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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 28/06/2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY FRIENDS OF THE EARTH LIMITED

FOR JUDICIAL REVIEW

Before: Morgan LCJ, Weatherup LJ and Keegan J

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Maguire J dismissing an application for Judicial Review by Friends of the Earth Limited in relation to a decision of the Department of the Environment ("the Department") dated 20 November 2015. By that decision the Department refused to issue a Stop Notice to the Shaftesbury Estate of Lough Neagh Limited as owners of the bed of Lough Neagh ("the Shaftesbury Estate") and a number of businesses involved in sand extraction from Lough Neagh ("the sand traders"). Mr Jones QC and Mr Sayers appeared for the appellant, Mr McGleenan QC and Mr McLaughlin for the Department, Mr Orbinson QC and Mr Lynas for the Shaftesbury Estate and Mr Beattie QC and Ms Cooke for the sand traders.

Excavation from Lough Neagh

[2] Lough Neagh is a freshwater lough with a surface area of 41,188 hectares. Up to 1.5 million tons of sand is extracted from the lough each year. Sand extraction has been proceeding for 80 years without planning permission. The lough is a Special Protection Area, a Ramsar site and an Area of Special Scientific Interest. Any application for planning permission would require an environment impact assessment and a habitats assessment.

[3] In 2012 the Ulster Angling Association wrote to the Department questioning the status of the sand extraction operations in the lough. The Department undertook consultations with relevant agencies and representatives of the sand traders.

[4] By letter dated 25 September 2014 from the Department to the Shaftesbury Estate and the sand traders it was stated that the dredging of sand was unauthorised and that the activity should cease. The letter followed a meeting of the Department's Enforcement Group which had considered a report that the development had the potential to cause significant impacts and a precautionary approach was necessary in the absence of evidence to prove that the activities would not cause any impacts.

[5] Operations did not cease and on 27 May 2015 the Department issued to the Shaftesbury Estate and the sand traders an Enforcement Notice, an Enforcement Report and an EA Determination Sheet. The Enforcement Notice required the cessation of the working of minerals within one day of the notice taking effect on 30 June 2015, unless an appeal was lodged beforehand.

[6] The Enforcement Report concluded that the operations were unauthorised and were unacceptable and that, with the presence of doubt over the potential impacts of the operations on a European site and on the environment, the operations were not considered compliant with the EIA Directive and the Habitats Directive. It was stated that in order for the operations to be carried out they must first be subject to an Environmental Impact Assessment and a Habitats Assessment and be determined in accordance with the planning system. In the interim it was stated that a cessation of operations was necessary.

[7] The EA Determination Sheet stated that the operations fell within the EIA Regulations, listed the likely environmental effects by reason of traffic movements, site operations, barge operations, extraction and restoration, confirmed that consultation was necessary to complete the environmental assessment determination and of particular note, stated that the environmental effects were likely to be significant. An Environmental Statement was recommended because the impact of the operations on each of the categories referred to above was, for the detailed reasons set out, stated to be significant.

[8] The Shaftesbury Estate and the sand traders appealed against the Enforcement Notice to the Planning Appeals Commission ("the PAC"). The grounds of appeal included the claim that planning permission ought to be granted in respect of the breach of planning control. Such an appeal does not provide for planning permission for future development. The effect of the appeal was that the Enforcement Notice had no effect pending the final determination or the withdrawal of the appeal. The sand traders were required to submit an Environmental Statement to the PAC.

[9] In July 2015 the Minister considered whether to issue a Stop Notice. The Minister deferred the decision pending an environmental report from the Northern Ireland Environment Agency.

[10] The sand traders applied to the PAC for an extension of time to lodge an Environmental Statement and on 13 November 2015 the PAC extended the time for the Environmental Statement to 31 October 2016.

[11] In the meantime officials in the Department became concerned about the on-going extraction of sand from the lough pending the completion of proceedings before the PAC. By a submission to the Minister on 9 November 2015 it was recommended that the Department appoint a scientific body to undertake research on the impact of the sand extraction. It was recommended that a Stop Notice should be issued compelling the cessation of operations. This recommendation was affirmed in a subsequent submission to the Minister on 19 November 2015.

The Decision not to issue a Stop Notice

[12] The Minister issued his decision on 20 November 2015 which is the subject matter of this application for Judicial Review. The decision refers to the procurement of ecologists to carry out work to inform the Department of any adverse impacts on the lough, that the sand traders should be informed that a separate planning application will be required if it is their intention to seek permission for future dredging of the lough, that leave should not be contested on the Friends of the Earth's application for Judicial Review which had issued on 23 September 2015 and that the Department did not agree to an extension of time for the submission of an Environmental Statement to the PAC. In relation to the recommendation for a Stop Notice it was stated –

“A Stop Notice should not be issued at this time. In my view it would not be a proportionate response in a situation where there is no evidence that the dredging, which has been going on since long before the site's designations, is having any impact on the environmental features of the lough. It would not be in the wider public interest to risk such potential economic harm until there is some understanding of the environmental situation as outlined above. However, I will review the situation as soon as the relevant information is available.”

[13] In June 2016 the Department received a report entitled “Implications of Sand Extraction on the Lough Neagh and Lough Beg SPA and Ramsar site”. The report concluded that on the evidence then available no significant negative impact of moderate significance or greater had been identified during the assessment. However they were recognised to be areas where further information was required in relation to impact assessment.

Operations likely to have significant effects on the environment

[14] The Treaty on the Functioning of the European Union at Article 191(2) states that the policy on the environment shall be based on certain principles, namely, the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. This sets out the aims and principles of EU policy but does not impose any duty.

[15] Environmental Impact Assessments arise under Directive 2011/92/EU as implemented by the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015. The preamble to the Directive states that the policy is based on “the precautionary principle” and that the effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.

[16] Article 2 and Regulations 4 and 30 are relevant. Article 2(1) requires the Member States to adopt all measures necessary to ensure that before consent is given “projects likely to have significant effects upon the environment” should be subject to an assessment with regard to their effects.

[17] Regulation 4(2) provides that planning permission shall not be granted unless the decision-maker shall “have first taken the environmental information into consideration”. The environmental information is the environmental statement submitted by the developer and any further environmental information submitted by the developer and any information supplied as part of the consultation process. A screening process is undertaken to determine whether such assessment is required in a particular case.

[18] Habitats Assessments arise under Directive 92/43/EEC as implemented by the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995. Special Protection Areas such as Lough Neagh are designated under the Wild Birds Directive 2009/147/EC.

[19] Article 6 and Regulations 43 and 44 are relevant. Article 6(2) requires Member States to take appropriate steps to avoid in special areas of conservation the deterioration of natural habitats and the habitats of species as well as the disturbance of the species insofar as such disturbance could be significant.

[20] Article 6(3) provides first that any plan or project “likely to have a significant effect” shall be subject to appropriate assessment and second that the plan or project will only be agreed if it will not adversely affect the integrity of the site.

[21] The European Court of Justice in Waddenzee [2006] 2 CMLR 683 found that Article 6(3) set a low threshold for likely significant effects. The test was said to be “essentially similar” to the corresponding test under the EIA Directive and that it

had to be interpreted in accordance with the precautionary principle as one of the foundations of community policy on the environment. It was concluded that any plan or project was to be subject to an appropriate assessment of its implications if it could not be excluded on the basis of objective information that it would have a significant effect on the site.

[22] The ECJ has stated the precautionary principle in relation to the health issues arising from BSE in Case C-180/96 UK v Commission [1998] ECR -I 2265 para [99] as follows –

“Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks becomes fully apparent.”

The challenge to the refusal to issue a Stop Notice

[23] The requirement for EIA and Habitats assessments applies with the finding of likely significant impact on the environment. The Department required the cessation of operations, which operations continued, the Department then issued an Enforcement Notice, which did not result in the cessation of operations. The appeal to the PAC neutralised the Enforcement Notice and the operations could continue until the decision of the PAC. The Department had to consider whether to issue a Stop Notice. The appellants secured an extension of time for the submission of environmental information so it was clear that a PAC decision would take some time. Retrospective planning permission might be granted but operations would continue in the meantime. Prospective planning permission was eventually sought. The impact of the ongoing operations had been assessed as likely to be significant but it remained the position that the impact was not known. Thus the Minister had to decide if the operations should continue in the circumstances.

[24] Stop Notices may be issued under section 151 of the Planning Act (Northern Ireland) 2011 where the Department “considered it expedient that any relevant activity should cease before the expiry of the period for compliance with an Enforcement Notice”. The Stop Notice may be served on any person who appears to have an estate in the land, in the present case the Shaftesbury Estate, or to be engaged in any activity prohibited by the notice, in the present case the sand traders.

[25] The application for Judicial Review challenged the failure of the Minister to issue a Stop Notice. The grounds related to a breach of the EIA Directive and the Habitats Directive and the implementing Regulations. Maguire J discussed a number of authorities, R (Ardagh Glass Ltd) v Chester City Council [2010] EWCA Civ. 172, R (Prokopp) v London Underground Limited [2003] EWCA Civ. 961, R v (Baker) v Bath and North East Somerset Council [2013] EWHC 946 Admin and R (Evans) v

Basingstoke and Dean BC [2014] 1 WLR 2034. Maguire J concluded that the response of the Department in not issuing a Stop Notice did not involve a breach of the Directives or Regulations and was within the range of lawful responses available and that no grounds for Judicial Review had been established.

[26] The grounds of appeal essentially reduce to two matters to be considered. The first is that Maguire J misunderstood and misapplied the decision in Ardagh Glass Ltd v Chester City Council. The second is that Maguire J was in error in not finding that the failure of the Department to serve a Stop Notice was in breach of the Directives and Regulations in failing to give effect to the precautionary principle and the preventative principle and the obligation under Article 4(3) of the Treaty on European Union to take any appropriate measures to ensure fulfilment of obligations.

Ardagh Glass Ltd v Chester City Council

[27] Ardagh Glass Ltd concerned retrospective planning permission for a large glass container factory. The trial judge held that retrospective planning permission could lawfully be granted as long as the relevant decision-making authorities paid careful regard to the objectives of the EIA Directive. The grounds of appeal were that the trial Judge had erred in holding first of all that planning permission could be granted retrospectively for an EIA development and secondly that the local authority was not required to serve a Stop Notice in respect of unauthorised EIA development.

[28] In relation to the first ground concerning retrospective permission the Court of Appeal confirmed that planning permission could be granted retrospectively for an EIA development. Measures to ensure compliance with the directives must be proportionate. The Court of Appeal concluded that a prohibition upon the grant of retrospective planning permission for EIA development, regardless of the circumstances surrounding, and the environmental consequences of, the breach of the Directive, would be wholly disproportionate.

[29] In relation to the second ground concerning the Stop Notice Sullivan LJ at paragraph [22] stated:

“Although it is arguably too late to serve a stop notice, the court would have power, in an appropriate case, to grant injunctive relief. However, once it is accepted that retrospective planning permission for unauthorised development is permissible in principle (subject to certain conditions), there is no substance in the appellant's further submission before the judge that the respondent was bound to issue a stop notice and not merely to issue an enforcement notice. The latter was sufficient to ensure the removal of the

unauthorised EIA development if retrospective planning permission was not granted either by the respondent under section 73A, or by the Secretary of State under section 177 in response to any appeal against the enforcement notice by the interested party.”

[30] Maguire J referred to paragraph [22] of Ardagh Glass Ltd as being in point in the present cases. There was an Enforcement Notice already in existence, the issue was whether a Stop Notice had to be served and there was also an appeal against the Enforcement Notice. It was stated that Sullivan LJ plainly viewed his conclusion on the point as not inconsistent with EU law and Maguire J stated that he was inclined to follow that view.

[31] Maguire J rejected the proposed distinction of the decision in Ardagh Glass Ltd based on the possibility of rectifying the damage in Ardagh by requiring the building to be removed if planning permission was not granted, whereas in the present case it was not possible to return extracted sand.

[32] This Court is of the opinion that there is a distinction to be made between Ardagh Glass Ltd and the present case and that it bears on the application of the principles to be applied. In Ardagh Glass Ltd it was found that the issue of an Enforcement Notice was sufficient to ensure the removal of the unauthorised development if retrospective planning permission was not granted. While the workings might continue in the meantime it was recognised that ultimately, if necessary, the unauthorised development, in the form of the factory structure, could be removed. However the present case is different in character. There is no such structure to be removed in the event that planning permission is ultimately refused. The unauthorised development is the excavation which cannot be reinstated. Of course, as in Ardagh Glass Ltd, there will also be the ongoing operations at the site but the focus is on the structure rather than the workings. In the present case the issue of the Enforcement Notice will not be sufficient to ensure the removal of the unauthorised development in the form of the excavation between now and the refusal of planning permission. The material extracted is irreplaceable. Therefore the basis on which no Stop Notice was issued in Ardagh Glass Ltd does not apply in the present case.

[33] It was contended that, by reason of the distinction that can be made between the present case and Ardagh Glass Ltd, a distinction that we have accepted, the Minister would be compelled to issue a Stop Notice in the circumstances. We do not accept that contention. The matter remains one of discretion for the decision maker.

The Precautionary Principle

[34] We return to the decision under challenge and the statement of the Minister in the decision letter that there is “no evidence that the dredging ... is having any

impact on the environmental features of the lough". This is the wrong approach. It is acknowledged by the Department that these operations are likely to have a significant effect on the environment. It is not known what that effect will be. The precautionary principle applies. It operates on the basis that there should be no planning permission until it is established that there is no unacceptable impact on the environment. The Minister's decision proceeds on the basis that there is an absence of evidence of an unacceptable impact on the environment. The proper approach is to proceed on the basis that there is an absence of evidence that the operations are not having an unacceptable impact on the environment.

[35] The test for the issue of a Stop Notice as stated in the 2011 Order is whether it is considered "expedient" that operations should cease. In Ardagh Glass Ltd it was stated at first instance that the test of 'expediency' suggested the balancing of the advantages and disadvantages of a course of action. In the European context which applies in the present case the measures undertaken by the Department must be proportionate. For the purposes of the present exercise we would read the domestic test of expediency to be equivalent to the requirement for proportionality.

[36] The Minister balanced the absence of evidence of environmental impact against the potential economic harm occasioned by the cessation of operations. The appellant contends that the economic factors are not relevant to the decision whether to issue a Stop Notice. We do not accept that contention. The Minister has discretion whether to issue a Stop Notice in the circumstances. Those circumstances concern the interim arrangements pending the determination by the PAC on the Enforcement Notice and retrospective planning permission and on foot of the subsequent application for planning permission, prospective planning permission. One outcome may be that all operations will cease. Alternatively, operations may be permitted subject to whatever conditions might be applied. The Minister has to determine what measures are expedient and proportionate in those circumstances during the interim period. We are satisfied that economic impact cannot be an irrelevant consideration.

[37] Given the repeated finding that the operations are likely to have significant impact on the environment the decision maker cannot simply put in the balance the absence of evidence of harm. It is not considered a sufficient response to the content of the decision letter to refer to the options and the references to the precautionary principle in the briefings to the Minister. What has been disregarded in the letter of decision, where it deals with the Stop Notice, is that these operations are considered likely to have significant impact, that the nature and extent of that impact has not been established, that prior to the grant of permission is the requirement to establish that there will be no significant impact and that it is imperative that the precautionary principle be applied. What must be put in the balance is the absence of evidence that there is no harm. To approach the matter with a requirement for evidence of harm is the negation of the precautionary principle.

[38] The decision will be quashed. Were these operations a new plan or project seeking permission, appropriate assessments of environmental impact would be required before any decision. Appropriate measures would be required to be taken to ensure fulfilment of that obligation. What constitutes appropriate measures where the developer proceeds without permission now requires consideration of expediency and proportionality in the circumstances. The issue requires immediate attention. The Court refers the matter back to the Department so that a determination may be made as soon as possible on whether or not to issue a Stop Notice.