AGENDA ITEM No. 7

PEAK DISTRICT NATIONAL PARK AUTHORITY

NATIONAL PARK AUTHORITY MEETING

27 MARCH 2009

STRATEGY & DEVELOPMENT

PART A

1. BACKDALE, LONGSTONE EDGE (MIN.2382/JJL)

1 Purpose of the report

1.1 To advise Members of the judgment of the Court of Appeal following the hearing on 10-11 February 2009, and to explain the issues that now arise.

2 Recommendation

2.1 **That the judgment of the Court of Appeal be welcomed.**

3 Background

3.1 The quarrying concerns at Longstone Edge arise from a 1952 planning permission issued by the Ministry of Housing and Local Government. Longstone Edge was extensively covered by a number of planning permissions, including the 1952 permission. These permissions were principally for the extraction of vein minerals by opencast and underground mining methods, and associated development. The 1952 permission allows for the winning and working of fluorspar and barytes and for the working of lead and any other minerals won in the course of working these minerals from that area.

4 Court of Appeal Hearing, 10-11 February 2009

4.1 The Court of Appeal heard an appeal by the Secretary of State for Communities & Local Government (CLG) and the National Park Authority against the High Court decision of Mr Justice Sullivan given on 7 March 2008. Sullivan J had allowed an appeal by Bleaklow Industries Limited (Bleaklow) against the decision on 26 April 2007 by the Planning Inspector Mr Baldock to uphold, with amendments, the Authority's enforcement notice issued to end unlawful limestone extraction at Backdale.

4.2 The Court of Appeal judgment was handed down on 18 March 2009. The 3 judges – Lord Justices Pill, Keene and Goldring - unanimously allowed the appeal by the Secretary of State (CLG) and the Authority. In allowing the appeal they restored the decision of the Planning Inspector. Key parts of the decision are summarised as follows. The full transcript of the judgment is available to Members. Paragraphs 1 to 64 were written by Keene LJ, Paragraph 65 by Goldring LJ, Paragraphs 66 to 83 by Pill LJ.

4.3 The first issue that Keene LJ dealt with in the judgment is the meaning of the 1952 planning permission. As stated above, the permission allows for the winning and working of fluorspar and barytes and for the working of lead and any other minerals won in the course of working these minerals from that area. The judgment includes the following statements on this matter.

(Paragraph 17) "the judge [Sullivan J] properly concluded that the first limb of the permission permits the removal of as much or as little limestone as is reasonably necessary in order to win and work the fluorspar"

(Paragraph 18) "As for the second limb of the permission, the judge does not seem to have reached a clear view on what role that was intended to play"

(Paragraph 28) "I am satisfied that the wording of the 1952 planning permission should be regarded as deliberate and meaningful. There is no basis for treating it as having been loosely worded."

(Paragraph 29) "Those meanings [of "winning" and "working"] must, of course, then be applied in an appropriate fashion to the mining of fluorspar" …… "but in principle it must be the case that "winning" as used in the 1952 permission refers to the process of achieving access to the desired mineral, so that it can then be worked, and "working" refers to the process of removing the desired mineral from its position in the land. When the fluorspar is contained in a vein embedded in limestone, "winning" will consist of obtaining access to the vein and "working" will describe the process of extracting the fluorspar from the vein."

(Paragraph 30) "the second limb permits limestone to be worked when it is won in the course of *working* fluorspar, but only in those circumstances."

(Paragraph 33) "one should seek an interpretation which gives effect to both limbs of this permission, and that can only be achieved by construing this permission as meaning what it says: that is, allowing the winning and working of fluorspar and barytes (but not limestone) under the first limb and allowing the winning and working of limestone (and other minerals) but only in the circumstances described in the second limb."

(Paragraph 34) "What is to happen to the quantities of host rock removed in the course of winning fluorspar? The answer is that which is put forward by the appellants [Secretary of State and the Authority], namely that it is to be treated as waste, and consequently it is to be disposed of in accordance with condition 3 [of the permission]. That means that it is to be disposed of in the hollows left by old workings, in agreement with the Local Planning Authority, or, in the event of disagreement, as shall be determined by the Minister."

(Paragraph 37) "I have concluded, therefore, that the judge was wrong in his view that the first limb of this permission allowed the winning and working and subsequent export from the site of any limestone severed in order to win fluorspar or barytes. The permission insofar as it allows the commercial extraction of limestone is much more limited than that. Such extraction is only permitted to the extent allowed by the second limb of the permission."

(Paragraph 37) "The Minister in his grant of permission refers expressly to the location of the site within the Peak District National Park, but decides to grant permission because of the importance of *fluorspar* to industry, not because of the need for limestone to be quarried. This was not intended to be a permission for the winning and working of limestone."

4.4 Keene LJ then dealt with the practical application of the permission. On this matter his judgment includes the following statements.

(Paragraph 38) "Like the inspector, I do not accept the very narrow application of the second limb suggested, at least at the inquiry, by the Park Authority." …….. "Some limestone immediately adjacent to the fluorspar vein would inevitably be removed when removing fluorspar, and that could properly be seen as falling within the scope of the permission."

(Paragraph 39) "It seems that it was in an attempt to allow for this and to provide a practical measure or guideline for development control purposes that the inspector put forward the 2:1 ratio criterion"

(Paragraph 41) "What he put the 2:1 ratio forward as was as a measure of the permissible amount of limestone which could be *won and worked* in comparison to the amount of fluorspar and barytes. For the reasons set out earlier in this judgment, limestone simply removed in order to get access to fluorspar has not been won and worked (and cannot be exported for sale). Those quantities of limestone are not to be included within the 2:1 ratio. There is, therefore, nothing inherently impractical in the ratio adopted by the inspector."

(Paragraph 46) "to defeat the enforcement notice [Bleaklow] and MMC had to succeed *both* on the issue of the proper interpretation of the 1952 permission (so that it covered limestone won and worked in the course of *winning* fluorspar) *and* on the issue of whether the limestone had in fact been worked in the course of winning fluorspar which existed at Peak Pasture."

(Paragraph 47) "The owner and the operator cannot show that their operations fell within the terms of the permission, irrespective of those issues which concern Peak Pasture."

(Paragraph 49) "He [the inspector] found that there was from mid-March 2004 no evidence that either [Bleaklow] or MMC had any substantial basis for believing Glebe Mines would give its consent to the ROMP scheme and no reasonably reliable prospect of implementing that scheme into Peak Pasture."

(Paragraph 55) "Once the position has been reached where it can be seen that there was an issue as to whether MMC had genuinely been excavating limestone on the appeal site as part of obtaining access to fluorspar at Peak Pasture, all that remains is whether the inspector was entitled to come to the finding which he did."

4.5 In his conclusion, Keene LJ said:

(Paragraph 64) "The inspector was therefore right, given his findings of fact, to have upheld the enforcement notice and to have dismissed the appeals brought under grounds (b) and (c) of section 174(2). No issue arises as to the variation he made to the requirements of the notice as a result of the appeal on ground (f). I would therefore allow the appeal by the Secretary of State and the Park Authority against the decision of Sullivan J and restore the decision of the inspector."

4.6 Goldring LJ agreed with the above.

4.7 Pill LJ also agreed that the appeal should be allowed. His statements included the following.

(Paragraph 67) "The case for Bleaklow and MMC has obvious attractions. Limestone is a valuable commodity and very substantial amounts of it have to be removed from the site in order to obtain a relatively small amount of fluorspar. There are real benefits not only to those parties but to the community if beneficial use is made of the limestone extracted."

(Paragraph 76) "However, I agree with the 2:1 ratio adopted by the inspector" …… "if the basis and reason for it is understood."

(Paragraph 77) "I agree with Keene LJ's explanation of the ratio" …… "The ratio was adopted … to give some flexibility to the amount of limestone which could be removed while "working" the fluorspar closely associated with it in the ground. Given the complexity of the structure, it was an assessment the inspector was entitled to make."

(Paragraph 78) "Appealing though the approach of Bleaklow and MMC, and the judge's [Sullivan J] reasoning, is, especially in straightened times, it does not, in my view, accord with the permission granted. I agree with the conclusion of Keene LJ. The permission, and the conditions attached to it, bear every sign of having been drafted carefully and with an understanding of and an intention to respect the meaning and significance of the words "winning" and "working", and the difference between them."

(Paragraph 79) The construction favoured by the inspector permits the two limbs of the permission to complement each other, each having a meaning and effect. Condition 3 then makes provision for material removed and not otherwise covered by the permission. In the face of clear wording, arguments based on the economic and financial desirability of permitting the limestone to be sold cannot, in my view, prevail. Neither can the argument that the purpose of the permission, the mining of fluorspar, is more likely to be achieved if the extractor is permitted to sell substantial quantities of limestone."

(Paragraph 80) "The permission granted was a measured attempt to permit extraction of fluorspar, a valuable mineral, in a National Park. It permitted the extraction of limestone on defined terms. The permission was not intended to, and did not, allow the large scale commercial removal of limestone extracted in the course of winning fluorspar, or permit such removal as long as there was an "operational nexus" between the winning and working of fluorspar and the removal of limestone."

5 What happens now

5.1 The Court of Appeal judgment meant that the Authority's enforcement notice took effect on the day it was given. It remains in effect unless Bleaklow (or MMC) is given leave to appeal to the House of Lords. We already know that on the day the judgment was given Bleaklow sought leave from the Court of Appeal to appeal to the House of Lords. The Authority's Counsel opposed leave. The Court of Appeal did not give leave, so the companies then have one month from the date of the judgment to seek leave from the House of Lords. There would be a further delay before we would know whether the House of Lords would hear an appeal. If leave to appeal is given it is likely to be into 2010 before it is heard.

5.2 If leave to appeal is given the Authority's enforcement notice would be suspended. Officers are considering the options that then arise.

6 The Planning Inspector's decision

6.1 The Court of Appeal has restored the decision of the Planning Inspector. It did not accept the Authority's narrow application of the second limb of the permission. At the Court of Appeal hearing the Authority said that it could accept the Inspector's decision if that was the court's judgment. The Inspector's application of a ratio of limestone to fluorspar of 2:1, in addition to the limestone inextricably intermingled in the vein, is still very restrictive on the amount of limestone that can be commercially sold.

7 Financial issues

7.1 These matters are dealt with in a Part B report.

Report Author

John Lomas, Director of Strategy & Development , 07 August 2017
Background Papers - None