

Neutral Citation No. [2009] NIQB 90

Ref: **WEA7674**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **17/11/2009**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH (JUDICIAL REVIEW)

Anderson Haulage Limited's Application [2009] NIQB 90

AN APPLICATION FOR JUDICIAL REVIEW BY

ANDERSON HAULAGE LIMITED

WEATHERUP J

[1] This is an application for Judicial Review, which proceeded by way of a rolled up hearing, of a decision of the Planning Appeals Commission made on 29 December 2008 rejecting the applicant's appeal against the refusal of a Pollution Prevention and Control Permit. Mr Beattie QC and Mr Scoffield appeared for the applicant, Mr Larkin QC for the Planning Appeals Commission and Mr McMillan for the Northern Ireland Environment Agency.

[2] The background I take from the affidavit sworn on behalf of the applicant by Kevin Gillespie, a Chartered Town Planner. Mr Gillespie submitted to the Environment and Heritage Service, which is now the Northern Ireland Environment Agency, on 22 December 2006, an application on behalf of the applicant under Regulation 10 of the Pollution, Prevention and Control (Northern Ireland) Regulations 2003 for a Pollution Prevention and Control Permit to operate an installation involving land filling with no special waste at a site owned by the applicant at Wolfhill, Ballyhill Road, Belfast,

[3] It is a statutory requirement for the grant of a Permit for a site that the applicant has any necessary planning permission in respect of the site. The Pollution Prevention and Control Regulations (Northern Ireland) 2003 came into operation on 31 March 2003. Regulation 9 imposes the requirement for a Permit to operate an installation or mobile plant as defined in the Regulations. Regulation 10 sets out general provisions in relation to Permits. Regulation 10(4) provides (*italics added*) -

“In the case of an application for a permit that will authorise the carrying out of a specified waste management installation or by means of mobile plant, *the permit shall not be granted unless –*

(a) the Chief Inspector is satisfied that the applicant is a fit and proper person to carry out that activity; and

(b) *in the case of installation where the use of the application site for the carrying out of that activity requires planning permission granted under the Planning (Northern Ireland) Order 1991, such planning permission is in force in relation to that use of the land.”*

[4] On 10 January 2007 the Environment and Heritage Service requested confirmation of the planning status of the site and on 19 February 2007 a copy of the stamped, approved planning drawing and decision notice were duly submitted to disclose the grant of a planning permission on 16 May 1983. On 5 March 2007 the Environment and Heritage Service issued notification that following legal advice they were of the opinion that the planning permission for the in-filling of a clay pit with hardcore and soil had not commenced on the site and that as a result the planning permission had subsequently expired. The solicitors for the applicant forwarded a written record of a site visit undertaken on 25 April 1988 by a DOE planning officer which indicated, according to the applicant, that there had been works on the site during the relevant period.

[5] On 30 October 2007 the Environment and Heritage Service wrote to the applicant to confirm that it had refused the Permit application for the following reason:

“The proposed installation does not, in the opinion of the Planning Service for Northern Ireland, have a valid and extant planning permission for the proposed operations. As the proposed activities are ‘Specified Waste Management Activities’ a valid planning permission is required under Regulation 10(4)(b) of the Pollution Prevention and Control Regulations (Northern Ireland) 2003 before a PPC permit can be issued. Therefore we have no alternative but to refuse the permit.”

There was then an appeal to the PAC and an informal hearing on 9 December 2008. The PAC decision then issued on 29 December 2008 upholding the refusal of the Permit.

[6] On this application for Judicial Review two issues have arisen. The first issue concerns the extent of the site in respect of which planning permission was granted in 1983. The second issue concerns the evidence that is available that the applicant commenced the works under the 1983 planning permission within the required period of five years.

[7] In respect of the first issue, the extent of the site for the 1983 planning permission, it appears that in July 1982 the planning application was submitted for a 6 acre site which proposed that a clay pit be filled with hardcore and soil. With the application for planning permission a drawing was submitted. The area owned by the applicant comprised some 11 acres and the boundaries were marked on the map in the shape of a blue triangle, with the public highway running along the eastern boundary. Also on the map, within the blue triangle, there was marked a red oval shape and inside that shape were written the words "Approx 6 acres".

[8] The application for planning permission was sent to consultees, the Landscape Division of the Department. They sent back consultee comments which indicated that no tipping or dumping of material should take place outside the area indicated on the applicant's plan and proposed that the application area was to be extended to include an access area. A copy of the site map attached to the landscape comments showed a hatched area that represented an access from the roadway running along the eastern boundary of the blue triangle area to the red oval shape.

[9] The planning permission was granted on 16 May 1983. Thereafter an official in Planning Service noted that the 'wrong' map had issued with the decision to grant planning permission and the "correct one i.e. showing 'blue' line - ownership, has been sent to him for issue." As a result a further map was issued which showed the blue ownership line, being the blue triangle area, and the oval area outlined in black. This further map appears to be a photocopy of the first map to which has been added the blue triangle. The oval area appears with a black outline, as it would if the original blue and red coloured map had been photocopied and only the blue boundary added.

[10] The applicant describes the further 'correct' map which shows the blue triangle and the oval area edged black as identifying the blue triangle area as the approved site for development. It is stated by the applicant to have been the Department's clear intention that the planning permission and conditions imposed related to the blue triangle area identified on the map.

[11] The application form for permission to develop the land identified the address as Wolfhill, Ligoneil, the area of the site as 6 acres, particulars of the proposed development as involving one clay pit to be filled with hardcore and soil and ownership of adjoining land as relating to land surrounding the clay pit.

[12] On the grant of planning permission it would appear that the extension of the 'application area' to include the access area was not a suggestion adopted by Planning Service. The grant of planning permission of 16 May 1983 stated that planning permission was granted 'in accordance with your application' and subject to conditions. The first condition was that the development be commenced within five years; the second that access to and egress from the site should be off Ligoneil Road; the third that the clay pit be filled in such a way that when tipping and restoration works were complete the landform of the site should blend into the surrounding ground levels; the fourth that over the access area the top soil be stripped to a certain depth and surfaced with hardcore before in-filling of the clay pit began; the fifth that the tipping into the clay pit should be permitted to a certain ground level and covered with soil; the sixth that the restored clay pit and access be graded and sown in grass; the seventh that on completion of works in the clay pit the access area be restored.

[13] A 2004 contour plan of the area shows the blue triangle area, together with the red oval shape in the position that it appears on the 1983 map, superimposed on the contours of the area. The contours of the land illustrate the area of the quarry and it is apparent that the red oval shape does not correspond exactly with the contours that represent the quarry. Rather the red oval area only partially covers the quarry by omitting the eastern side of the quarry and including land to the west of the quarry.

[14] Against that background the Planning Appeals Commission was faced with the submission from Planning Service that the relevant site for the infill works approved by the 1983 planning permission was the red oval area and by a submission from the applicant that the relevant site was the blue triangle area. The applicant's case is that the planning permission of 16 May 1983 had been amended by the reissue of the map on 14 July 1983 so as to extend the approved site to the whole of the blue triangle area. The Planning Appeals Commission finding was to adopt the red oval area as being the site of development approved by the 1983 planning permission.

[15] At paragraph 6.3 of his report the Commissioner made reference to the fact that nowhere in the application documents was it indicated that the boundaries of the oval area were approximate; that the area, although not indeterminate, did not relate to any topographical features discernible at the present and it comprised somewhat less than 6 acres; that it had not been suggested that the application was invalid; that the Department had not been

concerned that it was an incoherent proposal and had not sought any clarification in relation to the proposal.

[16] I am satisfied that the 1983 planning permission related to the infill of the area corresponding to the clay pit. The extent of the clay pit is now more particularly identified in the 2004 contour map. The 1983 map showed an area that was described as approximately 6 acres, being the area stated in the application in respect of infill of the clay pit. It was not stated on the plan or anywhere else that the boundaries that were marked on the map by the red oval shape were approximate boundaries, although it was stated that the area was approximate. Given the character of the representation of the red oval shape it was clearly meant to be approximate as well.

[17] I am satisfied that it was intended by the applicant that the application for planning permission should refer to the area of the clay pit. The application form makes clear that the work involved the filling of the clay pit and that the surrounding land beyond that site was in the ownership of the applicant, as shown by the blue triangle. Further I am satisfied that it was intended by Planning Service that they would grant permission in respect of the clay pit. The conditions make it clear that the works involved the filling of the clay pit to a certain height and the finishing of the clay pit at the same level as the surrounding land and sown in grass.

[18] After completion of the infilling of the clay pit it was also necessary to complete the restoration of the access area, which was outside the quarry/clay pit. The landscape consultee proposed an extension of the site to include the access area. I am satisfied that Planning Service did not so extend the development site on the grant of the planning permission. Planning Service was entitled to impose conditions in respect of works outside the designated site for development, which is what Planning Service did. I am satisfied that the planning permission of 14 May 1983 was intended by the applicant and the Planning Service to refer to the site of the clay pit.

[19] The applicant contends that the reissue of the map on 14 July 1983 extended the site of the planning permission to the blue triangle area. My conclusion is that it did not. The note from the official that I have referred to above makes reference to the 'correct' map as showing ownership, that is the blue triangle area. The map also contained the oval area, although in the later version of the map it was not coloured red. To my mind this did not change the site for development, which was the clay pit area. It did identify the area owned by the applicant as the blue triangle area. Thus the reissue of the map on 14 July 1983 did not change the planning permission that had been granted in respect of the filling of the clay pit.

[20] Was the applicant's 1983 planning proposal incoherent or void for uncertainty, given that the red oval area did not precisely correspond to or

overlay the area of the clay pit? The position of the red oval area did not correspond exactly to the position of the features of the clay pit on the ground, to which I am satisfied it was meant to correspond. However I am satisfied that it was not an incoherent proposal. The quarry is sufficiently defined by the 2004 contour map and it must be correspondingly recognisable on the ground as being the lower level land of the quarry/clay pit. As with other infill areas, precise measurements cannot necessarily be shown on a plan but the feature in question is sufficiently defined by the application and the map and the physical layout on the ground. One cannot always draw this kind of map with precision, as might be expected when the relevant features are shown on the map. Given that the 1983 proposal related to the infilling of a quarry it would have been preferable if the accompanying map had contained the contours so that the relevant feature could have been identified precisely on the map. Does the absence of such contours invalidate the permission for uncertainty? No. The application and the map sufficiently identified the relevant feature which was sufficiently identifiable on the ground. As a result I consider that the site for which planning permission was granted in 1983 was the site of the clay pit.

[21] The second issue is whether the applicant commenced work on foot of the planning permission by May 1988, it being a condition that the development would commence within five years. The development concerned the commencement of the infilling of the clay pit within the five year period.

[22] The applicant contends that there is evidence that work was undertaken on foot of the planning permission in the form of a memorandum of Ms Patterson of April 1988 and the affidavit evidence of a Mr Anderson and a Mr Lynch, representatives of the applicant. The independent evidence is that of Ms Patterson, a DOE official, who inspected the site on 25 April 1988 and found waste materials, clay and rubble, had recently been deposited at 'the eastern edge of the quarry'. Secondly, she found a platform had been constructed for lorries to back onto and unload, although it is not clear whether this was located within the site. Thirdly, it was stated that the access and a small part of road have been filled with brick and rubble and was fairly rough. This clearly relates to the access area. The first item may suggest that some infilling had commenced within the clay pit by 25 April 1988, if that is how the reference to the eastern edge of the quarry is to be interpreted. The red oval area on the 1983 map does not correspond with the contours of the quarry and did not include the eastern side of the quarry. Hence the Commissioner concluded that such deposits as were noted by Ms Patterson on the eastern edge of the quarry were not within the red oval area. If, as I find to be the case, the planning permission applied to the quarry/clay pit, then Ms Patterson may provide some evidence that the works undertaken prior to 25 April 1988 were within the permitted site. There is also the

evidence of the other witnesses on affidavit, although the Commissioner was not satisfied in relation to their evidence.

[23] What I propose to do is to remit the matter to the Commissioner to reconsider the appeal on the basis that the relevant site in respect of which planning permission was granted in 1983 was the quarry/clay pit area and that the permitted area does not correspond exactly to the red oval area shown on the 1983 map but is represented by the actual area of the clay pit. The weight to be attributed to the evidence of Ms Patterson is a matter for the Commissioner. Whether he is satisfied that her evidence does indeed apply to the area of the quarry/clay pit or whether the reference to the eastern edge of the quarry is outside the permitted development site is a matter for the Commissioner. If the Commissioner is satisfied that Ms Patterson's statement is evidence of infilling on the permitted development site within the relevant time, he may wish to consider Mr Anderson and Mr Lynch in the light of his conclusion in relation to Ms Patterson. Again it is a matter for the Commissioner as to what weight he accords to the affidavit evidence of Mr Anderson and Mr Lynch. I reiterate that I am not expressing any view in relation to the weight to be accorded to any of this evidence; it is all a matter for the Commissioner.

[24] The applicant complained that the evidence of Mr Anderson and Mr Lynch was rejected without notice to the applicant. As the matter is being referred back to the Commissioner, it is not necessary to examine that argument. However I am satisfied that there was no obligation on the Commissioner to give notice to the applicant that there was an adverse finding pending in that regard. The burden was on the applicant to satisfy the Commissioner. The Commissioner did not have to explain to the applicant what view he was forming or had formed of the evidence prior to issuing his decision. The applicant should be aware of the position in relation to the evidence because the same issue may have to be faced when the matter returns to the Commissioner.

[25] The Planning Appeals Commission urged dismissal of the Judicial Review unless the Court upheld the blue triangle site contended for by the applicant. It is for the Court to construe the planning permission. I have done so by concluding that the development site for the 1983 planning permission was the quarry/clay pit. Having done so I find that the most practical way of dealing with this matter is for the Commissioner to consider the evidence that is available in the light of the redefinition of the planning permission site. The Planning Appeals Commission say that such reconsideration does not matter as the applicant seeks his Permit in respect of the blue triangle area and cannot obtain such a Permit as there is no planning permission for the blue triangle site. However the applicant may be able to apply to amend the Permit application and limit it to the quarry area so as to correspond with the site in respect of which planning permission was granted. In the interests of

time and costs I propose to refer the matter back to the Commissioner. The applicant may seek to amend the Permit application and the Commissioner will decide whether to allow any amendment. If refused and the appeal dismissed the applicant will have to start again before the Northern Ireland Environment Agency. If the Commissioner allows the amendment and is satisfied that there was no permitted use within the permitted site in the permitted time then he will dismiss the Permit application. I leave all of these matters to the Commissioner. In essence, I have redefined the site of the planning permission and referred the matter back to the Commissioner to decide the appeal on that basis.