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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **30/09/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KINGS'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GORDON DUFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF CAUSEWAY COAST & GLENS BOROUGH COUNCIL

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The Applicant appeared in person
Yaaser Vanderman (instructed by Causeway Coast & Glens Borough Council) for the proposed Respondent
William Orbinson KC and Philip McAteer (instructed by Carson McDowell) for the Notice Party

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HUMPHREYS J

Introduction

[1] The applicant seeks to challenge the alleged failure by the proposed respondent, Causeway Coast & Glens Borough Council ('the Council') to take enforcement action in relation to quarrying activities being undertaken by F. P. McCann Limited, the notice party, at Craigall Quarry in Kilrea ('the quarry').

[2] In particular, the applicant seeks an order from the court compelling the Council to serve an enforcement notice under section 138 of the Planning Act (Northern Ireland) 2011 ('the 2011 Act') and a declaration that planning permission granted in respect of the quarry in 1964 was extinguished by the operation of the Planning (General Development) Order (Northern Ireland) 1973 ('the 1973 Order').

[3] The applicant is a prolific litigant, having launched numerous applications for leave to apply for judicial review both in his own name and by using a variety of

corporate vehicles –see *Re Rural Integrity (Lisburn 01) Limited* [2020] NIQB 25 and *Re Duff's Application* [2022] NIQB 11.

[4] Leave is resisted by the Council and the notice party on three discrete grounds:

(i) Standing;

(ii) Delay; and

(iii) On the merits.

The History of the Quarry

[5] In order to understand the context of the application, it is necessary to delve a little into the history of the quarry. On 5 September 1964 Mr P Bradley was granted planning permission in relation to the 're-opening' of the quarry by Londonderry County Council pursuant to the powers contained in the Planning Acts (Northern Ireland) 1931 and 1944.

[6] The Planning (Northern Ireland) Order 1972 centralised all planning decisions in Northern Ireland within the then Ministry of Development and away from local councils. Article 3 of the 1973 Order provided that certain classes of development were permitted and could be carried out without the permission of the Ministry, including Class 13:

> "The winning and working of minerals by surface working during a period of one year from 1st October 1973 on land in respect of which such development was permitted immediately prior to that date under Paragraph 5 of the Schedule to the Planning (General Interim Development) Order (Northern Ireland) 1944 and which adjoins land used at that date for the same purpose (otherwise than in breach of planning control) where in relation to that use such winning and working forms a continuous operation"

[7] The applicant's case is that the permission to extract rock at the quarry expired on 1 October 1974 and that the lands do not therefore benefit from any planning permission.

[8] Since 1981 various approvals have been granted for extensions and alterations to the quarry as well as the erection of additional plant and facilities. All of these permissions proceeded on the basis that there was in place extant permission for the quarry operations.

[9] In 2012 a Mr and Mrs Dempsie made a complaint to the Department of the Environment alleging, inter alia, that the permitted development rights under the 1973 Order had expired. The Department rejected this claim and explained, in a letter dated 16 July 2014:

> "The majority of quarries operating in Northern Ireland when the Planning Service was formed in 1973…did not have specific planning permission and operated under permitted development rights granted under the Planning (Interim General Development) Order (NI) 1944. The Planning Service sought to rectify this position by providing in Class 13 of Schedule 1 to the [1973 Order]…that the permitted development rights for mining undertakers only continued for one year from 1st October 1973. This effectively gave quarries operating under permitted development rights one year to apply for planning permission for activities on the site…Craigall Quarry did not require planning permission as this already existed under the permission granted in 1964."

[10] Subsequently the applicant raised this same issue and it was confirmed to him, by correspondence dated 29 March 2021, that the position of the Planning Service remained that the 1964 permission was extant.

[11] The applicant asserts that the decision made in 2014 was wrong and based on an 'improperly modified plan', alleging that the true boundaries of the quarry were not reflected on the plan provided to him and which purported to be annexed to the 1964 consent. Effectively the applicant asserted that the notice party or its predecessor in title had committed some fraud in the production of the purported planning permission.

Priority Habitats

[12] The applicant also alleges that the notice party has destroyed priority habitats at the quarry and that the Council has failed to take any or appropriate enforcement action in respect of this. In this regard, he relies on the evidence of James Rainey, an ecologist with extensive experience of habitats in Northern Ireland and elsewhere.

[13] Mr Rainey explains that he mapped the priority habitats at the quarry in March 2020 using aerial imagery and field observation. He has concluded that some 6.6 hectares of priority habitat have been destroyed in the period from 2010 to 2020. This information was submitted to the Council on 27 March 2020. He also deposes to the further loss of habitat in 2021 and 2022 in respect of which notifications were made to the Northern Ireland Environment Agency ('NIEA'). He has also identified potential remediation works which could be carried out at the quarry.

[14] On 8 March 2021 the Council stated that no breach of planning control in respect of the removal of priority habitat had been identified, such removal not being contrary to any planning condition nor in breach of any legislative provision.

[15] The applicant served a pre action protocol letter on 23 March 2021. In its response dated 13 April 2021 the Council asserted that none of the grounds asserted for judicial review were well founded and that, in any event, the applicant did not enjoy the requisite standing to bring any such proceedings.

Standing

[16] Section 18(4) of the Judicature (Northern Ireland) Act 1978 provides that:

> "The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[17] Before one gets to the stage of the grant of relief however, the applicant must be granted leave to proceed under the Rules of the Court of Judicature (NI) 1980 ("RCJ") Order 53 rule 3(1). Order 53 rule 3(5) provides that:

> "The Court shall not, having regard to section 18(4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[18] In *Walton v Scottish Ministers* [2012] UKSC 44, the appellant challenged the validity of a scheme relating to new roads development in Aberdeen. The Supreme Court held that he was a 'person aggrieved' within the meaning of the relevant legislation and was entitled to pursue an application under the statute. It noted that he had made representations and participated in the public inquiry and was not therefore "a mere busybody interfering in things which do not concern him". The court also considered whether, absent the statutory right to bring an application, the appellant could have invoked the supervisory jurisdiction of the courts. In that context, a distinction was also to be drawn between the mere busybody and the person either affected by or who has a reasonable concern in the subject matter of the public law decision. Lord Reed commented:

> "In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's

> violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it." [para 94]

[19] The issue of this particular applicant's standing to pursue judicial review applications in the planning sphere has been the subject of recent judicial analysis. In *Re Duff's Application* [supra], he sought to judicially review a decision of the Council to grant planning permission for an infill dwelling in the countryside. Scoffield J concluded that he did not enjoy sufficient interest in the matter to which the application related. In particular, he found that the applicant had no personal substantive interest, his amenity would not be affected nor were any of his private law rights engaged. Conscious of the potential breadth of the *Walton* approach to issues of environmental law, the following factors were also identified [at paras 50-53]:

> "(i) The applicant had not participated at all in the planning process which led to the decision under challenge;
>
> (ii) The environmental harm was modest;
>
> (iii) The public interest did not merit the grant of leave to proceed."

[20] The learned judge went on to say:

> "In future, barring an exceptional circumstance, I would also be inclined to refuse leave to apply for judicial review in any case where Mr Duff has no direct personal interest in the planning permission under challenge and has failed to participate in the planning process resulting in the grant of that permission. I would not be inclined to refuse leave to apply for judicial review merely because the applicant does not live near the proposal site or in the proposed respondent's district, if he has earlier participated in the planning process out of legitimate environmental concern. In my judgement, this approach strikes an appropriate balance between the need to ensure wide access to justice in environmental cases but also the need to ensure that the standing test operates as a meaningful threshold in the public interest." [para 56]

[21] In the instant case the Council contends that the same lack of standing can be identified. The applicant has no direct personal interest in the quarry, he lives some 40 miles away, he has not participated in any earlier process, the claim will consume disproportionate resources and there are no evident exceptional circumstances.

[22] As against this, the applicant asserts that the subject matter is of national importance. No local challenger has come forward and very significant environmental harm has occurred. The applicant has a very strong interest in environmental protection and the legality of the operations at the quarry will impact on other challenges in which he is involved.

[23] To that list, the applicant could have added the fact that he was a very young child when the 1964 permission was granted - he could not have been involved in that process. Furthermore, it could be argued that a challenge to an alleged failure to take enforcement action should fall into a different category than one to the grant of planning permission. Enforcement of planning control is a responsibility imposed upon public bodies and if they have behaved unlawfully in failing to take the necessary steps, it could be argued that any citizen should have the right to bring this to the attention of the court. If, for instance, I were satisfied that there was an arguable case that no enforcement action had been taken in respect of significant environmental harm, for reasons which were legally unsustainable, I would not have refused leave to apply for judicial review on the basis of a lack of standing.

Delay

[24] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[25] The core of the applicant's case is that the operations at the quarry became unlawful in 1974 upon the expiry of the one year period provided for in the 1973 Order. On one view, that was when the grounds for judicial review first arose and, no extension of time having been sought, leave must be refused on the grounds of delay.

[26] An alternative analysis is that the Department investigated the question of the validity of the planning consent in 2013/2014 when the matter was raised by the Dempsies. A concluded view was formed and expressed in correspondence dated 16 July 2014. Time began to run from this date in respect of that decision and, no extension of time having been sought, the application must be dismissed.

[27] The applicant was not involved in the matter in 2013/2014 but as Lewis LJ observed in *R (AK) v Secretary of State for the Home Department* [2021] EWCA Civ 119:

> "A claimant cannot avoid the application of the time-limits by writing to the defendant and then seeking to characterise a response as a fresh decision." [para 50]

[28] If the court took a benevolent view and permitted the applicant to pursue an application for an extension of time, would this be granted on the basis of good reason? The answer to this question must emphatically be 'no' for the following reasons:

(i) The issue surrounding the grant of planning permission in 1964 is one which is particularly difficult to interrogate at a remove of almost 60 years. It is inimical to the interests of good administration to expect a public body to commit time and resources to investigate decisions made generations ago;

(ii) To make good his case, the applicant is driven to make wholly uncorroborated allegations of dishonesty;

(iii) The applicant's expert ecologist, Mr Rainey, was in possession of relevant evidence in relation to environmental harm in March 2020, over a year before proceedings were issued and no explanation is given as to why he did not pursue the matter;

(iv) Equally, no explanation is given as to why the Dempsies did not pursue the question of the validity of the planning permission back in 2014;

(v) The notice party purchased the quarry in good faith on the basis of the validity of the extant planning consent. The potential impact on its business of a successful challenge illustrates the need to bring planning matters to court promptly.

[29] For these reasons, and on whichever analysis one applies to the date time began to run, this application for leave to apply for judicial review is out of time and there is no basis to grant an extension.

The Merits of the Challenge

[30] Had the matter not been time barred, the applicant would have had to persuade the court that he enjoyed an arguable case, with realistic prospects of success, in order to secure a grant of leave.

[31] Section 138(1) of the Planning Act (Northern Ireland) 2011 states:

> "The council may issue a notice (in this Act referred to as an "enforcement notice") where it appears to the council—
>
> (a) that there has been a breach of planning control in relation to any land in its district; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the local development plan and to any other material considerations."

[32] In *Re Donnelly's Application* [2020] NIQB 35, I considered the principles underpinning a challenge to a failure by a planning authority to issue an enforcement notice and followed the decision of Hickinbottom J in *R (on the application of Community Against Dean Super Quarry) v Cornwall Council* [2017] EWHC 74 (Admin):

> "Generally, absent extraordinary (i.e. rare) circumstances…I consider that this court should be slow to entertain applications in respect of a failure to take enforcement action against particular unauthorised development."

[33] The thrust of the applicant's challenge to the want of enforcement is that a 1964 planning permission is invalid and a 2014 decision to hold otherwise was wrong in law. These are circumstances which speak against, rather than in favour of, the grant of leave to challenge the failure to serve an enforcement notice.

[34] In any event, it is simply unarguable that the Council took into account immaterial considerations or acted irrationally in finding that the 1964 planning permission was valid. The case advanced by the applicant, of some fraudulent modification of the documentation, amounts to a bare unsupported assertion and falls foul of the well-established principle that allegations of dishonesty must be properly pleaded, with full particulars, on the basis of credible evidence. On the material available to the court, the applicant would not be able to satisfy the burden of proof which rests on him on this central issue.

[35] Accordingly, it simply could not be said that this was one of the rare or exceptional cases where the failure to serve an enforcement notice could be challenged by way of judicial review. Indeed, the opposite must be the case. The finding of the validity of the 1964 permission is entirely rational and, on that basis alone, the applicant's claim must fail on its merits.

[36] Aside therefore from the issue of delay, I have concluded that the application for leave to apply for judicial review is unarguable.

Conclusion

[37] For these reasons, the application is dismissed. In light of the comments made by Scoffield J in relation to the costs of future leave applications in *Re Duff*, the Council sought an order condemning the applicant in the costs of these proceedings. However, given my finding in relation to standing, I have determined that the normal practice of the court be maintained and I make no order as to the costs of the proceedings.