition 10". Mr McCrisken, an officer in the Department for Infrastructure Northern Ireland, who is a senior planning officer, in an affidavit sworn on 6 June 2016, avers that a tailings pond was included in the original planning application drawings which were approved. He avers he has carried out an exercise in overlaying the diagram of the tailings cells over the area approved for dam/impoundment area in the original approved 1995 drawings and he exhibits this comparison map to his affidavit. He confirms at paragraph 63 that, "the tailings in existence are located in the same location as originally approved

although they extend beyond the area [*sic*] originally identified for this type of development."

[62] I am satisfied that the multiple cell tailings management system was approved under the 1995 permission in accordance with Condition 10 and does not therefore represent unlawful development. Firstly I find that Condition 10 placed no restriction on the design of the paste cells save that the final design had to be approved prior to construction. Therefore the design did not have to be generally in accordance with Figure 8B and therefore the Department was at liberty to approve the new design. If I am wrong about that, I am satisfied from the evidence of Mr McCrisken that the new tailings system is in the same location as the original tailings dam impoundment area. Given the fact that the original drawings provided for the layout of the site were not technical drawings and did not have a scale, having regard to the comparison map prepared by Mr McCrisken I consider that the new tailings system is within a degree of tolerance to the area originally approved for tailings. In view of this I conclude that the tailings constructed fall within the area approved in the 1995 Permission. Secondly, I am satisfied that the drawings were approved. The Department in correspondence dated 9 May 2005 stated it had no objection in principle to the amended scheme and simply requested final drawings to be submitted before construction. Therefore approval was granted subject to drawings being submitted. When these drawings were submitted on 5 October 2005 the condition for approval was fulfilled and therefore the drawings were approved as from that date. This was also the basis on which the Department worked. Therefore although no stamped approval drawings have been produced I am satisfied, from the correspondence that approval was given and this was operative from 5 October 2005. Thirdly I find that the drawings submitted on 5 October 2005 were of the "completed design." The affidavit evidence of Mr Hamilton as set out in paragraph [255]-[264] is rather confusing in respect of the 2007 report and its purpose. In particular at paragraph [261] he states the provision of the 2007 report was to "represent the [Notice party's] provision of details further to condition 11 for the Department's written approval of the change from till to HDPE and supply of the final design of the tailings system further to condition10." The SRK report dated June 2007, however simply reaffirms the 2005 design. Its real purpose was to deal with the issue of lining which relates to satisfying Condition 11 of the 1995 permission. Therefore, contrary to Mr Hamilton's analysis I find that the report did not represent the Notice Party's final design of the tailings system further to condition 10. I find this had been done in the 2005 report and approved by Department in 2005. Rather I find the 2007 report only related to matters relevant to Condition 11 and not condition 10. If I am wrong about that, as the 2007 report affirmed the design of the paste cells set out in the 2005 report, the Department when it approved the 2005 drawings was actually approving the completed final design and therefore this part of Condition 10 was fulfilled.

I therefore conclude that the tailing system, including paste cell 7, does not represent unlawful development as this was approved under the 1995 permission.

(d)Construction and operation of settlement lagoons

[63]The applicant alleges that two substantive settlement lagoons were constructed around 2006/2007. These remain in situ and will, he submits form an integral part of the underground mine project. No permission was given for them in the 1995 permission and he submits the 2015 permission amounts to retrospective approval of the construction of the lagoons which were never assessed.

[64]The Department and Notice Party submit that the settlement lagoons are part of the tailings management system and were therefore authorised and approved in accordance with Condition 10 of the 1995 permission.

[65]In accordance with Condition 10 of the 1995 permission, the Notice Party submitted detailed plans which included two settlement lagoons. Thereafter the lagoons were created and Mr McCrisken's evidence is that they were created in the correct location and are of the correct dimensions according to the plans/drawings which were submitted and then approved by the Department.

[66] For the reasons set out in respect of the tailings management system I find that the Notice Party submitted plans which included settlement lagoons. These plans were approved by the Department and thereafter the lagoons were created in the correct locations and were of the correct dimensions. I am satisfied this development is not unlawful and was approved by the Department in accordance with Condition 10 of the 1995 permission.

(e)Relocation of stockpiles

[67]The applicant asserts that the excavated waste rock and overburden stockpiles were not built in the locations approved in the 1995 Planning Permission. He particularly alleges that the rock stockpiles are now located to the southwest of the plant rather than in the approved location to the north. In addition he avers they occupy a smaller footprint, as half a million tons of rock was removed from the site. He alleges that the 2015 Planning Permission, by permitting the stockpiles to remain in their present location amounts to retrospective planning permission of unauthorised development.

[68]The Department and Notice Party submit the stockpiles are in accordance with the permission granted in 1995.

[69]Condition 2 of the 1995 permission required the development to be carried out in accordance with the drawings. On 23 May 1995 drawing/plans were approved by the Department. Drawing number K/92/D107/3/03 is a site plan indicating storage of rock after year two. Mr McCrisken, as appears at paragraphs [69] to [74] of his affidavit investigated whether the rock stockpiles are currently located in accordance with the original drawings approved by the 1995 permission. He avers that they are located in "a generally similar location and within the red line of the approval" although he accepts they now occupy a smaller footprint.

[70] I am satisfied that the nature of the development meant stockpiling conditions constantly changed and some tolerance is required. Having considered the comparison maps exhibited to Mr McCrisken's affidavit, although the stockpiles do not comply strictly with the location permitted in the 1995 permission drawings, I find they fall within the 1995 permission as they were generally in accordance with the approved drawings when tolerance is given for the fact the drawings were not technical scaled drawings. I therefore find that the stockpiles do not represent unlawful development.

Question 2 – Did the 2015 Permission retrospectively authorise the unlawful development?

[71]The applicant submits that the 2015 permission retrospectively authorised unlawful development. In accordance with the principles set out in *R (Padden) v Maidstone Borough Council,* retrospective permission can only be granted in exceptional circumstances and where no unfair advantage has been gained by the developer by failing to comply with the relevant Directives and Regulations. He submits that no exceptional circumstances exist in the present case and the Notice Party has gained an unfair advantage. For these reasons the grant of the 2015 permission is unlawful.

[72]In response, the Department and Notice Party submit that the 2015 permission is prospective and does not seek to authorise retrospectively any of the alleged unlawful development.

[73] I have found that none of the following: the tailings management system; the settlement lagoons; and the rock stock piles represent unlawful development as these were all permitted under the 1995 permission. I have further found that only the removal or rock and ore were unlawful.

[74] The Department has power to grant retrospective planning permission. The Notice Party however did not apply for such permission. Its application relates solely to future development, namely underground mining as opposed to open cast mining. As appears from the 2015 permission, the permission granted relates to underground mining operations whereas the 1995 permission related to open cast mining.

[75]In relation to the unlawful removal of ore from the site I am satisfied that this activity is historic and any removal of ore from the site now relates to underground mining as opposed to open cast mining. I am satisfied that the 2015 permission does not grant retrospective permission for this historic activity and the 2015 permission relates only to future removal of ore related to the underground mining operations.

[76] In relation to removal of rock, the 2015 permission permits this activity and Conditions 12-14 impose certain restrictions on traffic levels. Condition 11, however, only allows removal of rock off site, after the back filling of the Kearney trench worked under the 1995 permission, has been completed. Therefore any removal of rock under the 2015 permission relates to the underground working of the mine and is completely unrelated to the removal of rock which occurred in 2008-9. I am therefore satisfied that the 2015 permission does not grant retrospective authorisation for the historic removal of rock. I am further satisfied this activity had already ceased at the time of the 2015 permission.

[77]In respect of the rock stock piles, tailings and settlement lagoons I have already found that these were approved under the 1995 permission and therefore the 2015 permission did not retrospectively authorise this development.

[78] In all the circumstances I am satisfied that the 2015 permission does not grant retrospective planning permission for any alleged unlawful development. In view of my findings it is unnecessary to consider whether the requirements set out in *Padden* exist to enable retrospective permission to be granted.

Question 3 – Has the development been subject to proper environmental assessment?

[79]All the parties accepted that the development required planning permission and therefore in accordance with Section 51 of the 2011 Planning Act (Northern Ireland) an assessment of its environmental effects was required. Further it was accepted by all the parties that this was EIA development and therefore in accordance with Regulation 4 the Department had to consider the environmental information before granting permission.

[80]Although the application site was outside the boundary of any designated site it was located up stream of the River Foyle and Tributaries SAC ("Foyle SAC") and it drained by the Creevan Burn which was connected to the Foyle SAC and which itself contained a population of Atlantic salmon. In these circumstances, all the parties agreed that the Habitats Regulation was engaged.

[81]The applicant submits that the impugned permission is unlawful as it retrospectively authorised development which had already been carried out at the site, which was EIA development but which was not subject to EIA. The applicant's principal contention is that the Department acted unlawfully as it has failed to consider the past environmental effects of the unlawful development cumulatively with the environmental effects of the proposed development.

[82]The Department and Notice Party submit that the entire development was subject to EIA. The development which was authorised under the 1995 permission was subject to EIA in accordance with the then current requirements of the EIA Directive and the development authorised under the 2015 permission was also subject to appropriate EIA and Habitats assessment.

[83]The Department and Notice Party therefore submit the applicant in these circumstances has to establish that there is either a gap or flaw in the environmental assessment process undertaken in relation to the 2015 permission.

Was the development authorised by 1995 permission subject to appropriate EIA assessment?

[84] An environmental statement was submitted in respect of the 1995 permission. This assessed the overall effect of the proposed development, including the operation of a tailings facility (which included the settlement lagoons) and rock storage. The applicant has not made any complaint about the environmental assessments carried out by the Department in respect of the 1995 permission. I am therefore satisfied that the development authorised under the 1995 Permission was subject to EIA in accordance with the then current requirements of the EIA Directive.

Was there a gap or flaw in the environmental assessment process undertaken in relation to the 2015 permission?

[85] In respect of EIA assessment it was recognised from the outset that this was EIA development and the Notice Party provided an environmental statement on 6 July 2012 and a revised environmental statement in October 2012. The affidavits of Neil McAllister in the Water Management Unit and Silke Hartmann, a Senior Scientific Officer in Land and Ground Water Team set out the steps taken to address the ground water issues. Due to the underground nature of the proposal the NIEA Water Management Unit sought independent expert advice from consultants called Atkins. Atkins prepared a report which informed the

consultation response of Water Management Unit. As a result of the issues raised by Atkins the Notice Party then had to provide an addendum environmental statement on 14 November 2013 to address those issues. Water Management Unit, in its final consultation response indicated that it was content with the additional information now provided in the addendum environmental statement and recommended that a monitoring plan should be included as a condition on any planning approval.

[86] NIEA also reviewed the environmental effects and concluded on 8 July 2014 that "NIEA, Natural Environment has no concerns arising from the development".

[87] Keith Finegan, senior scientific officer in NIEA sets out and documents the assessments carried out under the Habitats Regulations in respect of the 1995 permission. Initially a Tols was carried out. The outcome of this was to trigger a stage two, "appropriate assessment". NIEA initially noted it was unable to complete the appropriate assessment on the basis of the current information and requested further information. Upon receipt of the further environmental information a habitats 'appropriate assessment' was carried out. That assessment concluded that subject to mitigation, (which would be secured by appropriate conditions attaching to any grant of planning permission), there would be no adverse impacts on the Foyle SAC.

[88]Keith Finegan in his affidavit states that:-

> "NIEA Natural Environment Division undertook a systematic assessment in this case of all potential impacts to the natural environment. Throughout the process NED reviewed and assessed all relevant information including that submitted by the planning applicant and consultation responses from expert consultees. Furthermore the case was subject to a number of reviews to ensure protection of the SAC …"

[89] I also note that, insofar as the operations authorised under the 2015 permission anticipated the use of facilities provided as part of the mining operations undertaken following the grant of the 1995 permission, that use was assessed as part of the EIA and or HRA process, as appropriate.

[90]In its final development management report the Department, after taking into account the representations made by the various statutory consultees and the objections raised and the information contained in the environmental statement and the addendum to the environmental statement, recommended that planning permission be granted subject to 59 conditions. This recommendation was accepted and planning permission was granted which included the mitigation measures recommended by the statutory consultees as conditions to the planning permission. The majority of these were imposed to secure control over the potential impact of the development on the environment.

[91]Having reviewed the process undertaken by the Department I am satisfied that it complied fully with the requirements of the EIA and Habitat Regulations. The developer submitted an environmental statement in accordance with the Regulations. The Department required further environmental information which ultimately was provided and considered by the Department. NIEA and the other statutory consultees carried out extensive, robust and thorough assessments and insisted on receiving further environmental information from the

Notice Party before they were each satisfied that there would be no adverse effects on the Natura 2000 sites or other adverse environmental impacts.

[92] In coming to its conclusion the Department took into account the environmental statement and the addendum environment statement, responses from statutory consultees and mitigation measures. I am satisfied that sufficient environmental information was provided to enable it to make its decision in accordance with the requirements of the EIA and Habitats Regulations. I am satisfied that the Department went to great lengths to ensure that all issues in respect of the environment were adequately addressed before it confirmed that it was content with the proposal.

[93] In particular the Department, in reaching the impugned decision, took into account the responses from the statutory consultees and acted on this expert advice. I find that this was a course that was open to the Department as a matter of planning judgment. As Treacy J stated in *Newry Commerce* at paragraph [64]:

> "I am in agreement with the respondent that these are matters of expert judgment which cannot legitimately be condemned as unreasonable. Furthermore, this is not a matter for an impermissible merits debate before this court. The decision-maker was entitled in the circumstances to accept and act upon the independent expert view of the statutory consultee. The NIEA, the Rivers Agency, and the Loughs Agency were all consulted on the planning application. Each confirmed that they had no objection to the development. The Respondent was entitled to give considerable weight to the non-objection of these statutory bodies. … To similar effect Beatson J in *Shadwell Estates v Breckland DC* [2013] EWHC 12 (Admin) at [72] said:
>
> > 'a decision-maker should give the views of statutory consultees …"great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons'."

[94]Having considered all of the evidence I am satisfied that the development carried out under the 1995 permission and the development carried out under the impugned decision have each been subject to appropriate EIA and Habitats assessment and the precautionary approach has been applied.

[95] In these circumstances the applicant must establish that there was nonetheless a gap in the assessments namely that the alleged unlawful development which took place after the 1995 permission was; (a) relevant to the 2015 Permission, (b) was improperly left out of account in the Habitats and EIA assessment process undertaken in relation to the impugned decision and (c) was sufficiently material to the determination of the impugned decision as to merit the intervention of the Court. I am satisfied the applicant has not discharged this burden. For the reasons I have set out above the alleged unlawful development was not relevant to the 2015 permission as it had been granted permission under 1995 permission. Secondly I am satisfied that insofar as the operations authorised under the 2015 permission anticipated the use of facilities provided as part of the mining operations undertaken following the grant of the 1995 permission, that use was assessed as part of the EIA and or

Habitats process undertaken in relation to the 2015 permission. It was not therefore improperly left out of account.
[96] Further the alleged unlawful activity is historical and either ceased before the 2015 permission was granted or the unlawful development had been in existence for over 4 years before the grant of the 2015 permission. In such circumstances the Department can rely on the principle set out in *Evans v Basingstoke* [2014] 1 WLR 2034. Thus, even if the development was not subject to EIA, the time limits for enforcement have now passed.

[97] The standard of review of the Department's decision-making under the EIA and Habitats Regulations is the Wednesbury standard. Having reviewed the actions of the Department I am satisfied that the Department did not fail to take into account any relevant matters; did not into account irrelevant matters. The applicant has not produced any credible evidence of how the alleged unlawful development, which he claims was retrospectively approved, would cause environmental impacts inconsistent with those assessed. In those circumstances I am satisfied there is no evidence to show that the Department acted irrationally. I am therefore satisfied that the 2015 permission cannot be impugned on any Wednesbury grounds.

Conclusion to Ground 1

[98]I am satisfied that there was unlawful development in the form of removal of ore and removal of rock. I am not however satisfied that these were retrospectively approved under the 2015 permission. I have also found that the tailings and lagoon structures and rock stock piles were approved by the 1995 permission and therefore did not represent unlawful activity.

[99]I also have found that the Department complied with its duties under the EIA and Habitat Regulations and there is no basis to justify the intervention of the court. Insofar as there is a subsidiary argument that the Department failed to follow the precautionary approach I have found that the Habitats Regulations were properly applied. The precautionary approach is inherent in the provisions of the Habitats regulations. The applicant has not produced any credible evidence of how the alleged unlawful development, which he claims was retrospectively approved, would cause environmental impacts inconsistent with those assessed. I therefore dismiss ground one of the challenge.

Grounds Two and Three

[100]The applicant contends that the Department "failed to retain its discretion" under the EIA, Habitats and Waste Regulations, as it accepted the Notice Party's analysis of the waste rock as inert and then approved an "Annex J" waste management plan. The applicant submits that the Department carried out an inadequate investigation by relying on the Notice Party's expert evidence. He contends, given NIEA's admission that it had no expertise in this field, it ought to have commissioned its own independent expert report to assess the acid generating potential of the rock. The applicant further submits the onset of acid rock drainage is unpredictable. In support of this proposition he relies on Silke Hatmann's reference to literature in her affidavit. He submits, as the rock from the site may now be used for road building there is a risk acid drainage could eventually go into the water system and pollute the Foyle SAC. The applicant belatedly sought to introduce a document which showed that rock samples from another mine were acid generating. The document produced by the applicant was not in evidence before the Court and its contents were disputed by the Notice

Party. He submitted that the uncertainty about the onset of acid rock drainage and the inadequate investigation conducted by the Department demonstrated that the Department had failed to comply with its duties under the various EIA, Habitats and Waste Regulations and in particular failed to comply with the precautionary principle.

[101]The Department submits that these grounds are misconceived as it took into account the information provided by the Notice Party and then had regard to the fact that none of the statutory consultees questioned the validity of this information. In the exercise of its planning judgment the Department was entitled to give such weight as it saw fit to the expert evidence and the views of the statutory consultees.

[102]The Notice Party submits that the applicant is merely attacking the weight given by the Department to expert evidence. Such an attack is impermissible except on Wednesbury unreasonable grounds, which it submits, are not established.

[103]The actions taken by the Department in respect of the issues relating to waste rock are set out in the affidavits of Keith Finegan, Silke Hartmann, Colin Miller, Neil McAllister and Stephen Hamilton.

[104]From these it appears that the environmental statement submitted by the Notice Party considered the characteristics of the waste rock to be produced. In its consultation response of 2 November 2012 the Water Management Unit of the NIEA expressed the view that specialist advice should be sought and accordingly on 20 December 2012 it advised that it was unable to complete a full Habitats Regulation assessment. Keith Finegan explains further information as to the acid generating potential of the rock was sought because:

> "Use of such rock as aggregate for the purposes (e.g. road construction) in close proximity to water courses flowing into Natura 2000 sites has the potential for effects through contamination run off."

[105] As a result Water Management Unit sought a specialist review of the environmental statement by Atkins Consultancy. Atkins provided a report and a second technical note. To address the concerns raised by Atkins, the Notice Party then provided further information. This included test results which showed the waste rock was "non-acid forming", which meant it was "inert". All this information was then reviewed and in its consultation response dated 18 December 2013 Water Management Unit made no further comments save to state that the permission should include a condition for a monitoring plan to deal with any residual risk. Subsequently the applicant made an objection in relation to passing bays and submitted these were constructed using potentially acid producing rock from the site. Ms Hartmann wrote the groundwater part of the response on 22 October 2014 and outlined that "the ratio of the neutralising potential in comparison to the acid generating potential would suggest minimal impact on the environment." A further issue was raised by the applicant in March 2015 about the issue of potential acid mine drainage and the groundwater part of the response stated its previous advices dated 22 October 2014 still stood.

[106]NIEA carried out a screening test in compliance with its obligations under the Habitats Regulations and concluded, in light of the test results which confirmed rock from the site was non-acid generating, "Effects from acid rock are not considered as likely to be significant."

[107] On 18 November 2014 the Department received a waste management plan pursuant to Annex J of the Waste Regulations. It stated the waste from the site was inert and therefore it was not identified as a Category A site for the purposes of the Regulations. NIEA Waste Management did not identify any concerns with this classification of the waste.

[108]The applicant attacks the actions of the Department, not on the basis it took the environmental statement into account but on the basis it relied on it and did not commission its own report. I find that this ground is without foundation.

[109]Firstly, the Regulations require the developer to produce the environmental statement. Therefore I find it is not unlawful for the Department to rely on the environmental statement provided by a developer. This is not an abdication of its discretion under the Regulations. This is standard practice and one which the Regulations clearly envisaged by requiring the developer to provide the environmental statement. Secondly, as Weatherup J stated in *National Trust Application* [2013] NIQB 6 see at paragraph [40]:

> "The adequacy of the contents of an environmental statement is a matter for the Department, subject to the Wednesbury rule that the decision-maker must be rational, take into account relevant considerations and leave out of account irrelevant considerations."

[110] Secondly the applicant submits that there was uncertainty in respect of acid generating potential of rock and therefore in light of the requirements under the various Regulations and in light of the precautionary principle the permission should not have been granted. I find this ground is without merit. The evidence of Ms Hartmann satisfies me that on the basis of objective expert evidence the risk of significant effects on the site could be excluded. The applicant has not provided any credible evidence of a risk that the rock was acid producing. He purported to introduce evidence in respect of the risk of acid producing rock at another mine. This document however was not part of the evidence before the Court of risk. The applicant has not therefore produced any credible evidence to show that there was any real as opposed to hypothetical risk to the site. I am therefore satisfied the requirements of the regulations and the precautionary principle were met.

[111] I find that the applicant's real complaint is the weight the Department gave to the expert evidence provided by the Notice Party. The weight to be afforded to evidence is a matter of planning judgment and can only be challenged on the grounds of Wednesbury unreasonableness. Given that the applicant has produced no evidence of risk, I find Wednesbury unreasonableness is not established.

[112]As appears from the affidavit evidence the Department took into account the environmental statement, requested additional environmental information and then took into account the responses of the experts statutory consultees before it granted planning permission which included certain mitigation conditions. None of the consultees questioned the validity of the information provided in the environmental statement and the addendum environmental statement and none raised any issue with regard to the classification of the rock.

[113] In all the circumstances I am satisfied that there is no basis for a challenge under the Habitats and EIA Regulations. The Department after taking appropriate advice, was satisfied

that there was no significant impact on the environment and then imposed conditions to address any residual risk.

[114]Insofar as the complaint relates to the application of the Waste Directive and Regulations I find that the process followed by the Department did not involve any failure of discretion. The Department took advice from specialists in the NIEA and imposed conditions which provided additional safeguards including Condition 42 which required regular monitoring and Condition 39 which required a five yearly review of the water management plan for the site.

[115] I am therefore satisfied that the Department, rather than failing to retain its discretion, carefully applied its mind to the issues raised by the application.

[116] Further in respect of the applicant's concern that the rock could be used for road building, Mr Miller, in his affidavit sworn on 2 June 2016 confirms that any rock from the site that would potentially be reused as aggregate is subject to the Quality Protocol. Under the Protocol tests will be carried out and rock which could pollute the Foyle SAC will not be used for road building.

[117] I therefore dismiss Grounds two and three of the challenge.

Ground 4 – Inaccuracy of Drawings

[118] The applicant's fourth ground of challenge is that the application for the permission stated that the area for the proposed development was 60 hectares whereas the Department approved plans which in fact show an area of 81 hectares. The additional 21 hectares he submits were not assessed in the environmental statement and therefore the Department failed to comply with the EIA and Habitats Regulations which require the entire site to be assessed.

[119]The Department's response is that the environmental statement took the entire 81 hectare into account. When the discrepancy between the hectarage in the application and the drawings was brought to the Department's attention, it imposed Condition 57 in the Planning Permission which, it submits prohibits mining operations on the 21 hectare part of the site.

[120]The Notice Party submits that the implication of mining the 81 hectare area, subject to the mitigation contained in Condition 57, has been fully assessed in the environmental statement.

[121]Stephen Hamilton in his affidavit accepts that there is discrepancy between the application form which states the site area as 61 hectares and the drawings which encompass 81 hectares. He avers however that the application has been always been considered to relate to the entire red area of the application, that is 81 hectares. He avers that the environmental statement took the entire area into account, save that no ecology assessment was carried out in respect of the 21 hectare part of the site. As a result of there being no ecology assessment of this area NIEA's consultation response was that the planning permission should be subject to a condition fencing off this area. Ultimately planning permission was granted subject to Condition 57 which states:

> "Post and wire fencing with exclusion signs shall be erected along the boundaries between the blanket bog and the existing

> open cast mine, as marked on drawing number 19 date stamped receipt ……. 26 January 2015 by DOE Planning. No works, infill, storage or construction activity associated with the development, including the removal, dumping or storage of materials, or tree planting shall take place in these blanket bog areas. The fence shall be retained along this boundary until all works are completed and the site is restored."

[122]Mr Miller submits that Condition 57 effectively constitutes a total prohibition on mining operations in this area and he asserts the environmental assessment was completed in respect of the area which is to be developed, namely the 60 hectare site.

[123]Contrary to the view expressed by Stephen Hamilton, I am not satisfied that the environmental statement covered the entire 81 hectares. The environmental statement and the addendum environmental statement both refer to the site as comprising 60 hectares. The drawings within the environmental statement variously refer to this site comprising 60 hectares or 81 hectares. I accept that there may have been some environment assessments carried out which covered the entire 81 hectare site but I am not satisfied that the environmental statement covered all of the matters required under Schedule 4 in respect of the additional 21 hectare area. In particular it is clear that no ecology assessment was carried out in respect of this area. Further the testing for acid rock took place only within the 60 hectare site. I am therefore not satisfied that the additional 21 hectare area was assessed as required by the Regulations.

[124] The question then arises whether the planning permission extends to the additional 21 hectare area. The Department's case is that Condition 57 effectively means the mine cannot be mined in the 21 hectare part of the site. I do not however accept that Condition 57 limits underground mining. It is clear from its wording that Condition 57 only restricts surface work and therefore does not restrict underground mining. I am however satisfied that the planning permission granted only relates to what was applied for, namely the 60 hectare area. In his final development management report of 10 June 2011 Neil Marshall confirmed that the "proposed mine will be within the existing mine site area" that is 60 hectares. I therefore find the planning permission only extends to the 60 hectare site notwithstanding the fact that some of the drawings which were approved encompass the larger 81 hectare area. For the reasons set out above I am satisfied that the 60 hectare site was properly assessed.

Ground 5 – Post Permission Monitoring Plan for acid rock testing

[125] The applicant alleges that the Department breached the EIA Habitats and Waste Regulations by accepting a monitoring plan for acidic rock testing post-approval. He submits that this shows there was a gap in the assessment. He further submits that the requirement for such testing shows the Department is no longer convinced the rock waste is in fact inert.

[126] A draft monitoring plan was submitted as part of the environmental statement. Ms Hartmann commented on this and responded by stating that a condition should be included in the 2015 permission requiring the Notice Party to submit a monitoring plan to be approved by the Department. As part of the 2015 permission, Condition 5 required the Notice Party to submit to the Department, for approval prior to commencement of the development a monitoring and action plan for controlled water. It set out the details which the plan should

include. In compliance with this the Notice Party submitted a monitoring plan on 7 December 2015.

[127] In *R (PPG11 Limited) v Dorset CC* [2003] EWHC 1311 the applicant challenged a decision to grant planning permission for a landfill site on the basis that it contained conditions which required further surveys as to habitats and protected species. The studies and survey carried out had led the ecologists for the decision-maker to conclude that there would not be significant adverse effects on habitats or species. The court held the fact an authority thought it would be beneficial to have further surveys to understand any adverse effects was not inconsistent with concluding that the development would have no significant effects. The court held at paragraph [46]:

> "Where a defendant in fact goes on to obtain and make provision for a survey that it is no more than a prudent approach … to establish whether any changes had taken place on the ground between the last survey and the starting of work…"

[128]In this case I am satisfied that the imposition of the condition for a monitoring plan does not indicate any deficiency in the assessment. Rather it was a prudent approach taken to ensure protection of the aquatic environment in the future to ensure that effects did not arise above those assessed or if unforeseen effects did arise, that there was mitigation in place to address them. Seen in its proper context therefore it was not a new proposal but was rather an aspect of monitoring which was part of the mitigation required by the 2015 permission. I therefore reject this ground.

Ground 6 – Failure to comply with the precautionary approach required by article 191 of the Treaty on the Functioning of the European Union

[129] This was not pursued as a separate ground of challenge.

Ground 7 – Failure to consult the public

[130]The applicant alleges that the Department failed to consult the public in breach of the EIA Regulations. In particular he points to the failure to upload Atkins 2 onto the planning portal and a failure to inform the public of the monitoring and action plan, which was only submitted post approval.

[131]Regulations 16 - 21 of the EIA Regulations set out the publicity requirements. Under Regulation 16 and Regulation 19(4) the Department is required to make available the environmental statement and the addendum environmental statement to the public. Both these documents were made available to the public in the present case. There is no requirement to make available all advice received by the statutory consultees. I therefore find that failure to publish Atkins 2 and the Post Approval Monitoring Action Plan does not amount to a breach of the publicity requirements set out in the EIA Regulations.

Additional Ground – Sulphide Waste

[132] The applicant in his rejoinder affidavit raises a new ground of challenge. He contends there is a sulphide waste storage facility on the site which was not mentioned in the environmental information. The Notice Party denies that such a facility exists on the site. The

Notice Party accepts that the 1995 permission refers to a cyanide leach process. This however was not installed on environmental grounds and therefore the environmental statement relating to the 2015 permission only includes the benign flotation process. The only by-product generated by the benign flotation process is inert tailings. Keith Finegan in a second affidavit sworn on 22 September 2106 avers that no process which produces leach residue is undertaken on the site and avers there is no storage of sulphide waste residue on site and consequently the 2015 permission does not deal with this matter. He notes that it is the discharge consent which includes an informative which requires the Notice Party to notify NIEA if it intends to process ore using a cyanide reactor. It is this process which would produce sulphide waste residue. If such notification were to be given this would lead to a review which would be subject to the Habitats Regulations and therefore habitats assessment would be undertaken to assess if there were any impacts on the Foyle SAC.

[133] I am satisfied that there is no sulphide waste storage facility on the site and I am satisfied that there are no processes undertaken which would produce leach residue. For this reason the 2015 permission did not undertake an assessment of the potential impact of such development. I accept the discharge consent refers to potential use of a cyanide reactor. I am satisfied that if this process is to be undertaken it would be subject to appropriate environmental assessment before permission could be given.

Conclusion

[134] For the above reasons none of the grounds of challenge has been established and the application must be dismissed. I accept that in the past the applicant has been frustrated by breaches of the planning permission carried out by the Notice Party and, as confirmed by the Ombudsman the lack of action by the Department to deal with these breaches in a timely fashion. I am however satisfied that in respect of the impugned decision the Department was assiduous in complying with the duties imposed upon it under the various regulations and I find its judgment cannot be challenged on any Wednesbury ground. I understand that there may be good reasons why the applicant is disappointed that permission has been granted to the Notice Party to carry out this development. This court cannot however concern itself with the merits of the Department's planning decision. That is not the role of the court. The court's function is limited to reviewing the Department's decision-making process. I am satisfied that the Department acted legally, rationally and followed proper procedures. Accordingly I dismiss the application.