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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **5/10/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY WARNER CHILCOTT UK LIMITED AND CARIDIAN BCT NORTHERN IRELAND LIMITED FOR JUDICIAL REVIEW

Warner Chilcott UK Ltd and Caridian BCT NI Ltd's Application [2011] NIQB 137

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TREACY J

[1] The first applicant is Warner Chilcott Limited which leases and operates premises at Old Belfast Road, Millbrook, Larne. It describes itself as a leading speciality pharmaceutical company that focuses upon developing, manufacturing, marketing and selling branded prescription pharmaceutical products in the gastrointestinal, women's healthcare, urology and dermatology markets in the United States and throughout Western Europe. The second applicant is Caridian BCT Northern Ireland Limited which also carries on business at Old Belfast Road, Millbrook, Larne. It manufactures a range of sterile fluids such as invitro fertilisation drips and other similar solutions for veterinary products. Caridian also makes generic drugs that are exported exclusively to the United States, employs 250 personnel at their Larne operation and 95% of what is manufactured in Northern Ireland is exported to the US, Australia and Western Europe.

[2] On 4 January 2010 the Department of the Environment Planning Service ("the Planning Service") granted planning permission to Topping Meats who were the notice party in these proceedings for "change of use from chilled carcass holding/boning into a multi species butchery incorporating slaughtering, chill holding and further processing" – in other words an abattoir at Topping Meats' existing premises also at Old Belfast Road, Millbrook, Larne. These premises are adjacent to those operated by both applicants. It is against this permission that the applicants seek relief.

[3] The primary relief being sought is an order for certiorari quashing the decision of the Planning Service of 4 January 2010 granting planning permission for the proposed development by the notice party at Old Belfast Road, Millbrook, Larne.

[4] Mr Coulter, a Planning Officer with the Planning Service, in his affidavit, reminded the Court that at the leave hearing the Planning Service confirmed that it would not oppose leave and did not intend to oppose the grant of primary relief. At para 7 he stated:

> "The Department accepts that at the time the grant of planning permission was considered those who were involved in the decision making process were not aware of the precise nature of the activities carried on at the applicants premises. The Department was conscious that the site was located within an existing general industrial estate but accepts that the precise activities should have been a material consideration in the determination of the planning application and in this respect is not opposing the quashing of the permission."

[5] At paras 14 and 15 Mr Coulter confirmed that it was also accepted on behalf of the planning service that they failed, in breach of the PPS1 neighbour notification scheme, to inform the applicants of the application for planning permission.

[6] Mr McMillen, on behalf of the Planning Service, filed a skeleton argument in which he accepted that it hadn't been aware of, and accordingly did not have proper regard for, the circumstances of the applicant's business operations at the premises adjoining the development site and that this would have been a material consideration. Accordingly the Planning Service concedes that the applicants have made out grounds 5(i)-(viii) of the Order 53 statement.

[7] The applicants relied on a further ground in the Order 53 statement. Sub-para (f) of para 5 was in the following terms:

> "Failing to have regard, misunderstanding, misdirecting itself or misapplying the 1999 Regulations regulation 3(a) of which provides discretion to the Department to direct that a particular development is environmental impact assessment development where the threshold criteria in Schedule 2 are not met."

[8] Regulation 3(a) of the Planning (Environmental Impact Assessment) Regulations (NI) 1999 provides:

> "Directions

> 3. The Department may direct that-
>
> (a) a particular development of a description described in column 1 of the table in Schedule 2 and which does not meet the conditions in sub-paragraph (a) and (b) of the definition of "Schedule 2 development" is EIA development".

[9] In para 4 of its skeleton argument the Planning Service accepted that that ground was made out on the basis that, in the exercise of the discretion as to whether to treat the proposed development as an EIA development pursuant to Regulation 3(a) they would have to properly take into account the nature of the processes carried out at the applicant's premises. This matter is dealt with by Mr Coulter at paras 33 and 34 of Mr Coulter's affidavit where he states:

> "33. The Department does accept, however, that even if there is no automatic requirement to consider whether this was an EIA development it also has a discretion to consider if in the particular circumstances of an individual case it should direct that it is an EIA development. The Department did not consider that the proposal was an exceptional case which would merit the use of this discretion as it would only be in the rarest of circumstances that such a step would be viewed as appropriate. In fact in Northern Ireland I am not aware of an EIA ever having been required for a proposal which fell outside schedule 1 or schedule 2 development. Further the Department considered albeit in the absence of knowledge of the applicant's specific environmental requirements that the development would not have any significant effects on the environment. However the Department accepts that it was necessary to have to hand all relevant facts in the exercise of its discretion. In terms of this case the Department would accept that the nature of the processes carried out at the applicant's premises was something which may have informed the exercise of this discretion and on that basis the respondent conceded that ground as pleaded by the applicant."

[10] The net effect of the approach taken by the Planning Service is that it has acknowledged the propriety of quashing the impugned planning permission on three broad overlapping grounds.

(i) The failure of the Planning Service to have regard to the nature of the operations carried out by the applicants at their premises adjacent to those of the notice party.

(ii) That in breach of PPS1 they failed to notify the applicants of the notice party's planning application.

(iii) By failing to appreciate the nature of the activities carried out at the applicant's premises it failed to take all relevant matters into account when exercising its residual statutory discretion to consider if in the particular circumstances of an individual case it should direct that a particular development is an EIA development.

[11] A somewhat unusual feature of the present case is that the only party objecting to relief is the notice party and it does so on various grounds including delay and prejudice.

The Neighbourhood Notification Scheme

[12] There was some dispute by the notice party, but not the applicants or the Planning Service, as to whether breach of the non statutory neighbour notification scheme in PPS1 gave rise to any relief and was otherwise justiciable.

[13] At paras 13-15 of Mr Coulter's affidavit he states:

> "Article 21 of the Planning (Northern Ireland) Order 1991 places a statutory requirement, for the purpose of informing the general public, on the Department to advertise planning applications in at least one newspaper circulating in the locality in which the land to which the applicant relates is situated. In accordance with this statutory requirement the application was advertised in the Larne Times on 1 July 2009. In this respect I am satisfied that the Department did comply with all statutory requirements in relation to ensuring that the application was advertised in the press and brought to the attention of the appropriate consultees. However the court will be aware the Department also operates a voluntary non statutory neighbour notification scheme. The scheme is designed without prejudice primarily to be helpful to third party interests and specifically to advise those who are most likely to be affected by development ie those on neighbouring land. In this respect applicants are required to list on the application form the address of

> occupied buildings on neighbouring land to the application site."

He then goes on to deal with some particulars of the actual application in this case which included a reference by the notice party to Warner Chilcott who were listed twice in the planning application form but no reference to the second named applicant Caridian. He continues:

> "In accordance with normal practice I am advised by the case officer that this information (that is the information contained in the application form) was checked using the GIS function of the electronic register of planning applications maintained by the Department. I understand this system works on the basis of postal numbers and the applicant's premises were not recorded on this data base. It identified 15 addresses to be notified. These notifications were duly carried out. It was erroneously assumed by the case officer that these addresses included the adjacent industrial premises occupied by the applicants in this case. However the premises were not identified by a postal number of the electronic map base and were therefore not identified or notified."

[14] Both applicants contend, and the Planning Service has accepted, that in this case the failure to notify the applicant is in breach of PPS1 and that this constitutes a ground for quashing the impugned decision.

[15] The neighbour notification scheme was introduced by the respondent in 1985. PPS1 – General Principles at para 9 acknowledges the importance of the participation of the public. It refers to the neighbour notification scheme which, in addition to public advertisement, brings planning applications to the specific attention of those individuals who are most directly affected by them. It provides:

> "In addition to advertising applications as required by law the Planning Service will continue to implement a neighbour notification scheme the Planning Service will continue to examine ways of improving public consultation and participation."

[16] The 1991 Order does not impose any statutory requirement to notify neighbours. It only requires that there is a public advertisement. It is clear, in my view, that the Planning Service is required to take account of all statements of planning policy and that includes PPS1. I am therefore satisfied that the commitment contained within PPS1 in the circumstances of this case created a legitimate expectation on the part of the applicants that the Planning Service would take all

reasonable steps to identify neighbours, particularly those sharing a land boundary with the development site and to notify them accordingly.

[17] In the present case the planning service has acknowledged that all reasonable steps were not taken and for the reasons given in Mr Coulter's affidavit set out at para 13 above the applicants were not notified.

[18] I am satisfied that the formal but non statutory policy did create a legitimate expectation that the Planning Service would take all reasonable steps to notify the applicant but did not and in the circumstances I am satisfied that the decision is liable to be quashed on that ground.

[19] There are conflicting affidavit accounts concerning, in particular, unminuted informal conversations relevant, *inter alia,* to the issues of the applicant's knowledge of the impugned application, delay etc. The conflicting accounts are not limited to a phone call which it is now accepted took place between Mr Topping and Mr McKelvey, the managing director of the second named applicant Caridian, in June 2009. These conversations were not followed up by email or letter and are not authenticated by any corroborative follow up. The position that has emerged from the affidavits is far from satisfactory. However the existence of these conflicts emphasises the vital importance of compliance in cases such as the present with PPS1 and the non statutory neighbour notification scheme.

The Importance of Formal Notification

[20] Formal notification by a public authority,in this case the Planning Service, of the details of a planning application is capable of being one of the most effective ways of ensuring that those who may be adversely affected by a particular planning application are put on notice. The solemnity of formal notification by the public authority with sufficient accompanying detail is much more likely to ensure that its potential significance registers at the appropriate level within a company. The obvious importance of what is at stake for everyone in the present case merely serves to emphasise how the failure to comply with PPS1 can have potentially far reaching consequences. Had the policy been complied with the applicants would have had the opportunity to furnish details of the nature of their operations and the potential impact on their businesses if planning permission were granted. Certainly no one can say or has said that had this opportunity been afforded and availed of that the outcome of the planning application must have been the same. Casual or informal conversation is no substitute for formal neighbour notification. Formal communication especially by a public authority is much more likely to fully engage (at the requisite level) corporate and commercial antennae and lead to an appropriate formal response. The fog of memory and the time consuming attempt to reconstruct the truth would have been displaced by the officially communicated and recorded notification. The advantage of PPS1 compliance and the consequences of non compliance have I believe been made manifest by this case.

[21] The other side of this coin is that if the applicants had been notified and had not taken prompt steps thereafter to challenge the grant of planning permission they would likely face an uphill struggle in obtaining relief in judicial review proceedings in the absence of some very compelling reason.

EIA – Engagement of EU Law or Purely Domestic Law and the Discretion to Quash

[22] There was also some dispute between the parties as to whether the EIA point engaged EU law or was purely domestic. The significance of this dispute is that the applicants contend that if EU law has been breached the grant of relief, notwithstanding any delay or prejudice, would be virtually irresistible with the court having little if any discretion other than to quash it. In this respect the court was referred to Article 10 of the EC Treaty and to the European jurisprudence on time limits in cases such Uniplex [2010] All ER (D) 13 (Feb) and Bug Life [2011] EWHC 746. The court was also referred by the notice party to the decision in Gavin 2003 EWHC 2591 where Mr Justice Richards held at para 41:

> "For my part, I see no reason, in principle, why the exercise of discretion [ie to refuse to grant relief] in accordance with Section 31(6) of the 1981 Act should give rise to a problem under EU law. To entertain a claim outside the normal time limit but, at the same time, to take into account the consequences of that delay for third parties and good administration, does not render it impossible or excessively difficult to enforce EU rights, or involve any denial of effective protection, or otherwise offend general principles of EU law. For those reasons, and in the absence of any reasoned argument on this issue, I propose to approach the application of s31(6) of the 1981 Act in a conventional way."

[23] The Court was also referred to Edwards [2006] EWCA Civ 877 in which the Court of Appeal (Auld, Rix and Maurice Kay LJJ) at para121 observed:

> "As the judge observed at para93 of his judgment, a domestic law procedural defect, not contravening EU law or rendering the ensuing decision ultra vires - here the Agency's failure to disclose the AQMAU Reports before making its decision - does not necessarily lead to the quashing of a decision. It was for him, looking at all the material facts of the case before him, to determine in the exercise of his discretion whether it was "necessary or desirable for him to do so in the interests of justice" – see per Lord Woolf MR, as he then was, in R v Inner London South District Coroner ex party Douglas Williams

> [1999] 1 All ER 344 at 347(d)-(f), 162 JP 751. Whilst the House of Lords have held in *Berkley* that there are limitations on that discretion where there has been a breach of EU law, on the Judge's rulings, which I would uphold, there was no such breach in this case. In any event, as Richards J, (as he then was) reasoned in R (Gavin) v Harringey LBC [2003] UKPC 63, [2003] 1 WLR 2839, [2004] 2 P & CR at paras 40-41, EIA principles are not necessarily offended by the application of s31(6) of the Supreme Court Act 1981, giving the court a discretion in the event of delay in seeking judicial review to refuse to grant permission for the making of a claim or for any relief sought in such a claim."

[24] It seems therefore that the weight of authority favours the approach that EIA principles are not necessarily offended in this jurisdiction by the application of the comparable provisions of Order 53(RSC)(4) in giving the court a discretion to refuse leave or relief on grounds of delay.

[25] I have, however, concluded that even if the case is approached on the basis of pure domestic public law that the decision must be quashed. I accept that there has been delay but good reason has been demonstrated as to why the court should extend time and grant relief notwithstanding the prejudice to the notice party. The nature and potential consequences of the admitted breaches constitute good reason for acceding to the application to quash. This, of course, includes but is by no means limited to the consideration that allowing the planning permission to remain in place could have very serious consequences amongst other things for the manufacturing of human medicines and blood products.

[26] Moreover to the extent that the notice party has been prejudiced by the delay in bringing these proceedings Warner Chilcott has given a written undertaking in damages. I reject the notice party's contention that relief should not be granted until the final position as to what if any compensation is payable is known. The undertaking given by Warner Chilcott is in my view clear, unequivocal and materially unqualified. Dr Claire Gilligan, the Vice President of Operations at Warner Chilcott, swore an affidavit on 28 May 2010 for the purposes of leave and ultimately the substantive application. She stated at para 32 thereof that she was authorised on behalf of the company to indicate that Warner Chilcott shall pay for the costs of all works incurred by Topping to date occasioned by any lapse of time in bringing this application for leave for judicial review.

[27] I requested that the parties reduce the undertaking to writing which was duly done. The copy I have is unsigned but I understand there is a signed version and it is signed by the notice party as well as by Warner Chilcott but not by Caridian because the undertaking is given only by Warner Chilcott. The undertaking is in the following terms:

> "To pay damages in respect of all and any loss and damage as is determined by this honourable court to have been sustained by the notice party, Topping Meats as a result of delay on the part of the applicant in bringing the application for judicial review in the period from 4 January 2010 to 27 May 2010 in respect of the premises at Old Belfast Road, Larne."

It goes on to state:

> "Warner Chilcott and the notice party further recognise that Warner Chilcott wish any hearing of the judicial review court on whether it is obliged to pay any damages to Topping Meats pursuant to the above undertaking to take place after the chancery court determines the proceedings issued by Warner Chilcott against Topping Meats and Invest NI. The notice party reserves its position as to whether or not this is necessary or desirable in the event of there being no agreed position the matter will be determined by this court and the parties would wish to make submissions on the significance of the said chancery decision to the judicial review judge prior to the court's ruling on the said undertaking. It is for the court to determine whether any and all loss and damage claimed to have been sustained by Topping Meats as the result of delay on the part of Warner Chilcott in bringing the application was reasonably incurred and all such loss must be proved to the satisfaction of the court. Warner Chilcott reserves it right to seek discovery . . ."

[28] Naturally the undertaking is confined to damage if any which can be attributed to the delay caused by the applicant in bringing these proceedings. The damages picture is complicated by an outstanding appeal under Article 83(e) of the 1991 Order which, if favourable to the notice party, may significantly reduce if not completely obliterate recoverable loss because the change of use and the expenditure thus far incurred would not have been wasted depending on the outcome of the appeal.

[29] Delay and loss of profits might still be an issue but so also might the failure to lodge such an application sooner. The picture is further complicated by the chancery proceedings referred to in the undertaking which is why the written undertaking signed by the parties is in the terms which I have previously set out.

[30] The fact that the legal position may be complex in relation to what damages may ultimately be recoverable does not preclude the court from reaching a prompt

conclusion on the grant of appropriate relief. I am not persuaded that the court should refuse or delay the grant of relief and accordingly I quash the impugned decision on the ground already stated.