IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM 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

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT MADE ON 27 JULY 2015

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Before: Morgan LCJ, Stephens LJ and Sir Malachy Higgins

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MORGAN LCJ (delivering the judgment of the court)

Neutral Citation No: [2018] NICA 44 Ref: MOR10789
Judgment: approved by the Court for handing down Delivered: 23/11/18
(subject to editorial corrections)*

[1] William Donnelly ("the appellant") and his wife conduct a bed-and-breakfast business from their home at Laurel Road, Omagh. In 1995 the Notice Party, Omagh Minerals Ltd, was granted planning permission in respect of a 60 hectare site close to their home at the townland of Cavanacaw Upper for an opencast pit for the extraction of gold and silver and associated minerals with associated plant and storage. The permission was time-limited for a period of eight years from the commencement of development and opencast mining began in 2007.

[2] On 27 July 2015 the Department of the Environment ("the Department") granted planning permission 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.

[3] The appellant challenged the July planning permission on various grounds but on appeal submits: –

(a) The planning permission was issued in respect of a site of 81 hectares whereas an assessment under the EIA Directive 2011/92/EU and the Habitats Directive 92/43/EEC was only carried out in respect of 60 hectares of the site;

(b) The Department accepted a new proposal for acid generation testing every 25 vertical metres as part of a monitoring plan four months after it granted approval. That represented a failure to comply with the precautionary requirements of the EIA Directive, the Habitats Directive and the Management of Waste from Extractive Industries Directive 2006/21/EC.

Mr Donnelly appeared on his own behalf and presented his case with precision and clarity. We are grateful to him for the care and attention with which he undertook this considerable task. Mr Mould QC and Mr McAteer appeared for the Department and Mr Orbinson QC and Mr Lyness appeared for Omagh Minerals Ltd, the Notice Party. We are also grateful to all counsel for their assistance.

The acid generating issue

[4] The Water Management Unit ("WMU") is the unit within the Northern Ireland Environment Agency ("NIEA") with responsibility for the protection of the water environment and acts as a consultee to the Department's Planning Division. When consulted on the subject application it responded on 2 November 2012 indicating that mine developments were not common in Northern Ireland and consequently there was limited expertise within the WMU to assess the application. It was recommended that specialist advice should be sought.

[5] WMU decided to procure specialist advice from Atkins Consultancy and as a result of the first Atkins report a response was provided by WMU on 21 February 2013 seeking further environmental information. The Notice Party then lodged further environmental information on 18 April 2013 as a result of which a further report was obtained from Atkins. That report was forwarded to the Planning Service and copied to the Notice Party's agent. There were further discussions between WMU and the said agent as a result of which a second environmental addendum and draft monitoring plan was issued on 20 November 2013.

[6] Ms Hartmann, a Senior Scientific Officer in the Land and Groundwater Team of the NIEA, reviewed the proposed monitoring plan for controlled water and suggested draft conditions regarding the draft monitoring and action plan. The officer indicated that the Geotechnical chapter had to be taken at face value since she was not an engineering geologist or geotechnical engineer. That chapter was prepared by SRK Consulting which is a consultancy specialising in mining consultancy services.

[7] The appellant's objection letter was placed on the Planning Portal on 5 August 2014 and raised the question of possible environmental damage from acid producing rock. Ms Hartmann wrote the groundwater part of the response and outlined that the ratio of the neutralising potential of the rock compared to the acid generating potential would suggest minimal impact on the environment.

[8] In response to the appellant's skeleton argument in the court below Ms Hartmann explained that the test results in the SGS report and a further report by Knight Piesold gave no indication that any of the samples of rock which had been recovered from the site were acid generating. She supported that conclusion by reference to scientific literature. Although the rock that was tested was removed from the surface there was no evidence to suggest that the rock below the surface presented any different risk of acid generation.

[9] Condition 5 of the subject planning permission required the Notice Party to submit to the Department for approval prior to the commencement of the development a monitoring and action plan for controlled water. Ms Hartmann indicated that it is good environmental practice to conduct ongoing monitoring in case of unforeseen circumstances occurring and to demonstrate environmental compliance. That would enable additional mitigation measures to be identified if required. The monitoring plan is linked to an action plan which sets out the steps to be taken when compliance levels are exceeded including notification to NIEA. In addition all monitoring data needs to be submitted annually to NIEA. The monitoring action plan is reviewed annually internally and at least every five years with relevant external parties including NIEA. For those reasons she was satisfied that any residual risk can be properly managed through the monitoring and action plan.

[10] The learned trial judge noted that the Department took into account the environmental statement, requested additional environmental information and then took into account the responses of the expert statutory consultees before granting 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. She concluded that the Department, after taking appropriate advice, was entitled to be satisfied that there was no significant impact on the environment and then impose conditions to address any residual risk. There was compliance with the Habitats and EIA Regulations.

[11] There was no dispute about the applicable law. The EIA Directive was transposed into domestic law by The Planning (Environmental Impact Assessment) Regulations (NI) 2012. The adequacy of the contents of an Environmental Statement was a matter for the Department and was reviewable only on Wednesbury grounds. It was again for the Department to assess whether the proposal was likely to have a significant impact on the environment and any such assessment was reviewable only on the same basis (see An Application for Judicial Review by the National Trust for Places of Historic Interest or Natural Beauty [2013] NIQB 60).

[12] The Habitats Directive was transposed into domestic law by The Conservation (Natural Habitats etc) Regulations (NI) 1995. Article 6(3) of the Habitats Directive and Regulation 43(1) of the Habitats Regulations impose a two stage test. The first stage 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. If so an appropriate assessment must then be carried out under the second stage. The assessment under the first stage by the NIEA concluded that effects from acid rock deposition were not considered as likely to be significant. No further assessment was required.

[13] We agree that there was ample evidence to justify the conclusion that there was likely to be no more than minimal impact upon the environment from the risk of acid generating rock. A monitoring and action plan was required as part of the conditions. The submission of the proposal for acidic rock testing every 25 vertical metres as part of the monitoring plan was submitted on 7 December 2015 in compliance with the requirements of Condition 5. That was sufficient to enable adequate mitigation measures to be put in place if required. The tests carried out on the exposed rock were sufficient to inform the assessment of risk in light of the expert evidence. The imposition of the scheme of monitoring for the purpose of ensuring mitigation if unforeseen circumstances arose, upon which the Department relied, did not give rise to any breach of the Habitats or EIA Regulations.

The Extent of the Development Authorised by the Planning Permission

[14] The planning permission was dated 27 July 2015, identified the address of the site and described the proposal as set out at paragraph [2] above. Having set out the name and address of the Notice Party and its agent it then referred to 20 numbered drawings and continued:

"Department in pursuance of its powers under the above-mentioned Act hereby grants planning permission for the above-mentioned development in accordance with your application subject to compliance with the following conditions which are imposed for the reasons stated".

There then followed 59 conditions.

[15] A number of the drawings to which reference was made in the planning permission identified the extent of the site as comprising a total of 81 hectares, all of it within the ownership of the Notice Party. Some of the plans identified further lands adjoining the application site also in the ownership of the Notice Party. It is common case that 60 ha of the said site comprised the existing open cast mine for which planning permission had been granted in 1995 and the remaining 21 ha consisted of blanket bog.

[16] Condition 57 was designed to minimise the impact of the proposal on blanket bog and associated flora and fauna on the site and provided as follows:

"Post and wire fencing with exclusion signs shall be erected along the boundaries between the blanket bog and the existing open cast mine… 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…"

[17] The appellant maintained that the application was for development comprising "underground mine and associated surface level works". The application site comprised 81 hectares. Condition 57 was the only condition which prevented development on the blanket bog site. That condition did not prevent development by way of underground mining. Accordingly, submitted the appellant, the planning permission permitted development for 81 ha of underground mining whereas the assessments under the Habitats Directive and Environmental Impact Directive only considered the impact of underground mining in 60 ha of the site.

[18] The learned trial judge rejected the submission by the Department that Condition 57 effectively prevented development by way of underground mining in the blanket bog. She was satisfied that the condition only restricted surface work and in our view she was clearly correct in that conclusion. She noted that the environmental statement and the addendum environmental statement both referred to the site as comprising 60 ha. She was not satisfied that the environmental statement covered all of the matters required under Schedule 4 to The Planning (Environmental Impact Assessment) Regulations (NI) 2012. She concluded that the application was made in respect of the 60 ha site and that the planning permission therefore only extended to that site notwithstanding the fact that some of the drawings which were approved encompassed the larger 81 ha area.

[19] The interpretation of a planning permission is a matter for the court. It requires the court to consider the natural and ordinary meaning of the words in the particular legal and factual context. As Lord Carnwath pointed out in Trump International Golf Club Scotland Ltd v Scottish Ministers [2016] 1 WLR 85, one aspect of the context is that the planning permission is a public document which might be relied upon by parties unrelated to those originally involved. That suggested a relatively cautious approach to the categories of documents which might be used to interpret a planning permission.

[20] Applying those principles in this case the nature of the development in the description of the proposal is underground mining with associated surface level works therein described. Condition 57 deals with development by way of any associated surface level works and the issue in this case, therefore, is whether the permission permits development by way of underground mining beneath the blanket bog area.

[21] The planning permission on its face makes reference to 20 drawings and asserts that the permission granted is in accordance with the application made. It follows, therefore, that reference to both the drawings and the application form can

be examined to establish first, the area in respect of which the application was determined and secondly, the extent of underground mining permitted within the application area.

[22] As indicated at paragraph 15 above the drawings provide considerable evidence of the extent of the site in respect of which the application was made. Drawing number 1 locates the site in its regional context. Number 2 is a site location plan illustrating existing contours and conditions. Number 3 is a site location plan illustrating proposed development/working areas. Number 16 is a restoration plan illustrating proposed final contours. Number 19 is a drawing indicating the presence of flora and fauna and number 20 is a drawing showing current and future car parking arrangements within the site.

[23] All of these drawings, stamped as approved by the Department on 27 July 2015, show the site as comprising 81 ha of which 60 ha represents the existing open cast mining operation and 21 ha is identified as blanket bog. None of the drawings suggest that the application site comprised only the 60 ha existing open cast mine. This is, therefore, overwhelming evidence that the application site comprised the 81 ha area.

[24] Paragraph 2 of the application form is concerned with the application site. It requires the applicant to give the full postal address of the site to be developed and to outline it in red on the site location map. The postal address was the same whether the site comprised 60 ha or 81 ha. The applicant was then asked to state the area of the site and the answer was 60 ha. The present use of the land/buildings was described as existing open cast mine for mineral extraction and associated plant, buildings et cetera.

[25] There is clearly a conflict between the drawings and the area of the site asserted in the application form. The answer to the question about the present use of the land/buildings is neutral since the only use of the entire 81 ha was the open cast mining use. The drawings are of some assistance, however, since drawing number 3, which illustrates the proposed development/working areas for the underground mining development, shows that the area to be developed lies entirely within the existing 60 ha area of the existing open cast mine.

[26] The application form also required information on the average number of vehicles at the premises daily and the average number of persons attending the premises daily. The answer to both questions was “Refer to TA in ES”. We are satisfied that this should inform any reader that the answers were contained in a traffic assessment (“TA”) within an Environmental Statement (“ES”). Reference to the existence of the ES having been disclosed, we consider, therefore, that it is necessary to take into account the information contained within it in addressing the issues set out at paragraph [21] above.

[27] The ES describes the development site as comprising 60 ha. The location map provided in the appendix includes the area of the open cast mine but excludes the 21 ha blanket bog area and therefore does not correspond to the location map in the approved drawing stamped by the Planning Service. The assessment in the ES

plainly only deals with the impact of underground mining within the 60 ha site. It does, however, contain an assessment of the impact upon the blanket bog in chapter 4.3 and concludes that it will be protected in the form of a buffer around the habitat and will also benefit from existing planning policy guidelines. No residual impact is anticipated.

[28] We agree with the learned trial judge that if underground mining were to be permitted below the 21 ha blanket bog area an ecology assessment would have been necessary as would testing for acid rock. Neither of those matters were dealt with within the ES and the blanket bog area was assessed as an area potentially affected by the proposed development taking place exclusively within the 60 ha area. We are satisfied, however, that the approved drawings must take precedence in identifying the area of the site in respect of which the permission issued.

[29] The second issue is to identify the development permitted within the approved area. In answering that question we consider that it is necessary to take into account the approved illustrative drawing number 3 which shows the development taking place within the area of the open cast mine, the reference in the application form to the 60 ha area of the site, the reference in the application form to the existing open cast mine for mineral extraction and associated plant, buildings et cetera and the ES which identified the area to be developed as the open cast mine and carried out an assessment in respect of that area only. All those factors point against the permission of any development below the surface of the 21 ha blanket bog area and none of the documents which assist in interpreting the planning permission give any support to the view that underground mining operations were to be permitted within that area. We agree that there was a surprising lack of coherence between the application drawings and the ES but do not consider that this lent any support to the view that permission had been given for development below the surface of the blanket bog area.

Conclusion

[30] We have concluded, therefore:

(i) The interpretation of the planning permission requires us to consider the natural and ordinary meaning of the words in the particular legal and factual context.

(ii) In this case the planning permission expressly refers to 20 approved drawings and incorporates reference to the application.

(iii) The application form refers to the Environmental Statement and that statement forms part of the context for the interpretation of this permission.

(iv) The approved drawings overwhelmingly identified the application site as comprising 81 ha, 60 ha of which was the open cast mining operation and 21 ha of which was blanket bog.

(v) We do not consider that the reference in the application form to the 60 ha site or the content of the Environmental Statement dealing only with 60 ha displaces the conclusion that the application site comprised 81 ha, a conclusion supported by the inclusion of Condition 57.

(vi) The planning permission, the application form, the approved drawings and the Environmental Statement are all material to the determination of the development approved by the permission.

(vii) The application form, the approved drawings and the Environmental Statement all point to the conclusion that the approved development consisted of underground mining within the 60 ha area only. We accept that conclusion.

(viii) We accept that the Water Management Unit was entitled to rely on the advice from Atkins Consultancy and the expert reports from SGS and Knight Piesold assessing the acid generating potential of the rock.

(ix) We consider that the Water Management Unit was entitled to rely on the outcome of tests carried out on surface rock in the absence of any indication that the position was different further below the ground.

(x) There was ample evidence to support the conclusion of the learned trial judge that significant effects from acid rock on the site could be excluded.

(xi) For the avoidance of doubt the provision of a subsequent monitoring plan approved by the Department did not undermine this conclusion.

[31] Accordingly, insofar as the appeal sought to overturn the decision not to quash the planning permission it must fail.