Judicial Communications Office

15 December 2020

COURT DISMISSES CHALLENGE TO PLANNING DECISION

Summary of Judgment

The Court of Appeal[1] today dismissed an application by Coulters Hill Residents Ltd for leave to apply for judicial review of a decision of the Planning Appeals Commission to allow an appeal against an enforcement notice issued by Ards and North Down Borough Council about mixed-use processing and quarrying on the site of Fishquarter Quarry, Kircubbin.

Background

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. An appeal against the enforcement notice was lodged. In a decision given on 30 October 2018 the Planning Appeals Commission allowed the appeal in respect of the alleged processing use of the site and in respect of the earth bund. Coulters Hill Residents Ltd ("the applicant") sought leave to issue judicial review proceedings in respect of the decision.

Representation

The applicant is a limited company with its stated object being 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.

The Court of Appeal examined Mr Duff's entitlement to act on behalf of a company in Rural Integrity (Lisburn 01) Ltd's Application [2020] NICA 12. It said 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. The Court said 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.

[1] The panel was the Lord Chief Justice, Mr Justice Maguire and Mr Justice Colton. The Lord Chief Justice delivered the judgment of the Court.

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. In the Rural Integrity case the Court offered Mr Duff the opportunity to conduct the litigation on his own behalf. 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.

In this instance the Court 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 the Court concluded that exceptionally, in the interests of justice, it should allow Mr Duff to represent the company's interest on condition that security for costs was provided as promised.

Background

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.

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. It sets out the grounds on which an appeal may be brought. The breach of planning control alleged in the enforcement notice as ascertained by the Planning Appeals Commissioner ("the 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 but those matters did not arise for consideration in this appeal.

The appeal against the enforcement notice

The Court set out the planning history in his case at paragraphs [11] to [17] of its judgment. Commissioner provided out some of the planning history at the beginning of his decision. In 1967 the former Down County Council granted planning permission for use of land at Fishquarter, Kircubbin for quarrying purposes. In 1981, a planning officer visited the site and concluded that the quarry was inactive. In June 2016, complaints were made to Ards and North Down Borough Council about quarrying at the 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.

The Council's case before the Commission was that the 1967 permission was for quarrying only meaning the winning and working of minerals. The Council submitted that the treatment or processing of minerals fell outside the scope of winning and working and hence of quarrying. 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.

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

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.

Mr Duff advanced extensive arguments on the ecological damage being caused by the quarrying operations. The trial judge considered that 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

The Court said that the starting point in this case 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. 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.

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. 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. The decision of the council remains subject to challenge in public law. The Court pointed out to Mr Duff that 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. The enforcement notice that was issued proceeded on the basis that there was an existing use for quarrying 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.

The Court said 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. It explained to Mr Duff that if he wished 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 Court said the applicant is not entitled to conduct that challenge before the Planning Appeals Commission in respect of this enforcement notice. It said the company's complaint was 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 and that that is not a matter for determination by the Planning Appeals Commission

Conclusion

The Court of Appeal refused the renewed application to issue judicial review proceedings.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk