In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 232

IN THE MATTER OF AN APPEAL OF A DECISION OF THE MINISTER OF THE ENVIRONMENT, TELECOMMUNICATIONS AND E-COMMERCE PURSUANT TO SECTION 17 OF THE CLEAN AIR ACT, 1991

IN THE MATTER OF AN APPLICATION FOR A PERMIT FOR A ROCK CRUSHER AND SAND SIFTER AT 7 MARSH LANE, DEVONSHIRE

BETWEEN:

RODRIGUES TRUCKING & EXCAVATING LIMITED **Applicant**

-and-

THE MINISTER OF THE ENVIRONMENT, TELECOMMUNICATIONS AND E-COMMERCE **Respondent**

JUDGMENT

Date of Hearing: 24 October 2007

Date of Judgment: 15 November 2007

Mr. Mark Pettingill, Wakefield Quin, for the Applicant

Ms. Maryellen Goodwin, Attorney-General's Chambers, for the Respondent

The Proceedings

1. These proceedings are taken under the provisions of section 17 of the Clean Air Act 1991 ("the Act") in relation to a decision of the Minister of the Environment, Telecommunications and E-Commerce ("the Minister") dated 8 August 2007, by way of appeal from a decision dated 18 May 2007 made by the Environmental Authority established pursuant to the Act ("the Authority"). In its decision, the Authority had declined to grant applications made by Rodrigues Trucking & Excavating Limited ("the Applicant") for operating licences for a rock crusher

and a sand sifter to be operated at the Applicant's business premises at 7 Marsh Lane, Devonshire, and an appeal was made against the decision of the Authority to the Minister pursuant to section 16 of the Act. These proceedings are taken by way of appeal from the Minister's decision pursuant to the provisions of section 17 of the Act.

2. Before turning to the factual background in relation to the applications to the Authority and the appeal to the Minister, let me deal with the procedural position in relation to the proceedings. They were commenced by notice of originating motion dated 23 August 2007, which set out the grounds of the Applicant's appeal. These were:

> *"1. That the Minister erred in law in that the Minister had authority to consider Planning Legislation and that pursuant to section 16 (8) (a) of the Clean Air Act 1991 (the "Act") the Minister had a duty to review the facts as if the matter had first come before her and in failing to do so the Minister was in error.*
> *2. Such other grounds that may follow this application."*

3. There were directions given in standard form relating to the filing of documents and written submissions, and the only other matter of note is that late on 19 October 2007, only two full working days before the scheduled hearing, the Applicant filed an amended notice of originating motion which set out the first ground of appeal in the same terms as above, and added the following:

> *"2. That the refusal to grant the Applicant licences was in large part based on anticipatory breach and consequently wrong in law.*
> *3. That the Applicant had been granted similar operating licences at other locations with operating conditions and therefore had a reasonable and legitimate expectation of the granting of licences for equipment at #7 Marsh Lane, Devonshire.*
> *4. That the Minister erred in law in failing to find that the Authority had fettered or abdicated its statutory duty."*

4. Objection was taken to the late filing of the amended notice of originating motion, which document had been filed late in the day fixed for the filing of skeleton arguments. The consequence was that the skeleton argument for the Minister made no reference to the three additional grounds of appeal, while that filed for the Applicant did. At an early stage of the proceedings, Ms. Goodwin for the Minister objected to the expanded form of grounds of appeal, and referred the Court to the provisions of Order 55 of the Rules of the Supreme Court 1985 ("RSC"), which applies to every appeal to the Supreme Court from any court, tribunal or person, and hence applies to appeals from the Minister. Order 55 rule 6 (1) provides that amendment may be made to the notice of motion by which the appeal is brought, without leave, by supplementary notice served not less than seven days before the day appointed for the hearing of the appeal. The hearing date having been set for 24 October 2007, the Applicant was not entitled to amend without leave, something which Mr. Pettingill for the Applicant accepted. However, Order 55 rule 6 (3) grants leave to the Court to amend the grounds, on such terms as may be just, so as to ensure "the determination on the merits of the real question in controversy between the parties." Ms. Goodwin maintained that she had been disadvantaged by the late application, but also maintained that the additional grounds represented grounds which had not been relied upon in the appeal to the Minister from the decision of the Authority; that, she submitted, was a defect which could not be cured, since the appeal to this Court pursuant to section 17 of the Act is allowed only on a point of law. Ms. Goodwin referred to authority indicating that if points of law had not been taken before a lower court, they could not be raised in an appellate court, and said that those principles applied to this case.

5. In the event, I took the view that it was appropriate to proceed in the first instance on the basis of the amended grounds, since if I had limited the appeal to the narrower grounds and had been wrong on that issue, it would no doubt be helpful to all concerned for me to express a view on the issues raised in the wider grounds of appeal. I would then deal with the merits of the application to amend in the judgment. That position was taken on the basis that it remained open to the Minister to contend that it was not open to the Applicant to argue the wider grounds of appeal on this application. I will return to that aspect of matters in due course. I also indicated to Ms Goodwin that if in relation to argument on the new issues she felt the need to apply for an adjournment, that course remained open to her.

Factual Background

6. At the directions stage of matters, counsel were agreed that there was no factual dispute, and that the issues in the case were matters of law. However the agreed

facts have relevance to the decisions both of the Authority and the Minister, so that it is necessary to give some detail in regard to these facts.

7. The applications for licences were made on 14 March 2007, and were considered at a meeting of the Authority held on 21 March 2007. The Authority declined the applications at that meeting and wrote the following day to the Applicant so advising it. That led to a request from the Applicant's attorneys Wakefield Quin for the Authority to give full reasons for the applications having been declined. This request in turn led to the Authority at its meeting held on 4 April 2007 confirming its previous decision, and providing reasons, which reasons were set out in a letter of the same date from the Authority to the Applicant. This caused the Applicant's attorneys to make further representations to the Authority, which representations in turn led the Authority to indicate to the Applicant that it wished to consider its decisions afresh. The Applicant's attorneys continued to press the matter, and on 3 May 2007 the chairman of the Authority wrote a comprehensive letter to the Applicant's attorneys. This letter set out various matters which the Authority said it intended to take into account when it came to reconsider its decision in relation to the applications, and invited comment from the Applicant. Given the importance of the matters raised in this letter, its full terms are set out below:

> *"Further to our letter to you of April 13th in which we informed you that the Environmental Authority would reconsider afresh its decision of refusing your applications for operating licences for a rock crusher and sand sifter at 7 Marsh Lane, Devonshire, we write to inform you of the following.*
>
> *Before the Authority reconsiders its decision, it invites you to comment on the following matters which the Authority intends to take into account when the decision is reconsidered.*
>
> *In particular, our files indicate the following:*
>
> *(a) In 2003, your client commenced operations at Marsh Lane in violation of section 7 of the Act. When a Stop Order was issued by the Minister of the Environment to address this, your client ignored it. In May 2003, the Environmental Authority issued operating licences of three months duration to your client in order to assess the degree of his compliance with the terms and conditions of those licences. Your client was in breach of these terms and conditions within weeks of the licences being issued. Your client's applications to renew these operating licences were therefore refused.*
>
> *(b) Your client appealed the Authority's decisions to the Minister. The Minister denied the appeal and your client was instructed to cease operations at Marsh Lane. In violation of the Minister's directive, your client continued to operate the rock crusher and sand sifter and so the Minister had to issue a second Stop Order. This too was ignored by your client. Your client then appealed to the Supreme Court against the Minister's decision and then*

unilaterally decided that the Act did not apply to his operations because his plant was portable.

(c) Proceedings in the Supreme Court were commenced for an Enforcement Order. After a full hearing, the Enforcement Order was issued. Your client appealed to the Court of Appeal where the Supreme Court's decision to issue the Enforcement Order was upheld. Your client then applied to take the matter before the Privy Council but subsequently abandoned this course of action. Throughout this period your client continued to operate controlled plant at Marsh Lane and indeed continued to do so after abandoning his final level of appeal. Your client then ignored warnings to cease and desist his operations which necessitated enforcement action being taken in the form of removal of the controlled plant from the site, an operation which took a full day to accomplish. Mr. Rodrigues's actions on this day, whilst this lawful enforcement action was being taken, resulted in him being arrested.

Your client's history of non-compliance with the Clean Air Act 1991 is of the greatest concern to the Authority. The Authority also intends to take into account your client's continued defiance of the Department of Planning and his flagrant violations of the Development and Planning Act 1974 in assessing the likelihood of your client abiding by the terms and conditions of a licence issued to him and his history of operating his controlled plant at Marsh Lane.

In assessing your client's applications the Authority intends to consider the best interests of the public. This involves balancing the rights of your client against the rights of the public at large.

We hereby enclose all the relevant documents for your perusal and invite you to submit additional information to support your application."

The letter enclosed more than fifty pages of supporting material.

8. The response from the Applicant by letter dated the following day did not comment on the detailed concerns which had been set out in the Authority's letter, and did not refute any of the factual matters detailed in the letter. Instead, the letter referred to other licences granted to the Applicant in relation to different locations, which it contended had operated without issue and in full compliance. It said that the whole purpose of addressing matters at Marsh Lane and attaining the licences had been for the purpose of a "clean up", that it did not understand why this could not be accomplished with appropriate conditions, and that the Applicant was prepared to abide by "all reasonable conditions". The letter urged that the matter then be brought to an expedient resolution.

9. The Authority duly reconsidered the applications at its meeting on 18 May 2007, and its minutes of that meeting show that the matter was dealt with in the following terms:

"*The Members considered afresh the application by Rodrigues Trucking and Excavating for operating licences for a rock crusher and sand sifter at Marsh Lane, Devonshire. The Members took note of the history of complaints, the applicant's non-compliance with operating licence conditions, and evidence of an unlicensed sand sifter being operated at the applicant's site on 29th and 30th March 2007. The Members were pleased that the applicant is considering remediating the site and reducing the size of the rubble piles. The Members considered whether or not the applicant required the use of the sand sifter and rock crusher on site for the remediation. But they expressed the opinion that the applicant trucked it there at a time when he did not possess operating licences for the sifter and crusher, and so he could truck it away for processing or disposal.*

The Authority ***DECLINED***
The applications for operating licences for a rock crusher and sand sifter at Rodrigues Trucking and Excavating, 7 Marsh Lane, Devonshire based on the historical records of complaints and the applicant's non-compliance with operating licence condition."

10. The reasons given for the Authority's refusal to grant the licences after reconsideration essentially duplicated what appeared in the minutes, but in slightly different terms, and were contained in a letter sent by the Authority to the Applicant dated 6 June 2007. For completeness, I set out the terms of that letter, as follows:

"*Your applications for licences to operate a rock crusher and sand sifter at 7 Marsh Lane, Devonshire were reconsidered afresh at the meeting of the Environmental Authority held on Friday, 18th May 2007.*

In reaching its decision on your applications, the Environmental Authority has taken full account of all that your lawyer, Mr Pettingill, has said on your behalf. The Authority has also taken into account your history of non-compliance at this site.

You have demonstrated that you have not been willing to comply with the terms and conditions of operating licences which have been granted to you in the past. In addition, you have demonstrated and continue to demonstrate, that you are not prepared to comply with the provisions of the Clean Air Act 1991 which operating licences are issued pursuant to. At its meeting on 18th May 2007, the Authority was presented with evidence that you were operating a sand sifter at 7 Marsh Lane on 29th and 30th March 2007 in violation of section 7(2) of the Act.

The Authority has duly considered your assertion that you are willing to abide by all "reasonable" conditions to be attached to any licence granted to you to operate controlled plant at Marsh Lane but, it is persuaded by the totality of the evidence to the contrary, as illustrated by your extensive history of non-compliance at this site, that it is far more likely that you will not adhere to the terms and conditions of any licence issued to you.

The Authority also took note of your submission that the reason you require operating licences is because you wish to "clean up" the site. The members are pleased that this is your intention, but fail to see how having permission to crush rock and sift sand is necessary for remediation of the site. Certainly it will be necessary to remove the piles of rubble from the site but, it is not the case that only processed rubble is capable of being moved elsewhere. In this regard, the members took particular note of the fact that knowing that you did not have licences to operate the machinery required to process rubble, you have nevertheless continually trucked it to Marsh Lane. It is their view that

you can therefore truck the rubble to other locations for processing or disposal.

In the circumstances and for the reasons set out above, the Authority has decided to refuse to grant you the operating licences you applied for. As you are aware, if you are aggrieved by this decision, you may appeal to the Minister in accordance with section 16 of the Clean Air Act 1991."

11. That decision on the part of the Authority led to the filing of a notice of appeal, which gave two grounds of appeal, in the following terms:

"*Grounds of Appeal*

1. *That the Authority erred in law in refusing the grant of a license on the basis that the existing mound of rubble could simply be processed at an alternative licensed site:*

The Appellant contends that pursuant to section 2 of the Development and Planning (Use Classes) Order 1975 the removal of the unprocessed rubble from 7 Marsh Lane Devonshire (an amount equal to 400 truck loads) to an approved site (the "Site") licensed to operate Controlled Plants would amount to a change of use of the Site. This change of use would be subject to applications for planning permission on the Site as intensification of user amounts to a material change in the use of the Site. That this proposition by the Authority is a blatant disregard for planning regulations and would be contrary to the objective for which the Authority was initially created.

That the intensification is not only cost prohibitive but likely to impact greatly upon the terms and conditions of the approved license including but not limited to the increase of noise pollution to area residents, the increase of time needed on the Site to cope with the additional quantity of rubble delivered for processing, the inherent difficulties in storing such a volume of unprocessed rubble, the subsequent delay to the prescribed scheduled works at the Site and further costs incurred managing the increased material at the Site.

2. *That the Authority has contributed to the delay in clearing the mound of rubble at 7 Marsh Lane by failing to consider the application properly and in a timely manner.*

That the Department of Environmental Protection (the "Department") stated in their letter dated 13 April 2007 that they would reconsider the application for Controlled Plants at 7 Marsh Lane, Devonshire an application that was first submitted in May 2006 and that such reconsideration caused further unnecessary delay.

The unreasonable period of delay caused by the Departments apathy directed at the Appellants application and case in general has caused the Appellant to suffer loss.

The Appellant appeals the decision."

12. The Minister's decision on the appeal was provided by letter dated 8 August 2007 and the relevant part of that letter is in the following terms:

Your grounds of appeal indicated that your view was that the Authority had erred in law in refusing to grant the license and that the Authority had contributed to the delay in clearing the mound of rubble at 7 Marsh Lane by "failing to consider the application properly and in a timely manner".

The Minister has considered the appeal and does not feel that the Authority erred in law as that the Authority has no jurisdiction over Planning legislation. Additionally, it is felt that the timing of the consideration of the application is not relevant to whether or not the application was approved or refused."

13. The only other matter was that there followed an application for a copy of any note made by the Minister, pursuant to Order 55 rule 7 (4) RSC. The response was that the Minister had made no such note, and that the reasons for her decision were contained in the Permanent Secretary's letter of 8 August 2007.

Preliminary Issue

14. Let me now return to the issue of whether the Applicant should be allowed to amend its grounds of appeal and be at liberty to rely for the purposes of this hearing on matters which did not form part of the appeal from the Authority to the Minister. In this regard the position is difficult to follow, because the grounds of appeal to the Minister do not all appear to be the subject of complaint in these proceedings. Nevertheless, Mr. Pettingill did seek to argue all the matters which were before the Minister, as well as others which were not. Essentially, the grounds of appeal to the Minister covered three areas; first, there was the planning point, where the Authority was criticised because it had commented, in refusing the applications, that the rubble at the Marsh Lane site had been trucked there at a time when the Applicant did not possess operating licences, and the Authority took the view that the Applicant could in those circumstances truck the rubble away for processing or disposal. For the Applicant it was contended that such a course would necessarily breach planning regulations. The second complaint effectively broke down into two parts, and again concerned the rubble at Marsh Lane. It was said that the Authority had contributed to the delay in clearing this, firstly by failing to consider the applications properly, and secondly by failing to consider the applications in a timely manner.

15. Of these three grounds of appeal to the Minister, the first, the planning point, appeared as the first leg of the first ground of appeal in these proceedings. The second part of the first ground of appeal related to the manner in which the Minister dealt with the appeal, so is not dependant on the underlying complaints made of the Minister. The second ground of complaint to the Minister, which I have broken down into two parts above only because Mr. Pettingill urged that the Minister's failure to consider the applications "properly" was the key issue, appeared to be aimed primarily at the issue of delay. Although the fourth ground of appeal in the amended notice of originating motion was that the Minister had erred in law "in failing to find that the Authority had fettered or abdicated its statutory duty", Mr. Pettingill's submissions made it clear that in this regard he relied upon the delay point. Hence in looking at the amended notice of

originating motion, I would regard the first and fourth grounds of appeal contained therein as being matters which were before the Minister, and accordingly in relation to the application to amend the grounds of appeal (which I indicated I would deal with in this judgment), I would allow the amendment to include the delay aspect of ground four, on the basis that the issue of delay was before the Minister.

16. In relation to the alleged failure on the part of the Authority to consider the applications "properly", there is no complaint in these terms in the amended notice of originating motion, and nothing to indicate that the point at issue was the alleged activity on 29 and 30 March 2007. It is somewhat difficult to determine under which ground of appeal this aspect of matters comes. The point was taken in paragraph 15 of the submissions under ground two, and there was then a reference to "hearsay allegations" in relation to ground four, which I had assumed was intended to cover the alleged activity of 29 and 30 March 2007. In argument, it was treated as part of the second ground, but also referred to in what I took, rightly or wrongly, to be submissions in relation to ground four. The heading for the second ground was "anticipatory breach", a reference to the Applicant's past conduct which was both the subject of notification by the Authority and admitted. The March 2007 conduct was different in both respects. I would propose to cover the point under ground four. But wherever it should properly be addressed, I am satisfied that the point was not before the Minister, and I would not allow the amendment to enable the Applicant to argue this new point, particularly when it is not readily identifiable from the revised grounds of appeal in any event.

17. In relation to the second and the third ground of appeal, which I refer to in shorthand as the anticipatory breach point and the legitimate expectation point, neither of these was an issue raised before the Minister, and I would therefore not exercise my discretion so as to permit an amendment in regard to these grounds. In placing weight on whether or not the particular question was before the Minister, I bear in mind that the issue before me is the correctness (or otherwise) of the decision of the Minister. It seems to me that in considering this appeal, I should have regard to that fact when considering "the real question in controversy between the parties". The only ground of appeal in the amended originating notice of motion which I have allowed is the delay point, which Mr. Pettingill sought to argue as part of ground four, even though the ground itself made no reference to delay. However, in case I am wrong in the way I have dealt with the amendments, I will go on to consider the amendments which I have disallowed, as well as that allowed, and will now deal with each of the grounds in turn.

Ground One – the Planning Points and the Conduct of the Minister's Appeal

18. As I have said, this ground breaks down into two parts, the first being the planning point and the second being the nature of the exercise conducted by the Minister in considering the appeal. In relation to the planning point, there is again the possibility of confusion between two different planning aspects. The first is the one which I have already referred to as the planning point, and comes from the assertion by the Authority, set out in the minutes of 18 May 2007 and appearing in the subsequent letter of 6 June 2007, to the effect that the rubble which the Applicant had moved on site could be trucked away for "processing or disposal". The second planning concern related to compliance, and arose from the fact that the Authority's letter of 3 May 2007, which invited comment on the various matters that the Authority intended to take into account when reconsidering its earlier decision, included the Applicant's "continued defiance of the Department of Planning and his flagrant violations of the Development and Planning Act 1974" as factors to be taken into account when considering whether the Applicant might comply with the terms and conditions of any licences granted to it in the future.

19. So the two points are separate, although they both appeared in Mr. Pettingill's written submissions under ground one. The latter point was also argued under ground four. In relation to the issue of trucking rubble off site, the complaint appears to be based on a suggestion that this would necessary involve the Applicant in a breach of planning regulations, either by the removal of the rubble from one site to another itself, or by intensification of use at the alternative site, which would represent a material change of use.

20. There seems to me to be absolutely no merit in that suggestion. All that the Authority said was that having trucked the rubble on to the Marsh Lane site (at a time when it did not have operating licences), the Applicant could "truck it away for processing or disposal". Processing would no doubt involve the use of equipment such as a rock crusher or sand sifter, and disposal could no doubt involve the rubble being used as fill. Both activities can and should be done in compliance with existing planning regulations, and there is no basis for the Court inferring that such a course necessarily invited the Applicant to breach planning regulations. The Authority was saying no more than that having trucked the rubble on to the site, the Applicant could truck it away again. One can well understand why the Authority should take such a view.

21. The second planning point, relating to complaints, has to be put in context. That context is that the complaints of the Planning Department were not, apparently, taken into account by the Authority in reaching its decision. That aspect of matters does not appear in the minutes of its meeting of 18 May 2007, or in the letter of 6 June 2007. The issue was raised in the Authority's letter of 3 May

2007 when it invited comment in regard to that aspect of matters. In the event, the reply sent on behalf on the Applicant did not make any reference to the Applicant's dealings with the Department of Planning, and so did not suggest that the Authority's reference was made in error.

22. In my view there is nothing in either of these planning points. The Authority was not in error in relation to these points in reaching its decision, and I find that the Minister did not err in law in relation to either planning matter in reaching her decision.

23. The next part of ground one is in relation to the complaint that the Minister had a duty to review the facts as if the matter had first come before her. In his written submissions, Mr. Pettingill emphasised the word "shall", which represents the proviso to section 16 (8) of the Act. But this applies only in relation to the situation where there has been an inquiry under subsection 7 of section 16, something which has no relevance for the purposes of this appeal. The operative word is the word "may" appearing in the body of section 16 (8) (a) of the Act, which as Ms. Goodwin pointed out is permissive, rather than imperative. I reject the submission that the Minister was in error in the manner in which she dealt with the appeal.

Ground Two - Anticipatory Breach

24. This ground of appeal is based on the contention that the previous "difficulties" which had unquestionably occurred at the site should not have been taken into account by the Authority when considering the licence application, or by the Minister when considering the appeal.

25. It is difficult to see how the Authority or the Minister could have ignored this past history, particularly given the fact that section 8 (2) (b) of the Act expressly permits the Authority to require that an applicant demonstrate that he will operate a particular plant in conformity with the operating licence. To refer to the Applicant's past history on this site as representing "some difficulties" is itself a considerable understatement. These complaints are fully set out in the Authority's letter of 3 May 2007, referred to at paragraph 7 above, and Mr. Pettingill conceded that they were accurately set out. The complaints are that the Applicant commenced operations without a licence, then breached the terms and conditions of the three month licences granted to it, leading to a refusal to renew. The Applicant did not then cease operations at the site, but continued for a lengthy period to operate without a licence while the Supreme Court considered, and then determined that the equipment in question was not "portable", and therefore constituted a controlled plant in respect of which a licence was required.

26. In my judgment, the Authority was more than entitled, particularly given the provisions of section 8 of the Act, to take the Applicant's past conduct into account, when considering whether operating licences should be granted. That does not constitute "anticipatory breach", which is of course a term of art in the law of contract. It follows in my view that the Minister is equally entitled to consider the Applicant's past conduct, and I find that the Minister did not err in law, if and insofar as she may have had regard to the Applicant's past conduct. In this regard, of course, there is nothing to suggest that the Minister did have regard to the Applicant's past conduct, that aspect of matters not having been raised in the grounds of appeal, and there being nothing in the record to show that such matter was considered by the Minister.

Ground Three – Legitimate Expectation

27. This again is a matter which was not before the Minister, and the complaint is that by granting the Applicant similar operating licences at other locations, the Authority had given it "a reasonable and legitimate expectation" that a similar licence would be granted in respect of the Applicant's site at 7 Marsh Lane.

28. The first point to be made is in relation to the underlying factual position. There is very little in the record in relation to the grant to the Applicant of other licences at other locations, and Mr. Pettingill did not rely on the first two sentences of paragraph 16 of his written submissions because objection was taken to the basis for his assertions. What the record did show was that there had been one grant of a three month licence to the Applicant at another site on 21 March 2007, and that on 18 May 2007 an application by the Applicant's associated company at the same site had been refused.

29. The written submission carried on to refer to the Authority "dangling a carrot" in the conduct of its negotiations with the Applicant. There is nothing in the record to support that contention.

30. In my judgment there is absolutely nothing to this point. A legitimate expectation typically arises where the decision maker has either given an express promise or followed a course of conduct which the claimant can reasonably expect to continue. In this case, the Applicant can have been under no illusions as to the concerns which the Authority had, and how seriously it viewed them. In any case, the legitimate expectation, if such there be, will typically give a right to a hearing. In this case the Authority dealt with the Applicant's applications in the same manner as it dealt with all other applications. But the main point is that the Authority did nothing to give the Applicant any expectation in relation to the grant of its licence applications, and, again, there is nothing to suggest that the Minister applied her mind to this aspect of matters at all, since the complaint was not before her.

Ground Four – Proper and Timely Consideration

31. Although this ground was worded in terms of a complaint that the Minister had erred in law in failing to find that the Authority had fettered or abdicated its statutory duty, the complaints submitted by Mr. Pettingill were essentially those made in the second ground of appeal to the Minister, namely that the Authority had failed "to consider the application properly and in a timely manner". In relation to the use of the word "properly", which Mr. Pettingill identified as the key issue, he relied upon two matters; first was the fact that in its letter of 3 May 2007 the Authority had referred to the Applicant's apparent breaches of planning regulations. The second matter was the one which had been raised in argument under ground two, and related to the Applicant's alleged use of a sand sifter on 29 and 30 March 2007. As I understood the argument, this was also put as part of the complaint that the Authority had not considered the applications properly and that the Minister had similarly erred in relation to the appeal. Again, of course, the complaint that the Authority had failed to consider the applications properly could hardly have led the Minister to appreciate that the complaint was that the Authority had had regard to certain alleged activity on the part of the Applicant on 29 and 30 March 2007. No particulars were given in the appeal to her.

32. In relation to the planning complaints, this essentially duplicates the argument which was made under ground one, which I have dealt with. There is nothing to suggest that the Authority relied upon these matters when considering the applications; all it did was refer to them in its letter of 3 May 2007 and invite the

Applicant to comment, something which it declined to do. The same holds true for the Minister in relation to the appeal.

33. In relation to the activity of 29 and 30 March 2007, this is in a somewhat different category. The minutes of the Authority's meeting on 18 May 2007 indicated that it took note of the history of complaints and non-compliance, and then referred to "evidence of an unlicensed sand sifter being operated at the Applicant's site on 29 and 30 March 2007". There is nothing to suggest that the Applicant was ever made aware of these matters, and they were again referred to in the letter which the Authority sent to the Applicant on 6 June 2007 which confirmed that at its 18 May 2007 meeting, the Authority had been presented with evidence that the Applicant had been operating a sand sifter at the Marsh Lane property on the dates in question.

34. There is no doubt in my mind that the Applicant was not given, and should have been given, an opportunity to be heard in relation to this allegation. The Applicant was not present at the 18 May 2007 hearing, and had no notice that this issue would be raised. Mr. Pettingill contended that the Authority appeared to have given "great weight" to the alleged activity of 29 and 30 March 2007.

35. With respect, I think that is overstating the position, and that one has to look at whole picture. That picture starts with the catalogue of concerns which were raised in the Authority's letter of 3 May 2007, in relation to a variety of matters. I have already referred to the seriousness of these matters. The minutes of 18 May 2007 indicate that the Authority considered the history of complaints, and the Applicant's non-compliance with operating licence conditions. Those were the reasons given in the minutes for the Authority's refusal of the applications. The non-compliance included a variety of instances of the Applicant having operated without a licence, both before and after the grant of the three month licence at Marsh Lane, and with breaches of the conditions attaching to that licence during its operation. There is nothing to suggest that the March 2007 incidents were treated other than as just one more example of non-compliance, with the earlier examples being more than sufficient to justify the Authority's decision.

36. Order 55 rule 7 (7) RSC provides that:

> "the Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned."

Given the history of matters, in my view there was no substantial wrong or miscarriage occasioned by the Authority's consideration of the alleged activity of 29 and 30 March 2007. There is, again, a substantial difference in looking at this aspect of matters from the point of view of the Minister, to whom the complaint was not made.

37. Next, there is the delay point, where I allowed the amendment to the Notice of Originating Motion on the basis that that issue had been before the Minister.

38. The starting point is to consider the period of delay. It is to be noted that the appeal to the Minister referred to an application having been made in May 2006, but there is nothing in the record in regard to such application, and in his oral submissions, Mr. Pettingill referred to a delay of two months as being excessive. So I am working on the basis of the record and the original applications having been made on 14 March 2007. At its longest, that would represent a period of two months and four days between the original applications and the meeting at which the Authority considered those applications afresh, although there was a delay of a further period of nearly three weeks before the Authority sent its letter to the Applicant advising the outcome of the Authority's deliberations. It is arguable that the length of time which the Authority took to process the applications was even shorter, since after the Authority had first dealt with the applications, within a period of approximately one week, it had then (on 13 April 2007) indicated a wish to reconsider the applications, indicating at the same time that it wished to take legal advice. Some two weeks later, the Applicant's attorneys wrote and said that two weeks had passed, and that was ample time to have sought legal advice. Within a few days, the Authority sent out its comprehensive letter of 3 May 2007, and the Authority was then asked to bring the matter to a speedy resolution on 4 May 2007. The Authority's decision was made known to the Applicant in just over a month from that date.

39. Mr Pettingill referred the Court to two authorities in relation to delay. The second of these, *R -v- Secretary of State for the Home Department ex parte Venables* [1998] AC 407, does not seem to me to have any relevance to the issue of delay before me. The first, *R -v- Tower Hamlets London Borough Council ex parte Khalique* [1994] 2 FCR 1074, involved a delay of years. I would not characterise the period of time within which the Applicant's applications were processed in this case as involving any significant degree of delay, much less such delay as would require the Court to set aside the refusal of the applications.

Summary

40. Ground One

(i) I find that the Minister did not err in law in her consideration of the appeal with reference to the relevant planning legislation.

(ii) I find that the Minister did not err in law in relation to the manner in which she conducted the appeal.

41. Ground Two

(iii) I did not allow the amendment to the notice of originating motion on the anticipatory breach argument. However, if I were wrong in that regard, I find that the Minister did not err in law in relation to the issue of the Applicant's past conduct and the alleged anticipatory breach.

42. Ground Three

(iv) I did not allow the amendment in relation to the legitimate expectation argument. However, if I were wrong in that regard, I find that the Authority did not give the Applicant any legitimate expectation as to the granting of the applications, and that the Minister did not err in law in her consideration of the appeal in this regard.

43. Ground Four

(v) I allowed the amendment only in relation to the issue of delay. However, if I were wrong in that regard, I find that the Minister did not err in law in failing to find that the Authority had fettered or abdicated its statutory duty, either in terms of a failure to consider the applications properly or a failure to do so in a timely manner.

It follows that the Applicant's appeal should be dismissed, and I so order.

Costs

44. I would expect costs to follow the event in the normal way, but will hear counsel in regard to costs should they so wish.

Dated the 15th of November 2007.

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Hon. Geoffrey R. Bell
Puisne Judge