Neutral Citation No: [2020] NICA 59 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **MOR11377** ***ICOS No:*** **19/008876/01/A01** ***Delivered:*** **15/12/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY COULTERS HILL RESIDENTS LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF THE PLANNING APPEALS COMMISSION

Mr Gordon Duff (in person) for Coulters Hill Residents Ltd (Applicant)
Mr Philip McAteer (instructed by O'Reilly Stewart Solicitors) for the Planning Appeals Commission (Proposed Respondent)

Before: Morgan LCJ, Maguire J and Colton J

Morgan LCJ (delivering the judgment of the court)

[1] On 23 April 2018 Ards and North Down Borough Council issued an enforcement notice under section 133 of the Planning Act (Northern Ireland) 2011 ("the 2011 Act") in respect of lands at Fishquarter Quarry located on Coulters Hill Lane between Parsonage Road and Rubane Road, Kircubbin, County Down. The breach of planning control alleged was a change in the use of land from quarrying to a mixed-use comprising processing and quarrying; erection of an earth bund, a weighbridge, a portaloo, a portacabin and a storage container; development of an area of hardstanding; and use of an area of hardstanding for parking.

[2] An appeal against the enforcement notice was lodged pursuant to section 143 of the 2011 Act and was heard on 27 September 2018. In a decision given on 30 October 2018 ("the decision") the Planning Appeals Commission allowed the appeal in respect of the alleged processing use of the site and in respect of the earth bund. There are further issues outstanding in respect of whether planning permission should be granted in respect of the remaining development the subject of the notice and what remedial steps if any are required. The applicant sought leave to issue judicial review proceedings in respect of the decision and leave was refused by McCloskey LJ on 6 January 2020. The applicant renewed its application before this court.

Representation

[3] The applicant is a limited company incorporated on 10 April 2018. Its stated object is to challenge excess development within the Ards and North Down Council area which undermines the sustainability of the Council area. The company wished to be represented in these proceedings by Gordon Duff, one of eight shareholders/directors of the company. The trial judge properly described Mr Duff as a prolific personal litigant. He is a registered director of certain limited companies all of which have the words "Rural Integrity" in the registered names. These companies have instituted more than 30 sets of proceedings challenging planning decisions.

[4] This court examined Mr Duff's entitlement to act on behalf of a company in *Rural Integrity (Lisburn 01) Ltd's Application* [2020] NICA 12. It was clear that Mr Duff examined the way in which he could conduct his affairs in relation to environmental litigation and determined that he should do so by way of the utilisation of the company format rather than using his own legal persona and exposing himself to a risk of costs. The company was not in a position to pay the £10,000 security for costs ordered by the trial judge in that case.

[5] The use of the company format has the advantage that the liability of the members of the company is limited by the terms of the articles of association and the degree of investment that each of the members has made. One disadvantage is the constraint on representation. Order 5 Rule 6 of the Rules of the Court of Judicature provides at Rule 6.2 that a body corporate may not begin or carry on any proceedings otherwise than by a solicitor. An exception is made providing that an employee may represent the company if authorised to begin and carry on the proceedings on its behalf and the court grants leave for the employee to do so.

[6] In the *Rural Integrity* case the court offered Mr Duff the opportunity to conduct the litigation on his own behalf. That was a case which fell within the Aarhus Convention and his personal liability would therefore be limited to a maximum of £5,000. Mr Duff declined the opportunity and as there was no one to represent the interests of the applicant in that case the appeal was dismissed.

[7] In this instance we again made the same offer to Mr Duff which he declined. He indicated, however, that the company would be in a position to provide the sum of £10,000 by way of security for costs. Having regard to the fact that Mr Duff had acted for the company in the lower court, that he was authorised to do so in these proceedings and that the company was in a position to provide security for costs at the maximum level that would have been payable in this Aarhus case we concluded that exceptionally, in the interests of justice, we should allow Mr Duff to represent the company's interest on condition that security for costs was provided as promised.

Background

[8] Part 5 of the 2011 Act deals with the enforcement of planning control. A breach of planning control occurs where development is carried out without the required planning permission or there is a failure to comply with any condition or limitation subject to which planning permission has been granted. Enforcement powers are available to the Council or the Department of Infrastructure. Section 138 of the 2011 Act provides that the council may issue an enforcement notice where it appears to the council that there has been a breach of planning control in relation to any land in its district and that it is expedient to issue the notice, having regard to the provisions of the local development plan and to any other material considerations. There are then various requirements in relation to the contents and effect of the notice which are not relevant to this appeal.

[9] Section 143 provides that a person having an estate in the land or a licence holder in occupation may appeal to the Planning Appeals Commission against the notice. The following are the grounds on which an appeal may be brought:

> "(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
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> (b) that those matters have not occurred;
>
> (c) that those matters (if they occurred) do not constitute a breach of planning control;
>
> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
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> (e) that copies of the enforcement notice were not served as required by section 138 or, as the case may be, section 139;
>
> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 140(9) falls short of what should reasonably be allowed."

[10] The breach of planning control alleged in the enforcement notice as ascertained by the Planning Appeals Commissioner was unauthorised use of the said land for processing (that is, the treating of minerals extracted from the quarry following their winning and working, but not the breaking of such mineral solely for the purpose of allowing them to be loaded on lorries for transport of the site in the raw state). The enforcement notice also alleged a breach of planning control in relation to the preparation of an area of hardstanding and the erection of a number of structures in that area and the use of the hardstanding for parking. Those latter matters do not arise for consideration in this appeal.

The appeal against the enforcement notice

[11] The Commissioner, Mr Rue, helpfully set out some of the planning history at the beginning of his decision. On 19 May 1967 the former Down County Council granted planning permission to Henry Gilmore for use of land at Fishquarter, Kircubbin for quarrying purposes in accordance with plans submitted on 20 April 1967 ("the 1967 permission"). No conditions were attached.

[12] Quarrying was permitted development under the Planning (General Interim Development) Order (Northern Ireland) 1944. However, there was provision in that Order for interim development authorities such as Down County Council to exclude certain development from permitted development in particular areas. At the hearing before the Commissioner there was general agreement that in all likelihood there was such an exclusion in force in the late 1960s in this part of County Down. A copy of another planning permission for use of land as a quarry granted in 1969 was submitted at the hearing. That site was at Orlock, Groomsport, County Down.

[13] Planning powers were transferred to the Department of the Environment in 1973. In 1974, permitted development rights for quarrying came to an end and thereafter express planning permission was required for mining operations throughout Northern Ireland. In 1981, a planning officer visited the appeal site and concluded that the quarry was inactive. Between 1997 and 2009, the Department of the Environment granted planning permission for several dwellings in the vicinity of the quarry.

[14] Planning powers returned to local government in 2015. In June 2016, complaints were made to Ards and North Down Borough Council about quarrying at the appeal site. Inspection confirmed that excavation and breaking up of rock for onward shipment from the site for sale were taking place. On becoming aware of the 1967 permission, the Council considered that it could not be regarded as abandoned, having regard to the decision of the House of Lords in *Pioneer Aggregates*

Ltd v Secretary Of State for the Environment [1985] AC 132. The Council accepted that the 1967 permission was a full permission for use of the site for quarrying purposes.

[15] The Council's case before the Commission was that the 1967 permission was for quarrying only meaning the winning and working of minerals. It was established in *English Clays Lovering Pochin v Plymouth Corporation* [1974] 2 All ER 239 that to "win" a mineral is to make it available or accessible to be removed from the land and to "work" a mineral is (at least initially) to remove it from its position in the land. The Council submitted that the treatment or processing of minerals fell outside the scope of winning and working and hence of quarrying.

[16] The developer explained that once rock was blasted out at the quarry it was put through a crusher to reduce in size to a foot square or below. There were four different products produced ranging from dust to clear drainage stone. Different wire meshes were used for screening depending on the nature of the extracted material. Some product was sold direct to the market and the rest was stockpiled. When the previously extracted material was nearly used up further blasting was carried out after notification. The developer, who was experienced in quarrying, stated that processing is standard practice in other quarries. He said quarried rock was normally put through four chambers. Other operators did more processing to break down rock to smaller stones. None of this was in dispute.

[17] The Commissioner concluded that the scale of processing was constrained by the scale of extraction and that was related to the demand for processed rock. Extraction and processing were interdependent and functionally integrated activities. Any increase in noise and dust was not indicative of a material change in the overall character of the use. Processing of rock extracted from the quarry within the quarry area was a quarrying purpose approved by the 1967 permission and/or ordinarily incidental to quarrying. The appeal succeeded in respect of processing.

The Challenge

[18] The core challenge by the appellant at the hearing at first instance was that the enforcement notice relied on a planning permission that had either been extinguished or been abandoned over a period of approximately 41 years between 1975 and 2016. That was the argument that was rejected by the Commissioner and the trial judge correctly concluded that it had no merit. On the hearing of this appeal that was augmented by the argument that the 1967 permission was a permission in principle only and did not authorise the use of the site for quarrying purposes.

[19] Mr Duff advanced extensive arguments on the ecological damage being caused by the quarrying operations. He noted that the quarry had been sold in 1974 to North Down Quarries Ltd. It was common case that this operator had lodged a planning permission for its intended use of the site in 1974 before permitted development rights had ended but that the application had failed to be considered

because of an error in the location of the site. Mr Duff relied on this, however, as evidence that the 1967 permission did not authorise use for quarrying purposes.

[20] The trial judge noted that the Commissioner considered the legislative history without error. The presumption that permitted development rights established by the 1944 Order had presumably been removed in this area of County Down prior to the lodging of Mr Gilmore's planning application had not been challenged. That provided an explanation for the planning application in April 1967. The conclusion by the Commissioner was an example of the presumptive expertise of the Planning Appeals Commission which the court should properly recognise. There was no material upon which the court could properly question much less reject the approach of the appointed Commissioner.

Discussion

[21] The starting point is to understand the structure of the 2011 Act. Part 3 of the Act deals with planning control. Major developments of regional significance fall within the remit of the Department for Infrastructure and that Department may also call in applications. The councils are responsible for determining other planning applications. In respect of those applications there is a procedure for consultation with affected persons and notification to the public who may raise objections.

[22] If planning permission is refused section 58 of the 2011 Act provides that the applicant is entitled to appeal the decision to the Planning Appeals Commission. If, however, planning permission is granted the third party objector has no right of appeal. The objector retains, however, the right to challenge the lawfulness of the grant of planning permission in judicial review proceedings. Where the permission has been granted on appeal the judicial review respondent will be the Planning Appeals Commission.

[23] Enforcement of planning control is dealt with in Part 5 of the 2011 Act. Section 138 of the 2011 Act provides for the circumstances in which a council can issue an enforcement notice:

> "138—(1) 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."

The 2011 Act does not provide any mechanism by which a directly affected person may initiate enforcement proceedings.

[24] The power to issue an enforcement notice is cast in very wide discretionary terms. It must appear to the council both that there has been a breach of planning control and that it is expedient to issue such a notice. Of course, the decision of the council remains subject to challenge in public law. As we pointed out to Mr Duff on several occasions during these proceedings it would have been open to him to issue proceedings seeking a declaration that the 1967 permission did not authorise the use of the land for quarrying purposes and if successful on that point seeking a mandatory order requiring the council to consider whether enforcement proceedings should be issued in relation to that quarrying use.

[25] The enforcement notice that was issued proceeded on the basis that there was an existing use for quarry purposes which was not challenged but it was contended that the processing of the stone fell outside that use. That was the issue which the developer appealed pursuant to section 143(1) of the 2011 Act and which the Planning Appeals Commission had to determine. It was on that issue that the developer succeeded.

[26] The scheme of the 2011 Act does not provide a freestanding opportunity for a person directly affected by matters which are properly subject to planning control to bring their concerns about the validity of a planning permission to the Planning Appeals Commission for determination. The extensive material which Mr Duff sought to introduce by way of new evidence effectively sought to do that.

[27] As we explained to Mr Duff if he wishes to challenge the validity of the 1967 planning permission he should do so directly and may also join the Council if he contends that they failed to act because they believed in error that there was a valid planning permission for the use of the land for quarrying purposes. Such an application would require proper grounds to be lodged and appropriate notification to those affected. The applicant is not, in our view, entitled to conduct that challenge before the Planning Appeals Commission in respect of this enforcement notice.

[28] We consider that the company's complaint is in reality directed at the Council because of its failure to issue enforcement proceedings against the developer for the use of the land for quarrying purposes. That is not a matter for determination by the Planning Appeals Commission.

Conclusion

[29] For the reasons given the renewed application to issue judicial review proceedings is refused.