



Decision Notice

By **G F Self MA MSc FRTPI**

Inspector appointed by the Secretary of State
for Communities and Local Government

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Appeal Reference: APP/M9496/C/07/2048337

Land at Wagers Flat, Great Longstone, Longstone Edge, DE45 1PB

- The appeal is by Bleaklow Industries Ltd. It is made under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991, against an enforcement notice issued by the Peak District National Park Authority.
- The planning authority's reference is: Min 2382/WF.
- The notice is dated 15 May 2007.
- The breach of planning control alleged in the notice is: "The winning and working of limestone other than in accordance with planning permission 1898/9/69".
- The requirements of the notice are:
 - "(a) Cease the winning and working of limestone other than the working of such limestone as is won in the course of working fluorspar and barytes.
 - "(b) Cease the exportation from the land of limestone other than limestone won in the course of working fluorspar and barytes.
- The period for compliance for both steps is one day.
- The appeal was made on grounds (b), (c) and (f) as set out in Section 174(2) of the 1990 Act.

Appeal Reference: APP/M9496/C/07/2048699

- The appeal is by MMC Mineral Processing Ltd. It is against the same enforcement notice and all other details are the same as those listed above.

Procedural Matters

1. This decision relates to the two appeals for which details are summarised above. In addition to the grounds of appeal listed, both appellants contended as part of their appeals that the enforcement notice was a nullity. All main parties have agreed that a determination should be made on whether the notice is a nullity, as a preliminary stage before an inquiry is held, if necessary, into the other aspects of the appeals. The reasoning and the decision on the nullity issue are set out below.
2. I held a Pre-Inquiry Meeting on 17 December 2007, where arrangements were made for written representations on the nullity issue to be submitted and exchanged. Representations have been exchanged between the parties so that they have had the opportunity for rejoining comments. I have had regard to these representations and to all other relevant considerations in reaching my decision, with one proviso. The Save Longstone Edge Group ("SLEG") submitted a statement only at the rejoining comments stage. Since the other parties have not had the opportunity to respond to SLEG's statement, in the interests of

fairness I have not given weight to the parts of SLEG's statement which are not comments on the other parties' submissions.

Reasons

Background History

3. The background history leading up to these appeals will be well known to most readers of this decision but I summarise certain points here for the purposes of cross-reference and completeness.
4. A key aspect of this case is a planning permission granted in 1952 by the then Minister of Housing and Local Government. This permission covered a site which included Wagers Flat and a larger adjacent area at Longstone Edge. Permission was granted for:

"the winning and working of fluorspar and barytes and for the working of lead and other minerals which are won in the course of working these minerals, by turning over old spoil dumps, by opencast working and by underground mining within the area shown outlined in black excluding the area cross-hatched, on the attached plan and the tipping of waste materials on the areas shown hatched vertically on the plan".¹
5. There is no dispute that the permission is extant. It was subject to six conditions, which among other things required the disposal of waste material in the hollows left by old workings, but did not impose any restrictions on the depth of working or the quantities of minerals extracted. It is also common ground among all parties in this case that limestone is a mineral and therefore falls within the term "other minerals" in the 1952 permission.
6. As well as the appeal site at Wagers Flat, the 1952 permission also covered an adjacent site known as Backdale, or Backdale Quarry. The Peak District National Park Authority issued an enforcement notice relating to that site on 5 May 2006. Appeals were lodged against that notice by the same appellants as have appealed in the present case; an inquiry was held into the appeals in February 2007. The decision on the appeals was issued in April 2007 and is currently the subject of further appeal to the High Court under Section 289 of the 1990 Act.
7. The allegation in the Backdale enforcement notice was the same as in the notice subject to the present appeals. The requirements of the Backdale enforcement notice related to two areas. In one area, the requirement was to cease all the winning and working of limestone; in the other area, the operative part of the requirement was worded identically to requirement (a) above.

Assessment

8. The essence of both appellants' cases is that the enforcement notice is a nullity because it does not tell its recipients fairly what they have done wrong and what they must do to remedy it.
9. This test is of course derived from the judgment in the *Miller-Mead* case.² It is a basic requirement which, if not met, renders an enforcement notice a nullity, as has been confirmed in a number of judgments quoted by the parties in their submissions.³ If a notice is a nullity it is equivalent to what a judge has termed

¹ The punctuation here is reproduced as in the permission, although as far as I am aware nothing turns on the erroneous position of the comma after "cross-hatched".

² *Miller-Mead v MHLG* [1963] 2 QB 196.

³ Including for example, *R (Lynes) v West Berkshire DC* [2003] JPL 1137 and *Payne v National Assembly for Wales* [2006] EWHC 597 (Admin).

"waste paper" and is not capable of correction, unlike a notice which may be flawed in such a way as to be invalid but capable of correction or variation.

The 1952 Permission

10. In their submissions on the nullity issue, the parties have chosen not to analyse the wording of the 1952 permission in any detail. I think it is relevant to consider that wording. The geological context at the Wagers Flat quarry is that there is a single mineral vein which passes across the site from north to south.⁴
11. One of the difficulties in this case is the meaning of the expressions "winning" and "working". These expressions were discussed in the decision by the inspector who took the Backdale inquiry.⁵ I do not propose to quote extensively from that decision because all parties in the present appeal will be familiar with it. In brief, the inspector refers to the judgment in the English Clays case⁶, in which Russell LJ took the view 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.
12. Those interpretations are not necessarily definitive in the present case, for various reasons - one being that Russell LJ was dealing with the 1963 General Development Order, another being that what might apply to china clay (which was extracted using water) does not necessarily apply equally to minerals such as fluorspar or limestone which are extracted by different methods. This part of the judgment was also on a point not directly in issue in the case before the judge. Nevertheless, the judgment reinforces the view that "winning" and "working" are not the same thing. A reasonable interpretation for present purposes, taking account of the English Clays judgment, is that "winning" means "getting at" or "making available" and "working" means "extracting". The "extracting" operation might also include some processing.
13. It is fair to assume that whoever drafted the 1952 permission did so deliberately. On that assumption it follows that the words "winning" (or won) and "working" (or worked) are intended to have distinct and different meanings.
14. The word "and" can be used in a conjunctive or disjunctive sense.⁷ In the 1952 permission, "and" appears to be used partly in its disjunctive sense - that is to say, the permission permits the winning and/or working of just fluorspar on its own (if that were feasible); and the expression "lead and other minerals" would appear to allow "other minerals" to be worked without necessarily having to work lead at the same time.
15. Interpreting the 1952 permission accordingly, and omitting aspects not relevant to the present appeals, it permits getting at or making available and extracting fluorspar (and barytes), and extracting such limestone which is got at or made available in the course of extracting fluorspar (and barytes).
16. In their statements of case Bleaklow Industries Ltd say that the 1952 permission "permits....the working of limestone while exploring for vein minerals", and MMC Mineral Processing Ltd say that the permission permits "the extraction of limestone where it is undertaken in the course of operations for the recovery of fluorspar or barytes". These assertions are symptomatic of the dispute between the appellants and the planning authority - there is a difference between "chasing a vein" and exploring (or prospecting), and the 1952 permission does not

⁴ This description is from a written description supplied at my request by MMC Mineral Processing Ltd.

⁵ Reference APP/M9496/C/06/2017966.

⁶ English Clays Lovering Pochin Ltd v Plymouth Corporation [1974] 27 PCR 447.

⁷ For example, in the statement that pencil and paper are needed to write something, "and" is conjunctive; but a shop which is "licensed to sell wines and spirits" is not forced by its licence to sell spirits with every purchase of wine - here "and" is disjunctive, being equivalent to "or".

mention exploring; nor does it mention anything being permitted during activities so potentially wide-ranging as "operations for the recovery" of fluorspar or barytes.

17. One thing is clear: the 1952 permission does not permit simply the winning and working of fluorspar, barytes and limestone.

The Allegation

18. Under Section 173(1)(a) of the 1990 Act, an enforcement notice "shall state the matters which appear to the local planning authority to constitute the breach of planning control". Section 173(2) provides that a notice complies with subsection (1)(a) "if it enables any person on whom a copy of it is served to know what those matters are".
19. The allegation alleges that limestone is being won and worked other than within the scope of the 1952 permission. The allegation does not say precisely how the permission is being infringed. To that extent, there is a degree of imprecision in the allegation if it is looked at in isolation. However, the imprecision is not such as necessarily to render the notice a nullity, for three reasons.
20. First, the requirement in the Act for the planning authority to *state* the matters which *appear* to the authority to constitute a breach of planning control (my emphases) allows an allegation to be framed in a way which may not be absolutely precise.
21. Secondly, the courts have held that the test of fairness was capable of being satisfied by a description in general terms.⁸ Under Section 173(2) it is sufficient that the notice enables any person on whom a copy of the notice is served to know what those matters (the matters which appear to the planning authority to constitute the breach of planning control) are.
22. Thirdly, it is reasonable to take into account the notice as a whole. It is apparent from everything within the notice (including the requirements) that it is directed at the alleged winning and working of limestone going beyond what was allowed by the 1952 permission, the limit being the working only of such limestone as is won in the course of working fluorspar and barytes.
23. It may be helpful to draw parallels here. An enforcement notice directed at, for example, an unauthorised storage use at a farm (or mixed agricultural and storage use) might typically refer in its allegation to use for storage other than storage for agricultural purposes, or other than storage ancillary or incidental to the agricultural use of the land. In many such cases it would not be practical to itemise individual items stored on the land and to specify which ones were part of an agricultural use and which were part of a storage use.
24. An enforcement notice directed at, say, a house not built in accordance with a planning permission could allege the construction of the house not in accordance with the permission; but it could equally correctly allege the unauthorised erection of a house. Similarly, in the present case the enforcement notice could simply have alleged the unauthorised extraction, or the unauthorised winning and working, of limestone. The fact that the allegation refers additionally to the 1952 permission does not make the notice a nullity.
25. The courts have also held that enforcement notices alleging an unauthorised material change of use of land do not have to specify the previous use in the allegation. The question whether a material change of use has actually occurred may be disputed or uncertain - but that would potentially be a matter for an appeal on grounds (b) or (c), not for a finding of nullity.

⁸ I have in mind here the judgment in *Bristol Stadium Ltd v Brown* [1980] JPL 107.

26. The allegation may leave room for improvement; but in my judgment there is sufficient within the four corners of the notice to tell its recipients fairly what they are alleged to have done wrong. I conclude that the allegation is not so flawed as to render the notice a nullity.

The Requirements

27. As is pointed out for the appellants, rather more precision appears to be demanded of the requirements in an enforcement notice than of the allegation, because Section 173(3) of the Act provides that an enforcement shall *specify* (as opposed to *state*) the steps which the authority require to be taken or the activities which the authority require to cease. Any failure to comply with the requirements of a notice is also potentially the basis for prosecution.
28. The appellants refer to the need for "actual, factual steps" to be specified in the requirements of an enforcement notice.⁹ This is in effect a re-statement and confirmation of the Miller-Mead principle and emphasises the need for precision.
29. However, this is not a case where the notice requires positive steps to be taken (such as carrying out alterations to an unauthorised building); rather, what is required is the cessation of an activity - in terms of the 1990 Act, the requirements fall within Section 173(5)(c) rather than Section 173(5)((a), (b) or (d). Moreover several judgments would appear to support the view that imprecise language may sometimes have to suffice where no more precise formula is available, such as a requirement to return to a level of activity before a breach took place.¹⁰ It is also quite common for enforcement notices to require land to be restored to its condition before a breach took place. Such restoration might involve all sorts of operations such as earthworks or laying seed or turf, but notices which do not specify these operations precisely as actual, factual steps are not nullities.
30. A further point is that the requirements in an enforcement notice have to relate to the allegation. The requirements can only go beyond the allegation in certain circumstances,¹¹ and if the requirements "under-enforce" compared with the allegation, there is a danger of inadvertent planning permission being granted by virtue of Section 173(11) of the Act. The appellants' contention that the requirements should contain actual, factual steps has to be considered in that light.
31. In this case, the planning authority's ability to specify steps is limited by the terms of the 1952 permission; and it is difficult to see what more precise formula would have been available to the authority. Assuming hypothetically that in the absence of any appeal against the enforcement notice, criminal liability became an issue on prosecution, the question whether the requirements had or had not been complied with would be a matter of factual evidence to be considered by the magistrates or other court. The court would have to consider whether only limestone which had been won in the course of working fluorspar or barytes had been worked, or whether limestone outside that limit had been worked. To put it in more general terms, the court would have to consider evidence and reach a judgment on whether the operators at Wagers Flat were operating predominantly a limestone quarry outside the scope of the 1952 permission. The case might well be one where a court would benefit from seeing the site as well as hearing factual evidence but that would be a matter for the court.

⁹ The quotation here is from the judgment in *R v East Lothian Council ex parte Scottish Coal* [2001] 1 PLR 1.

¹⁰ As in, for example, the judgments in *Trevors Warehouses Ltd v SSE* [1972] 23 P&CR 215; *Bristol Stadium Ltd v Brown* [1980] JPL 107; *Lee v Bromley London Borough Council* [1982] JPL 778.

¹¹ An example is where an enforcement notice directed at an unauthorised material change of use can require operational development which facilitates the use to be removed.

32. In discussing the allegation I drew a parallel with storage use at a farm. Much the same could be said in relation to the requirements of the notice. A court might have to determine from evidence whether, as a matter of fact, the type and quantity of agricultural equipment kept on the farm, and possibly the purpose of keeping the items there, amounted to a criminal offence even though an enforcement notice had not listed every item which had to be removed. The need for a magistrates' or other court to determine factual matters does not mean that the requirements are so vague that the enforcement notice is a nullity.
33. As the National Park Authority point out, if having received the enforcement action the appellants believed that the operations at Wagers Flat were within the terms of the 1952 permission, it was open to them to appeal on grounds (b) or (c) of Section 174(2) of the 1990 Planning Act. They have done so; and these are matters yet to be determined.
34. Requirement (b) of the enforcement notice relating to the exportation of material from the land is similar to requirement (a) as regards the reference to "limestone other than limestone won in the course of working fluorspar and barytes". Therefore it seems to me that the second part of the requirements stands or falls with the first part.
35. Like the allegation, there may be room for improvement in the wording of the enforcement notice's requirements. But in my judgment the requirements as drafted by the planning authority do not render the notice a nullity.

Other Matters

36. Various mutual allegations have been made about the parties having done things which appear inconsistent. Bleaklow Industries Ltd say in their submissions that the National Park Authority "first stated on its own website that what was occurring at Wagers Flat was lawful and then surrendered to public pressure and issued an enforcement notice....and at the same time issued a stop notice". The authority refute this interpretation of events.
37. It seems to me that the Park Authority may have had little option but to wait until the scale of the quarrying at Wagers Flat, particularly the scale of limestone extraction, became evident before they could make an informed judgment as to whether it appeared to the authority that a breach of planning control was occurring. Be that as it may, this argument does not materially affect the legal position regarding nullity.
38. The Park Authority in turn point out that neither of the appellants has tried to claim that the enforcement notice relating to Backdale Quarry (which as noted above is effectively identical to the Wagers Flat notice) is a nullity. The appellants submit that the fact that a previous enforcement notice in similar terms has proceeded to an inquiry and has been upheld by an inspector is irrelevant, and that it is not known what the position might have been if the issue of nullity had been raised by the appellants in relation to the Backdale notice.
39. In my view this point is not as wholly irrelevant as the appellants maintain. The appellants are entitled to raise the issue of nullity irrespective of whether it was raised previously. But it is curious that appellants who have been professionally advised throughout should introduce an argument for the present appeals which was not argued against the Backdale notice. Possible reasons for this may be guessed but I refrain from speculating.
40. I see this matter as a flaw, albeit one of limited relevance, in the appellants' case. As the appellants will be well aware, under Section 176 of the 1990 Act inspectors on appeal may correct "any defect" in an enforcement notice or vary its terms, provided no injustice is caused (always provided of course that the notice is not a nullity); and the appellants' approach to the Backdale notice suggests their acceptance that if the requirements were not precise enough, the notice was

capable of being corrected or varied without injustice arising. If the appellants genuinely believe that it is "impossible for MMC to know how it should alter its mode of operation", one is left wondering why that belief did not arise in relation to the Backdale notice.

41. The main appeal parties are not the only ones who have been accused of apparent inconsistency: the Planning Inspectorate has also issued differing statements on the matter of nullity. The Inspectorate wrote to the parties in August 2007 saying that: "We have taken legal advice and are of the opinion that the notice is a nullity", although later in the same letter saying that: "It is our initial opinion that the enforcement notice may be a nullity". In September 2007 the Chief Executive wrote to clarify the Inspectorate's position. This letter referred to the Inspectorate's "initial concerns that the notices may be a nullity" and stated that the issue would be determined by the inspector.
42. I do not consider myself bound by anything the Planning Inspectorate has stated. My decision is based on my own judgment.
43. In paragraph 2 above I mentioned the submission of a statement by SLEG at rejoining comments stage. In the statement SLEG concluded that: "What is needed is a definitive ruling on what the permission means in relation to Wagers Flat. That is why an inquiry is needed and why the nullity claim should be rejected." This argument is legally misguided. Either the enforcement notice is a nullity or it is not a nullity, as a matter of law. SLEG's apparent belief that an inquiry is necessary to obtain a ruling about the 1952 permission has no bearing on the decision on nullity.

Concluding Comments

44. It is common knowledge that this case is part of a larger problem which has bedevilled the extraction of vein minerals in the Peak District for many years. One aspect of the problem is the interpretation of old planning permissions which nowadays would be regarded as poorly worded. Another aspect is that minerals such as fluorspar occur where there have been geological effects (faulting, pressure or heat) on carboniferous limestone; and as a result it is in practice not possible to extract fluorspar from the ground without also extracting some limestone. It is also relevant to note that in order to extract any mineral, it may be necessary for safety and other reasons to form benches and access ways.
45. As the appellants have contended, the criteria which apply to the interpretation of a planning permission are not the same as those which apply to the interpretation of an enforcement notice. However, in this case there is a fairly close relationship between the permission and the notice. The points mentioned above do not make it impossible for a reasonable operator to make a reasonable interpretation of the 1952 permission, and to understand with reasonable certainty the related allegation and requirements of the enforcement notice.
46. In reaching my decision I have had regard to all the other issues raised in the submissions on which I have not specifically commented. They do not outweigh the considerations discussed above.

Decision

47. I find that the enforcement notice is not a nullity.

G F Self

Inspector