ANNEX 13

2016 No. 99762/01

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between:

WILLIAM DONNELLY

Applicant / Appellant

and

DEPARTMENT FOR INFRASTRUCTURE

Respondent / Respondent

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

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT

Counsel for Respondent/Respondent: Tim Mould QC and Philip McAteer

Solicitor for Respondent/Respondent: Departmental Solicitor's Office

INTRODUCTION

1. The Appellant / Applicant ("the Appellant") appeals against the decision of McBride J dismissing his application for judicial review of the decision of the Respondent ("the Respondent") to grant planning permission (planning reference K/2012/0373) ("the Permission") for mining

development at 56 Upper Botera Road, Cavancaw, Omagh ("the Site") on 27 July 2015.

2. As appears from paragraph 17 of the Judgment of McBride J, the Appellant initially relied at first instance on 7 grounds of challenge (TB1, tab 3, pI – SS) six of which he pursued at hearing. All were rejected after careful consideration by the Court.

3. As appears from the Notice of Appeal (TB1, tab 1, A – E) and from his skeleton argument the Appellant does not challenge the findings at first instance save in respect of what were described in the Judgment as Ground 4 – Inaccuracy of Drawings and Ground 5 – Post Permission Monitoring Plan for acid rock testing. In both cases the Appellant argues that the Judge erred in law in failing to uphold those grounds. Each is dealt with in turn below. The Respondent's case is that this Court should uphold the Judge's rejection of both of those grounds for the reasons that she gave.

THE LEGAL PRINCIPLES

The Role of Judicial Review and of the Appellate Court generally

4. The Role of the Court as a matter of general principle in hearing an appeal in an application for judicial review was reiterated recently by the Court of Appeal in *Department of Justice v Bell* [2017] NICA 69[1]:

> "[22] The Role of Judicial Review and of the Appellate Court was recently summarised by this court in *Re An Application by Christine Gibson* (unreported GIL10185) at paragraphs [9] and [10]:

[1] At paragraph 22, citing the decision of the Court of Appeal in *Re An Application by Christine Gibson* (unreported GIL10185), the decision of Maguire J at first instance in *Re Oasis Retail Services Ltd's Application* and the decision of the Supreme Court in *DBB v Chief Constable of PSNI* [2017] UKSC 7

"[9] For the guidance of personal litigants in the future we make clear that the role of judicial review can be summarised in the following bullet points cited in *Re Oasis Retail Services Ltd's Application* at paragraph [74] per Maguire J.

- The burden of proof to establish unlawful conduct rests with the applicant.

- The role of the court in judicial review is supervisory only.

- The court is not concerned with the merits of the decision or decisions at issue.

- The court will not intervene unless a public law wrong has been established.

- Issues which concern the weight to be attributed to various factors in the decision-making process will generally be for the decision maker and not the court subject only to a rationality challenge.

- The parameters of a judicial review challenge will ordinarily be set by the pleaded case contained in the Order 53 Statement.

[10] Moreover, an appellate court should be slow to second guess the approach of a first instance judge in such matters. *DBB v Chief Constable of PSNI* [2017] UKSC 7 was a judicial review case arising out of the flag protest, as it became known in Northern Ireland, which was finally determined by the UK Supreme Court. At paragraph 78 Kerr SCJ said:

'On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. For the purposes of this case, perhaps

the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 ... Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong" , ... and that of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that: "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.

The statements in all of these cases ..... were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in Anderson that the first instance trial should be seen as the "main event" rather than a "try out on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent'. "

The Legislative Framework

5. The relevant legislative framework has been set out in detail by the Judge at paragraphs 18 – 38 of the Judgment and is not repeated again.

The principles on Judicial Review in a planning context

6. Again these are set out in detail in the Judgment (at paragraphs 39 – 44) and are not rehearsed again.

THE FACTUAL BACKGROUND

7. The Judge summarised the factual background in paragraphs 7 to 17 of the Judgment. A Chronology is provided with this skeleton argument.

8. The following facts are of direct relevance to the two narrow grounds upon which the appeal proceeds –

    (1)On 6 July 2012 the Notice Party made an application for full planning permission for the development of an underground mine and associated surface level works with the area of an existing open pit mine (TB2, tab3, pp.289 – 299). The application for planning permission was accompanied by an environmental statement ("ES") and plans and drawings.

    (2)In answer to the question posed on the application form "What is the area of the [application] site in hectares?", the Notice Party answered "60ha" (TB2 p.293).

    (3)In answer to the question posed on the application form "State the present use of the land/buildings…", the Notice

Party answered "Existing open-cast mine for mineral extraction and associated plant, buildings etc" (TB2 p.293).

(4)Under the sub-heading "The Site", paragraph 2.1 of the ES stated "The development site is located in the countryside c.5km south-west of Omagh town. The site is c.60ha in size…" (TB3 p.311).

(5)On 14 November 2013 the Notice Party submitted an addendum to the ES. Included within the addendum at appendix 3.8 was a monitoring and action plan for the proposed development (TB4 pp.1426-1443 – also at TB1 Tab 11 pp.627-641). Paragraph 1.2 of the monitoring and action plan stated that its purpose was "to assist in the management of groundwater and surface water flow, level and quality. This includes the specification of control and compliance limits and an action plan in the event of these limits being exceeded".

(6)The Respondent's final Development Management Report dated 10 June 2015 (TB5 pp.1951-2002) noted at paragraph 1.1 that "The proposed mine will be within the existing mine site area" (at p.1952). It was further noted at paragraph 2.0 that "The site covers an area of approximately 60 hectares." (at p.1952). A further reference to the site being 60 hectares appears at paragraph 8.4 (at p.1958).

(7)By a notice dated 27 July 2015, the Respondent granted full planning permission for the proposed development subject to

59 conditions ("the Planning Permission") (TB5 pp.1700-1717). The notice of approval of planning permission stated "Department in pursuance of its powers....hereby grants planning permission for the above-mentioned development in accordance with your application subject to compliance with the following conditions". The description of the permitted development was set out on the first page of the Planning Permission.

(8)Condition 5 of the Planning Permission requires the submission for approval by the Respondent of a Monitoring and Action Plan for Controlled Water, specifying the measures of which the Plan should provide details.

(9)Condition 57 of the Planning Permission prohibits any works, infill, storage or construction activity associated with the development from taking place within the blanket bog areas to the west of a fence which was to be erected along the boundaries between the blanket bog and the existing open-cast mine, as shown on drawing 19 submitted on 26 January 2015.

(10) Annexed to the Planning Permission are a number of "Informatives". Informative 1 identifies the drawings to which the Planning Permission relates (TB5 p.1711). The approved plans and drawings are reproduced at TB5, pp. 1719, 1720 through to 1736.

(11) On 12 November 2015 the Respondent received from the Notice Party the document entitled "Cavanacaw monitoring

plan for environmental waters" ("the Monitoring Plan") (TB1 Tab 10 pp.607-625). Paragraph 1.2 of that document stated that it was an updated version of the original plan submitted as an appendix to the addendum to the ES, following a review of planning conditions and additional data made available by the Notice Party.

(12) On 19 January 2016 the Department of the Environment's Water Management Unit notified the Respondent that it had considered the Monitoring Plan "as part of condition 5 of the planning permission and on the basis of the information provided is content" (TB6 Tab 17 p.286).

THE GROUNDS OF APPEAL

9. The grounds of appeal are addressed by reference to the original grounds of challenge which the Appellant essentially seeks to revisit by this appeal.

Ground (d) The Department approved inaccurate drawings numbered 02 and 19 which show the application boundary encompassing an area of approximately 81 hectares, not 60 as applied for and assessed. This represents a failure to comply with EIA Directive 2011/92/EU Article 5(3), as well the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC).

10. The Judge dealt with this ground at paragraphs 118 – 124 of her Judgment.

11. The Judge found –

(1)That the application for planning permission stated that the area for the proposed development was 60 hectares.

(2)That the approved plans show an area of 81 hectares within the red line of the application site as marked on those plans.

(3)That the ES had not assessed all of the matters that schedule 4 to the EIA Regulations require to be assessed within the 21 hectares lying to the west of the 60 hectares comprising the existing open-cast mining area.

12. The Judge accordingly accepted the Appellant's submission that there had not been an environmental impact assessment of the additional 21 hectares as required by the EIA regulations (paragraph 123 of the Judgment).

13. That finding, however, begged the question raised by the Respondent as to whether the Planning Permission had effect to authorise underground mining operations within the additional area of 21 hectares lying to the west of the existing 60 hectare site. If the answer to that question was "No" – i.e. that, on its true construction, the Planning Permission authorised underground mining operations only within the 60 hectares comprising the existing site – then the validity of the Planning Permission was not affected by the lack of environmental assessment of the impact of underground mining operations within the 21 hectares to the west. That conclusion would follow because, so construed, the Planning Permission did not authorise such development to take place within that larger area in any event.

14. The Judge addressed that decisive question in paragraph 124 of the Judgment -

> "124. … 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."

15. For the following reasons, the Respondent submits that, in so concluding, the Judge was correct in law and there is no basis upon which this Court should interfere with that determination.

16. Interpretation of a planning permission is a matter of law for the court[2] (emphasis added):

> "28. I summarise those two grounds before dealing with either of them because to my mind they are not really separate issues. What we are concerned with in the present case is the meaning and effect of the 1998 planning permission. As the judge rightly recognised, the proper interpretation of a planning permission is a matter of law and it is a topic upon which the courts regularly pronounce. Whether they need the assistance of expert or other evidence depends upon the particular case, but in principle the meaning of a planning permission should involve the construction of documents, whether those are plans or textual documents. To arrive at that proper meaning involves a scrutiny of the permission and any other documents to which, in accordance with the legal approach set out in *Ashford* but modified by what I have said earlier, it is appropriate to have regard. This is the exercise in which, in my judgment, Sullivan J engaged."

17. Where the planning application is expressly incorporated by reference by words such as 'in accordance with the application', the planning application itself forms part of the planning permission[3]. In the case of a

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[2] per Keene LJ in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476 at paragraph 28

[3] *Slough BC v Secretary of State* [1995] 70 P&CR 560/567, *Wilson v West Sussex CC* [1963] 2 QB 764

full planning permission, the approved plans may also be taken into account in considering the interpretation of the planning permission[4].

18. The Judge's interpretation of the Planning Permission in paragraph 124 of the Judgment is in accordance with these principles of interpretation. Her conclusion, that the Planning Permission must be construed as limiting underground mine working to the 60 hectare site to the east of, and excluding, the 21 hectares comprising the blanket bog, is supported by the Planning Permission itself, the planning application incorporated into it, and the approved plans (which although including the 21 hectares within the red line, show no activity beyond the 60 hectare area).

19. Insofar as the Judge saw the need to resolve any ambiguity arising from the difference between the red line area shown on the approved plans and the stated area of 60 hectares within which the Planning Permission authorised underground mining operations, she was entitled in law to resolve that also by reference to the documents to which she refers for that purpose in paragraphs 118-124 of her Judgment[5].

20. It follows that the Judge was correct to conclude that the 60 hectare site for the proposed development was properly assessed in the ES and there was no breach of the EIA Regulations, the Habitats Regulations or the EIA or Habitats Directives as alleged by the Appellant. The fact that the approved drawings were inaccurate in their depiction of the red line does not affect the validity of the Planning Permission. Contrary to paragraph

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[4] *Barnett* at paragraphs 18 – 23. See also *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, *Trump International Golf Club Scotland Limited and another v The Scottish Ministers* [2015] UKSC 74 (at paragraphs 33, 34, 65 and 66), *Re Central Craigavon Limited* [2009] NIJB 122 (at paragraph 28) and *Re Mooreland and Owenvarragh Residents' Association's Application* [2016] NIJB 235 (at paragraph 50)

[5] *Slough BC v Secretary of State* [1995] 70 P&CR 560/567, *Wilson v West Sussex CC* [1963] 2 QB 764

16 of the Appellant's skeleton argument, the principle stated by Treacy J to which the Judge refers in paragraph 40 of her Judgment is not in point: the question at issue under this ground is one of law, i.e. as to the true meaning and effect of the Planning Permission.

21. Indeed the Judge's interpretation of the Planning Permission provides the answer that the Appellant seeks. It establishes authoritatively that planning permission does not exist to mine west of the 60 hectare site. It resolves any ambiguity in the approved plans and drawings in his favour. The Notice Party is bound by this finding and the fact that the Planning Permission relates only to the 60 hectare area.

Ground (e) The Department accepted a requirement for acidic rock testing every 25 vertical meters as part of a monitoring plan post approval. This entirely new proposal for acidic generation testing at various depths first appeared on the public planning portal on 7 December 2015, four months after approval. This is a subversion of the appropriate assessment process. It represents a failure to comply with the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC), it also breaches the (Management of Waste from Extractive Industries Directive 2006/21/EC).

22. The affidavit of Silke Hartmann (TB1 pp.723-733) addresses the purpose and scope of the monitoring and action plan. It, the affidavit of Colin Millar (TB1 pp.747-750), the affidavit of Neil McAllister (TB1 pp.751-756) and the affidavit of Keith Finegan (TB1 pp.734-746) together address consideration of acid rock and appropriate assessment.

23. As explained by Stephen Hamilton in his affidavit at paragraph 293 by reference to the affidvits of Ms Hartmann and Mr Finegan *"The imposition*

of a monitoring condition does not imply any deficiency in the assessment. The purpose of a monitoring condition in this instance was and is to ensure the protection of the aquatic environment by imposing a responsibility on the operator to carry out ongoing monitoring as the mine progresses."

24. The draft monitoring plan (19/11/13) that was provided as part of the addendum ES supporting the application appears at TB1p627-641.

25. The Habitats Regulation Assessment dated 8th December 2014 appears at TB7p107-129 (see also updated HRA 9/2/15 at TB1p130-152). The Appellant does not challenge and therefore accepts the Court's detailed consideration of the application of the Habitats and EIA Regulations in this case as appears in particular (with a focus on waste rock) at paragraphs 103 – 117. The findings recorded at paragraphs 106, 110 and 113 are particularly relevant:

> "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.
> ...
> 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.

...

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."

26. Condition 5 of the Planning Permission required the submission of a Monitoring and Action Plan for Controlled Water to be submitted for agreement prior to commencement of the approved development. (TB1p1701).

27. The monitoring plan was submitted in December 2015 (TB1p607-625). There is no contention that it failed to meet the requirements of Condition 5 but rather the Appellant appears to complain that it met and exceeded those requirements.

28. The Appellant does not say that the imposition of a condition requiring provision of a monitoring plan in itself reveals any failure of EIA or HRA - skeleton 30. He is right not to make that case. To require the developer to monitor the impact of carrying out the development is prudent and precautionary - it enables the planning authority to monitor the development and ensure that its environmental performance is as far as possible consistent with the EIA upon the basis of which planning permission was granted.

29. That is the point made in the PPG11[6] case, which was appropriately noted by the Judge at paragraph 127 of her Judgment.

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[6] *R (PPG11 Limited) v Dorset CC* [2003] EWHC 1311 at paragraph 46; see also *Smith v Secretary of State for the Environment, Transport and Region & others* [2003] EWCA Civ 262

30. That being the position, there is no logic to the Appellant's argument. He points to no authority that says that a planning authority may not accept a monitoring plan which exceeds in its requirements that which was required under a planning condition. It is a perverse submission and contrary to what the Appellant claims that he wants to achieve, i.e. that the potential for acidity in the rock should continue to be tested in case it turns out to be more acidic than the lab testing indicated. This does not imply a gap in the EIA. It simply shows that the Planning Authority and the developer recognise that it is prudent to keep an eye on that matter as the development proceeds. There is nothing remotely offensive to the EIA Regulations or the Habitats Regulations in taking that approach. On the contrary, it is consistent with the objectives of both sets of Regulations and the EU directives that they transpose.

31. The Judge's conclusion at paragraph 128 of the judgment is directly on point, consistent with the authorities and beyond reasonable criticism:

> "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."

CONCLUSION

32. For all of the reasons outlined above and those to be developed in oral submissions this appeal should be dismissed.

Tim Mould QC

Philip Mc Ateer BL

29th January 2018