2017 No. 132721

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (Judicial Review)

IN THE MATTER of an application by [redacted] for leave to apply for Judicial Review

AND IN THE MATTER of a decision of the Department for Agriculture, Environment and Rural Affairs dated 29th September 2017 ~~by [redacted]~~

AMENDED AMENDED STATEMENT PURSUANT TO THE RULES OF THE SUPREME COURT (NI) 1980 ORDER 53 RULE 3(2)(A)
Amended this 26th day of June 2018
Re-amended this 2nd day of July 2018

1. The applicant is [redacted], a retired person, of [redacted], Omagh, Co Tyrone BT79 9AF.

2. The relief sought is:
   (a) an order of Certiorari to quash a decision of the Department for Agriculture, Environment and Rural Affairs ("the Respondent") [redacted], dated 29th September 2017 which granted a Discharge Consent to Dalradian Gold Ltd (Consent no. 068/12/3) ("the impugned discharge consent") allowing dangerous substances and chemical compounds to be discharged into a waterway at Irish Grid Reference H5707 8690.

   (b) a declaration that the said decision was unlawful, ultra vires and void.

   (c) Costs, including a Protective Costs Order

   (d) Such further or other relief as this Honourable Court shall deem meet.

   (e) All necessary and consequential directions.

3. The grounds on which the said relief is sought are as follows:
   (a) The decision is unlawful in that it affords discharge amounts in excess of the maximum limits for pollutants set down in the Water Framework Directive (Classification, Priority Substance and Shellfish Waters) Regulations (Northern Ireland) 2015. In particular, in calculating maximum amounts and testing these, the Respondent failed to take into account the fact that undissolved solids remained in the discharge effluent.

   (b) The decision is contrary to Article 6(3) of the Habitats Directive 92/43/EEC; Regulation 43 of the Conservation (Natural Habitats, etc) Regulations (NI) 1995

and Commission Guidance on the procedure to be followed under Article 6(3) of the Habitats Directive in that:

(i) No adequate stage 1 test was carried out – the Respondent failed to consider whether the plan or project was likely to have a significant effect on the site, either individually or in combination with other plans or projects;

(ii) No adequate stage 2 appropriate assessment was carried out prior to the impugned discharge consent being granted. Any prior assessments did not constitute an appropriate assessment for the purpose of the impugned discharge consent.

(iii) In carrying out the Habitats Regulations Assessment ("HRA"), the Respondent decided that appropriate conditions could be placed on the impugned consent to ensure that no significant effect on the Owenkillew SAC was likely to occur. This was the wrong procedure under the Directive, Regulations and Commission Guidance. If conditions were necessary then it was necessary to carry out an appropriate assessment in order to decide what those conditions should be. Conditions could not be placed on the impugned discharge consent in the absence of an appropriate assessment. It is not possible to negate the need for an appropriate assessment by attaching conditions to a consent.

(c) The Respondent failed to take into account or to give sufficient weight to the fact that the Owenkillew River is a Special Area of Conservation; that the Foyle River and its tributaries are designated as Areas of Special Scientific Interest and that the whole area is an Area of Outstanding Natural Beauty. In particular:

(i) the Respondent failed to consult the Loughs Agency prior to granting the impugned discharge consent; and

(ii) the Respondent did not take into account, give adequate weight to, or comply with, the Owenkillew Sub Basin Management Strategy.

(d) The Respondent acted in contravention of Article 4 of the Water (NI) Order 1999 and failed to take into account or to give adequate weight to the facts that:

(i) the discharge included heavy metal (such as cadmium, mercury and zinc) which present a serious risk to health;

(ii) the total amount of each heavy metal was not being tested by either the Respondent or Dalradian;

(iii) the total amount of each heavy metal was not being tested in the local treatment plants;

(iv) there was therefore no testing of the total amount of heavy metal being discharged into or present in the relevant waterways.

(e) The Respondent failed to take into account or give adequate weight to the fact that there was a history of Dalradian failing to comply with the requirements of the conditions in discharge consents granted to them.

(f) The decision is unlawful and procedurally improper as:

(i) [redacted] acted beyond the purported delegated remit granted to him by the Minister on 16 June 2015 in that the purported delegated remit allowed him to sign domestic and non-strategic discharge consents, but it did not allow him to make decisions in relating to projects of strategic importance;

(ii) The Department did not have power to make the decision in the absence of a Minister. There was no Minister in place at the time the decision was made. In particular, the decision was contrary to Article 4(1) of the Departments (NI) Order 1999 which requires that the functions of a department shall at all times be exercised subject to the direction and control of the Minister.

(g) The decision is unreasonable and procedurally improper in that it failed to take into account or give adequate weight to the facts that, at the time the consent was granted:

(i) Dalradian was already in breach of the planning permission granted to Dalradian for the works on this site in January 2014. (Project K/2013/0072/F). Condition 43 of this planning permission required Dalradian to complete the implementation of the restoration of the site in accordance with Drawing Number 14 and in accordance with conditions 41 and 42 of the said planning permission on or before 3 years from the date of commencement, unless otherwise agreed in writing with the Department. The date of commencement was August 2014. Three years from the date of commencement was August 2017. Therefore, at the date of the grant of the discharge consent (29 September 2017), Dalradian was in breach of the above conditions of the planning permission granted to it for the development in respect of which the discharge consent had been applied for. The breach is continuing.

(ii) Dalradian did not have any valid planning permission for the activity associated with the discharge. Dalradian's application for the discharge consent was for trade effluent in respect of mineral exploration involving the extension of an existing underground exploration tunnel. At the time the discharge consent was granted, Dalradian did not have valid planning permission for the activity associated with the discharge consent, namely for mineral exploration involving the extension of an existing underground exploration tunnel.

(h) The Respondent wrongly considered that Dalradian did have valid planning permission for the activity associated with the discharge consent, namely for mineral exploration involving the extension of an existing underground exploration tunnel.

The Applicant will also rely on the affidavits filed herein and the reasons to be offered.
Dated this 28th day of December 2017

Signed: [redacted]

[redacted]
Omagh
Co Tyrone.
BT79 9AF

Amended this 26th day of June 2018

Signed : [redacted]
Brolly Jameson, Solicitors
14 Old Market Place
Omagh
County Tryone
BT78 1BT

Re-amended this 2nd day of July 2018