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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY WILLIAM DONNELLY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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HUMPHREYS J

Introduction

[1] This is an application for leave to apply for judicial review brought by William Donnelly, who is a resident of Omagh, Co. Tyrone. He seeks to challenge the failure of Fermanagh and Omagh District Council ('the Council') to take enforcement action in respect of alleged breaches of condition in the planning permission granted to mining works near his home.

[2] Mr. Donnelly represented himself and was ably assisted by his McKenzie friend, his wife Mrs. Margaret Donnelly. The applicant's case was presented with admirable clarity and brevity and I wish to express my gratitude to both Mr. and Mrs. Donnelly and to Mr. McAteer B.L., who represented the proposed respondent, for their oral and written submissions.

The Planning Background

[3] In May 1995 Omagh Minerals Limited was granted planning permission for the extraction of gold, silver and other minerals from an open cast pit at Cavanacaw, Omagh. Omagh Minerals Limited is a subsidiary of Galantas Gold Corporation, a major Canadian mining concern.

[4] On 27 July 2015 planning permission was granted for underground mining and associated surface level works, subject to a number of conditions. One of these conditions, number 57, provided:

> *"Post and wire fencing with exclusion signs shall be erected along the boundaries between the blanket bog and the existing open cast mine, as marked on drawing number 19, date stamped received by the Department on 26 January 2015 by DOE planning. No works, infill, storage or construction activity associated with the development, including the removal, dumping or storage of materials, or tree planting shall take place within these blanket bog areas. The fence shall be retained along this boundary until all works are completed and the site is restored."*

[5] Seamus Heaney famously said *"our unfenced country is bog that keeps crusting between the sights of the sun"* – at Cavanacaw this area of some 21 hectares of blanket bog was fenced to protect it and the associated flora and fauna on the site.

[6] The applicant sought to challenge the 2015 planning permission but in a detailed judgment at (2017) NIQB 84 Madam Justice McBride dismissed his judicial review application. An appeal to the Court of Appeal was similarly unsuccessful – (2018) NICA 44.

[7] Omagh Minerals also secured a grant of planning permission on 14 July 2016 for exploration boreholes which had been drilled without the benefit of planning permission prior to that application being lodged in 2012. The 2016 permission served to regularise the position insofar as those boreholes were concerned.

Breach of Condition 57

[8] In November 2018 the applicant wrote to the Council concerning unlawful development at the mine in the shape of boreholes which had been drilled in the area of the blanket bog contrary to Condition 57 of the 2015 permission. The Council carried out a site inspection in January 2019 but was unable to find any evidence of unlawful development. In an email of 22 January 2019 Ms. McSorley, the Council's Head of Planning stated:

> *"Council Officers…are satisfied that there is no breach of Condition 57…and no unauthorised works have been carried out on the blanket bog."*

[9] In June 2019 the applicant raised the matter again and Council representatives spoke to the Mining Manager of Omagh Minerals. They were advised that there was some drilling work carried out in 2015 but that this was notified to the Department of Infrastructure. As a result, the Council re-opened its enforcement file. Further meetings took place with Omagh Minerals and another site inspection occurred in February 2020. Information provided by Omagh Minerals appeared to confirm that no drilling had taken place within the area of the blanket bog.

[10] When this application first came before the Court, it was recognised by the parties that there was a dispute of fact which would be difficult for the judicial review court to resolve. The applicant specifically identified two boreholes, namely OML-DD-15-154 and OML-DD-15-153, as being located within the blanket bog. Accordingly, it was directed that further steps be taken by the Council to confirm or deny that this was the case. In its amended response to the applicant's pre action protocol letter, dated 20 March 2020, the Council accepted that the boreholes were located in the area of the blanket bog.

[11] Given that these boreholes were drilled in 2015, it was demonstrably the case that they were not the subject of the July 2016 retrospective planning permission as this only covered the boreholes drilled in 2012. As such, therefore, these boreholes represented a clear breach of Condition 57 of the 2015 permission.

The Council's Position

[12] Having accepted that there was clear evidence of a breach of planning control, the Council determined nonetheless that it would not issue an enforcement notice. In arriving at this decision, it took into account:

(i) The passage of time;
(ii) The absence of any evidence of physical damage as a result of the boreholes;
(iii) The opinions of other relevant statutory agencies; and
(iv) The absence of any satisfactory remedy.

[13] Prior to arriving at this decision, the Council consulted the Northern Ireland Environment Agency and the Shared Environmental Service. Both these agencies commented that they had no concerns about the boreholes from an environmental perspective. The Council 'reluctantly' concluded that enforcement action was not expedient in the circumstances of this case.

The Grounds for Judicial Review

[14] The applicant sought to impugn the Council's failure to take enforcement action on the basis of the need to protect the blanket bog and that the lack of action represented a betrayal of the Council's responsibilities. He contended that there had been a breach of paragraphs 5.55 and 5.56 of the Strategic Planning Policy Statement in relation to its failure to act in accordance with its statutory responsibilities. The applicant also relied on Regulation 32 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 ('the 2017 Regulations') which states:

> *"The Council…shall consider the exercise of their enforcement functions in such a way as to secure compliance with the objectives and requirements of the Directive."*

[15] The applicant argues that the decision was disproportionate and unreasonable in the *Wednesbury* sense.

[16] Essentially, the applicant contended that, unless some enforcement action were taken, Omagh Minerals would continue to flout the law and breach the conditions attached to its planning permission.

The Legal Principles

[17] Given that this is an application for leave to apply for judicial review, the applicant need only satisfy the Court that he has an arguable case, i.e. one which has a reasonable prospect of success.

[18] The enforcement powers of local Councils in relation to planning are contained in Part 5 of the Planning (Northern Ireland) Act 2011 ('the 2011 Act'). Section 132 of the 2011 Act provides that no enforcement action may be taken after the end of the period of 5 years beginning with the date on which the operations were substantially completed.

[19] Section 138(1) of the 2011 Act states:

> "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."*

[20] In *R (on the application of Community Against Dean Super Quarry) –v- Cornwall Council* (2017) EWHC 74 (Admin) Hickinbottom J considered the very similar provisions of section 172 of the Town and Country Planning Act 1990, the applicable legislation in England & Wales. He summarised the relevant principles thus:

> *"Where a developer is acting in breach of planning control, the statutory scheme assigns the primary responsibility for deciding whether to take enforcement steps and, if so, what steps should be taken and when to the relevant local authority. The statutory language used makes it clear that the authority's discretion in relation to matters of enforcement if, what and when is wide. That is particularly the case in respect of enforcement notices, the power to issue a notice arising only*

> *'where it appears to them…that it is expedient to issue the notice'. That is language denoting an especially wide margin of discretion."*[1]

[21] Accordingly, the learned Judge held that whilst such decisions could be challenged on public law grounds, intervention by the Courts was likely to be rare. He explained:

> *"Generally, absent extraordinary (i.e. rare) circumstances…I consider that this court should be slow to entertain applications in respect of a failure to take enforcement action against particular unauthorised development."*[2]

[22] One case where the Court did intervene, and made an order of *mandamus* requiring the council to serve an enforcement notice, is *Ardagh Glass –v- Chester City Council* (2009) EWHC 745 (Admin). In that case, Quinn Glass Limited constructed and began operating a glass manufacturing facility without planning permission. A retrospective planning application was unsuccessful. The applicant, a competitor company, sought to challenge the failure to take enforcement action. There was a dispute between the parties as when '*substantial completion*' of the Quinn factory was achieved and, therefore, as to when the time limit for the taking of enforcement action would expire.

[23] The learned Judge concluded that the Council had made errors of law in considering whether it was expedient to issue an enforcement notice. Accordingly, he made the mandatory order requiring a notice to issue which would oblige Quinn Glass to take down the buildings and cease all business activity.

[24] This judgment was referred to by the Court of Appeal in *Re Friends of the Earth* (2017) NICA 41, which concerned the refusal of the Department of the Environment to issue a stop notice under section 151 of the 2011 Act to the land owner and a number of businesses involved in sand extraction from Lough Neagh. The Court held that environmental obligations arising under, *inter alia*, the Treaty on the Functioning of the European Union, the Environmental Impact Assessments Directive[3] and the Habitats Directive[4] are founded on the 'precautionary principle', requiring early intervention to protect the environment even where the scientific outcomes are uncertain.

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[1] **Para 25**
[2] **Para 71**
[3] **2011/92/EU**
[4] **92/43/EEC**

[25] It was held that the Minister had erred in approaching the matter on the basis that there was an absence of evidence of unacceptable impact on the environment. This ran contrary to the precautionary principle which required an approach based on the lack of evidence that there was no harm caused to the environment. The decision maker was obliged to approach the statutory question of 'expediency' by weighing up the relative advantages and disadvantages of the proposed course of action. In the European context, the Court of Appeal held, this was equivalent to the requirement for proportionality.

Consideration

[26] I agree with Hickinbottom J that the statutory scheme affords to the decision maker a wide discretion as to whether to instigate enforcement action when a breach of planning control has been identified. Section 138(1) of the 2011 Act requires the Council to take into account all material considerations in exercising this discretion. The test of expediency is, as the Court of Appeal has observed, equivalent to proportionality under EU law.

[27] As in any proportionality challenge, it must be recognised that the law affords a margin of appreciation or latitude to the decision maker. I am satisfied in this case that the Council took into account all material considerations and that the decision not to pursue enforcement action was a proportionate one in the all the circumstances.

[28] The applicant has not adduced any evidence that the boreholes in question have caused any physical damage to the blanket bog. The evidence which does exist, from the relevant statutory agencies, is to the effect that there is no damage. Whilst I recognise that the precautionary principle is in play, it seems clear in this case that there is no environmental harm which could be rectified by the taking of enforcement action. This is in contrast to the glass factory in *Ardagh Glass* which could be ordered to be taken down or the sand extraction in *Friends of the Earth* which was an activity which could be stopped by enforcement action. In the instant case, there was no harm which could be remedied or activity ceased by the service of an enforcement notice.

[29] The statutory enforcement regime does not concern itself with punishment, at least in the first instance. As section 140 of the 2011 Act sets out, an enforcement notice should both set out the breach of planning control identified and the steps which the Council requires to be taken or the activities which it requires to cease. Given that the unlawful drilling took place over 4 years ago, and has not occurred since, and the lack of any physical damage to be remedied, it is difficult to see what purpose an enforcement notice would serve.

[30] As such, I have concluded that the Council was entitled to arrive at the decision which it did, namely that it was not expedient in all the circumstances to issue an enforcement notice. The claim that such a decision was irrational in the

Wednesbury sense was plainly unarguable. This is not one of the rare cases in which the Court should intervene in relation to the failure to take enforcement action.

[31] However, it should be a matter of grave public concern that the mining works at this site have been characterised by repeated breaches of planning control which have resulted in no enforcement action taken by the relevant authorities. In her 2017 judgment McBride J made the following findings:

(i) There was unauthorised removal of ore in the late 1990's which constituted unlawful EIA development; and

(ii) Between 2008 and 2009 half a million tonnes of rock3was unlawfully removed from the site. The Ombudsman later found that the failure to take enforcement action had completely failed to protect the public interest.

[32] It is now apparent, almost 5 years after it occurred, that Omagh Minerals Limited was guilty of a further breach of planning control which did not result in any timely enforcement action. It would seem that, despite a well-known history of flouting of planning requirements, first the Department and now the Council rely on complaints being raised by members of public before considering whether or not to take enforcement action.

[33] The matter is not determinative of this application but the Court is not satisfied that an approach which relies upon complaints from the public, and evidence produced by them, could properly be seen as compliant with the obligation imposed by Regulation 32 of the 2017 Regulations.

Conclusion

[34] For the reasons outlined herein, the applicant has not established an arguable case and the application for judicial review is dismissed. I make no order as to costs *inter partes*.