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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Thompson's Application [2009] NIQB 79

AN APPLICATION FOR JUDICIAL REVIEW BY

ALAN THOMPSON

_____

WEATHERUP J

[1] This is an application by Alan Thompson trading as Thompson Recycled Oil for Judicial Review of the decision of the Planning Appeals Commission (PAC) made on 17 February 2009 in relation to a waste oil recycling facility operated by the applicant at 33 Greenogue Road, Dromore, County Down. Mr Beattie QC and Ms Comerton appeared for the applicant and Mr Larkin QC appeared for the Planning Appeals Commission.

[2] The grounding affidavit sworn on behalf of the applicant states that the business commenced on the family farm around 1993. On 30 August 1995 planning permission was granted for a recycling plant for a used oil process including filtering and storage and relating to a defined area of the site. However since 1995 the business has operated on a larger area than that specified by the planning permission. On 18 October 1995 Banbridge District Council granted the applicant a licence for a waste treatment facility under the Pollution Control and Local Government (Northern Ireland) Order 1978. In 1998 the applicant installed three oil storage containers for the appropriate storage of received waste oil pursuant to the recycling process. Since 1998 the business has operated entirely within the same footprint and with the same equipment. On 14 October 2002 the applicant applied to the Planning Service for extension of the operations at the recycling plant and on 18 January 2006 planning permission was refused. Nevertheless the applicant continued to carry on business within the area that had been operated since 1998.

[3] Further to new Regulations in Northern Ireland the applicant required a permit for the operations on the lands. On 31 January 2007 the applicant

applied for a Pollution Prevention and Control Waste Treatment Permit, which was refused on 30 October 2007 on the ground that –

"The installation did not have full planning permission for all the activities being applied for. Planning permission for an extension to the previous extent of operations was refused by DOE Planning Service in January 2006. The lack of full planning permission is in contravention of paragraph 4(b) of the Pollution Prevention and Control Regulations (Northern Ireland) 2003."

The applicant appealed to the PAC against the refusal of the Permit. The hearing took place on 27 January 2009 and by decision dated 17 February 2009 the PAC rejected the applicant's appeal.

[4] It is necessary to consider the terms of the Regulations and of the Planning (Northern Ireland) Order 1991. Council Directive 96/61/EC of 24 September 1996 sought to achieve integrated prevention and control of pollution arising from specified activities. The Environment (Northern Ireland) Order 2002 was made in part to enable provision to be made in connection with the implementation of Directive 96/61/EC. 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."*

[5] Thus it is a pre condition to the grant of a Permit that where planning permission is required it is in force. The absence of planning permission was the basis on which the Department refused the Permit. The planning framework is contained in the Planning (Northern Ireland) Order 1991. In general the development of land requires planning permission. It was

common case that the applicant did not have planning permission for the area in respect of which he sought the Permit.

[7] Two particular provisions of the 1991 Order are relevant to the operation of Regulation 10(4) in the present case. First, Article 67 of the 1991 Order provides for immunity from enforcement action by the Planning Service after certain time limits have expired from the commencement of a change of use without permission. The applicant claims to be immune from enforcement in the present case as the time limits for enforcement have expired. Thus the applicant claims that planning permission is not required for the applicant's use of the lands.

[6] Second, in November 2003 Article 83(A) of the 1991 Order was introduced to provide for the issue of a Certificate of Lawful Development as follows -

> (1) If any person wishes to ascertain whether –
>
> (a) any existing use or operation on other land is lawful;
>
> (b) any operations which have been carried out in, on, over or under land are lawful; or
>
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful
>
> he may make an application for the purpose to the Department specifying the land and describing the use, operations or other matters.
>
> (2) For the purposes of this Order uses and operations are lawful at any time if-
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

[8] The applicant claims that the use of the lands is lawful as no enforcement action may be taken against the applicant. When the applicant's appeal came before the PAC the applicant was not in possession of a Certificate of Lawful Development. The applicant applied to the Department for a Certificate of Lawful Development on 29 January 2009 but this was returned as not complying with the requirements of Planning Service. The application was re-submitted on 9 March 2009 but no decision has been made on the application.

[9] On appeal to the PAC the applicant claimed compliance with Regulation 10(4)(b) of the 2003 Regulations which applies "where the use of the application site for the carrying out of that activity requires planning permission". The applicant contended that the use of the application site for the carrying out of the activity did not require planning permission as the applicant was subject to immunity from enforcement and was entitled to a Certificate of Lawful Development. Accordingly the applicant requested the PAC to made a determination that he did not require the grant of planning permission. However the PAC referred to Saxby v Secretary of State for the Environment and Westminster City Council (1998) JPL 1132 as authority for the proposition that following the introduction of Certificates of Lawful Development into English planning law in 1990 it was no longer open to an applicant, as part of an application for planning permission, expressly or impliedly to seek a determination that planning permission was not required for the development for which planning permission was sought. The PAC concluded that it did not have jurisdiction to rule that an existing use was immune from planning enforcement in an appeal brought under non-planning legislation such as the Pollution Prevention and Control Regulations.

[10] The applicant's grounds for judicial review are -

(1) The PAC failed to have regard to Article 67 of 1991 Order which expressly provides that development is immune from enforcement at the expiry of specified time limits.

(2) The PAC erred in applying Regulation 10(4)(b) of the 2003 Regulations and in particular failed to establish whether the use of the application site for the carrying out of the waste oil recycling required planning permission granted under the 1991 Order.

(3) The PAC failed to have regard to material considerations including:

(i) the requirement in Regulation 10(4)(b) to establish whether the site required planning permission granted under the 1991 Order; and

(ii) the use of the site for the carrying out of waste water recycling was immune from enforcement.

(4) The PAC was in error in asserting that the applicant "presented nothing to contradict, set aside or qualify the conclusions of Saxby" when the applicant's submissions dealt with the relevance of Saxby and further the PAC misdirected itself by relying on Saxby as an authority relevant to the pollution control regime applicable in Northern Ireland and the transposition failures identified in the appeal generally.

[11] Saxby concerned an application to quash a decision letter by an Inspector on behalf of the Secretary of State whereby he dismissed an appeal against the decision of the local authority to refuse planning permission for two dove cotes in Hyde Park Gardens, London. It was contended by the applicant in Saxby that planning permission was not required because the proposal constituted permitted development. Wells v Minister of Housing and Local Government (1967) 1 WLR 1000 and Western Fish Products Limited v Penwith District Council (1981) 2 All ER 204 had established that in a planning application there must be taken to be an implied invitation to the planning authority to determine if they were of the opinion that planning permission was not required. In each case the relevant legislation, being the Town and Country Planning Acts 1962 and 1971, provided for such a determination by the planning authority "…. either as part of an application for planning permission, or without any such application". However the legislative scheme changed in 1991 to provide for applications for Certificates of Lawful Development. Mr Lockhart Mummery QC sitting as deputy Judge in Saxby decided that the authorities of Wells and Western Fish Products could not represent the position arising under the new and different statutory provisions and that it would no longer be consistent with the scheme of the legislation for an applicant to be able to require the local planning authority or the Secretary of State to determine whether planning permission was required as part of a planning application. The reason was stated to be –

> "Such a determination would side step the detailed and comprehensive scheme enacted by Parliament whose provisions, of course, are for the protection of the interests of the public, as well as those of the applicant and the local planning authority".

[12] The applicant contended that Saxby should not be followed for a number of reasons. It was said to be concerned with jurisdiction solely in the English planning context, arose entirely within the context of a planning application, was not concerned with pollution control, EU Directives, pollution control permits or Northern Ireland legislation and further was decided contrary to the two previous Court of Appeal decisions referred to above.

[13] However I consider that Saxby is of a more general application. It was concerned with the emergence of a distinct statutory scheme and the implication that, when a specific statutory scheme was designed to secure a determination in a particular situation, an applicant for such a determination should not seek to side step that statutory scheme by attempting to secure the determination by alternative means. Thus the amendments made in 2003 to Article 83 of the 1991 Order are said to have provided a specific statutory scheme for the determination of lawful use or development. This specific statutory scheme involves the initial determination of lawful use or development by application to the Department for the issue of a certificate. Article 83(E) provides that where the Department refuses the application or fails to make a decision the applicant may appeal to the PAC. On that appeal the PAC may grant a certificate or dismiss the appeal. When this matter came before the PAC on an appeal under the Pollution Prevention and Control Regulations the specific statutory scheme for the determination of lawful use and development had not been used by the applicant and the PAC was not prepared to discount the requirements of the specific statutory scheme introduced by Article 83(A) of the 1991 Order.

[14] Regulation 10(4)(b) refers to an installation where the use of the application site for the carrying out of an activity requires planning permission granted under the 1991 Order. In this regard the applicant contends that planning permission granted under the 1991 Order is not required because of the applicant's immunity from enforcement. Is there a difference between the requirement for planning permission and immunity from enforcement?

[15] Article 83A(7) provides that a Certificate of Lawful Development shall have effect for the purposes of three statutory provisions as if it were a grant of planning permission, namely –

> (a) Section 3(3) of the Caravans Act (Northern Ireland) 1963;
>
> (b) Article 7(2) of the Pollution Control and Local Government (Northern Ireland) Order 1978;

(c) Article 8(3) of the Waste and Contaminated Land (Northern Ireland) Order 1997.

Section 3(3) of the Caravans Act (Northern Ireland) 1963 provides that a District Council may issue a Caravan Site Licence in respect of land "…. if and only if the applicant is entitled …. to the benefit of permission for the use of the land as a caravan site granted under the Planning Order".

Article 7(2) of the Pollution Control and Local Government (Northern Ireland) Order 1978 provided that a District Council shall not issue a Disposal Licence for waste for the use of land "…. for which planning permission under the Planning Order is required unless such planning permission is in force."

Article 8(3) of the Waste and Contaminated Land (Northern Ireland) Order 1997 provides that a Waste Management Licence shall not be granted for the use of land "…. for which planning permission is required under the Planning Order …. unless such planning permission is in force".

[16] The above deeming provisions recognise the gap that exists between there being in force a planning permission under the 1991 Order and use or development certified as lawful under the 1991 Order. It is necessarily the case that there may be use and development which may be claimed to be immune from enforcement and in respect of which no planning permission has been granted and no Certificate of Lawful Development has been obtained. Why would it have been necessary to specify the three instances referred to above if it were not that the requirement in each case that planning permission is in force in relation to the use of the land cannot be satisfied by a claim for immunity from enforcement?

[17] It will be noted that Regulation 10(4) of the 2003 Regulations is not included in the list of specific statutory provisions where certificates are treated as if they were a grant of planning permission. While the 2003 amendments to the Planning Order post dated the introduction of the 2003 Regulations there could have been a later amendment to include Regulation 10(4) if it had been intended that Regulation 10(4) were also to be satisfied by the grant of a Certificate of Lawful Use or Development.

[18] The corresponding English Regulations are the Pollution, Prevention and Control (England and Wales) Regulations 2000 No. 1973 which contain an equivalent to Regulation 10(4). However the English Regulations include at Regulation 10(5) the following:

"For the purposes of paragraph 4(b) a certificate under Section 191 of the Town and Country Planning Act 1990 (a certificate of lawful use or development)

> in relation to the use of the application site for the carrying out of the specified waste management activity, and an established use certificate under Section 192 of that Act, as originally enacted, in relation to that use which continues to have effect for the purposes of subsection (4) of that section, shall be treated as if it were a grant of planning permission for that use."

Thus the equivalent English provisions contain a deeming provision that treats a Certificate of Lawful Use and Development as a grant of planning permission. Counsel indicated that consideration had been given to the introduction of a similar provision in Northern Ireland but that had not occurred.

[19] I propose to follow Saxby. There is a specific statutory scheme in place in Northern Ireland and the applicant should not side step its requirements. In any event there is no provision that the securing of a Certificate of Lawful Development is to be treated as a grant of planning permission. Furthermore, regardless of the arrangements for the obtaining of a Certificate of Lawful Development, immunity from enforcement action does not equate to the grant of planning permission.

[20] I agree with the decision of Commissioner Rue on these issues. I also agree that the guidance issued and the terms of the application form are misleading to the extent that they suggest that the position is other than stated above. If the position is to be otherwise it requires amendments to the Regulations. If the applicant requires a Permit he should obtain planning permission. The application for Judicial Review of the decision of the PAC is dismissed.