Trinity Term
[2012] UKSC 31
On appeal from: [2011] CSIH 1

JUDGMENT

G Hamilton (Tullochgribban Mains) Limited (Appellant) *v* The Highland Council and another (Respondents) (Scotland)

before

Lord Walker
Lady Hale
Lord Clarke
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

11 July 2012

Heard on 20 June 2012

Appellant
James McNeill QC
Morag Ross
(Instructed by Archibald Campbell & Harley WS)

Respondent
Ralph Smith QC
Marcus Mackay
(Instructed by Biggart Baillie LLP)

Respondent
Roy Martin QC
Donald Davidson
(Instructed by Tods Murray LLP)

LORD WALKER (WITH WHOM LADY HALE, LORD CLARKE, LORD DYSON AND LORD REED AGREE)

The legislation

1. This appeal is concerned with legislation under which planning authorities have the duty of reviewing what are commonly referred to as "old" planning permissions for mineral working. The process of review is sometimes referred to by the acronym ROMP (Review [of] Old Mineral [planning] Permissions). The statutory provisions were introduced by the Environment Act 1995 and then reenacted in substantially the same form in the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act").

2. The principal legislative purpose of these provisions is to ensure that old mineral permissions are made subject to conditions meeting modern environmental standards. Some of the old permissions were granted many years ago subject to conditions less stringent and less precise than are appropriate today. Where more stringent conditions are imposed compensation is payable in certain cases, but only where the mineral site in question is classified as "active" rather than "dormant". A subsidiary purpose of the legislation is to achieve better and more reliable records of old planning permissions for mineral working. The evolution of the legislation has been described in detail by the Lord President (Lord Cullen) in *Lafarge Aggregates Ltd v Scottish Ministers* 2004 SC 524, paras 2 and 3.

3. The relevant provisions of the 1997 Act are section 74 and Schedule 9 (Review of Old Mineral Planning Permissions). Schedule 9 contains several special definitions and some interlocking provisions which call for careful examination, but on examination (and with the background history as explained by the Lord President) its general scheme becomes clear. It distinguishes between three categories of mineral sites, and lays down how the process of review is to affect each category. The three categories are "Phase I active sites", "Phase II active sites" and "dormant sites". The difference in treatment as between the first and second of these categories is a simple matter of administrative prioritisation: Phase I active sites include sites of particular environmental sensitivity (para 2(4)) and those which are the oldest sites dealt with by Schedule 9, and so most likely to have inadequate conditions (para 2(6); it should be added, for the sake of completeness, that an even older category of permissions, those granted before 1 July 1948, had been covered by earlier legislation). Phase I active sites are therefore to be reviewed first. By contrast the difference in treatment between all active sites (on the one hand) and dormant sites (on the other hand) is more

substantial. Dormant sites (which may be either Phase I or Phase II) are defined (para 1(1)) as sites on which no substantial minerals development was carried out in the period beginning 22 February 1982 and ending with 6 June 1995. Although a planning permission cannot be lost by abandonment, Parliament thought it right to deal with dormant sites in a rather more robust way, by freezing any further mineral working until new conditions had been applied for and approved (para 12(3)). This appeal relates to a dormant site.

4. As the Lord Justice Clerk (Lord Gill) said in his opinion in the Inner House (para 8) there are two stages in the Schedule 9 procedure. Stage 1 involves the preparation of two lists, termed the first list (para 3) and the second list (para 4). The first list has three main functions: (i) to list all mineral sites in the authority's area (para 3(1) and (2)); (ii) to sort them into the three categories already mentioned (para 3(3)); and (iii) for active Phase I sites only, to specify a date by which a para 9 application is to be made (para 3(4) and (5)). In that way active Phase I sites are given priority. The second list is simpler. It relates only to active Phase II sites and performs function (iii) above for them (para 4(3), (4) and (5)).

5. Paragraphs 5, 6, 7 and 8 contain further administrative provisions relevant to what the Lord Justice Clerk called stage 1. Counsel for the appellant placed particular emphasis on the provisions of para 6 (Applications for inclusion in the first list of sites not included in that list as originally prepared and appeals from decisions upon such applications) but it is better to defer consideration of that point.

6. Paragraphs 9 to 16 of Schedule 9 deal with Stage 2. Some of these provisions (including those as to compensation) do not apply to dormant sites. In relation to dormant sites the key provisions are para 9(1) and (5), para 11 and para 12(3) and (4). Para 9(1) is as follows:

> "Any person who is the owner of any land, or who is entitled to an interest in a mineral, may, if that land or mineral is or forms part of a dormant site or an active Phase I or II site, apply to the planning authority to determine the conditions to which the relevant planning permissions relating to that site are to be subject."

Para 9(5) is as follows:

> "Where the planning authority receive an application under this paragraph in relation to a dormant site or an active Phase I or II site they shall determine the conditions to which each relevant planning

> permission relating to the site is to be subject; and any such permission shall, from the date when the conditions to which it is to be subject are finally determined, have effect subject to the conditions which are determined under this Schedule as being the conditions to which it is to be subject."

Para 11 gives a right of appeal (now to Scottish Ministers) as to the terms of any new conditions to be imposed. Para 12(3) is as follows:

> "Subject to sub-paragraph (4), no relevant planning permission which relates to a dormant site shall have effect to authorise the carrying out of minerals development unless—
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> > (a) an application has been made under paragraph 9 in respect of that site, and
> >
> > (b) that permission has effect in accordance with paragraph 9(5)."

Para 12(4) provides for the termination of mineral permissions which are not included in the first list (either initially or on an application under para 6) except so far as concerns conditions for restoration or aftercare.

The facts

7. Some of the documentary evidence has to be addressed in detail. The relevant documents are not in chronological order in the appendix. The references are to pages in the hard copy of the appendix.

8. The mineral site with which this appeal is concerned is in a sparsely populated area on the edge of Strathspey. It is on the A938 road between Carrbridge and Dulnain Bridge, near Grantown-on-Spey. The appellant company, G. Hamilton (Tullochgribban Mains) Ltd ("Tullochgribban Mains") is the heritable proprietor of tenanted farmland in the vicinity. The first respondent, the Highland Council ("the Council") is the planning authority for the area, having taken over that responsibility from the Inverness County Council. The second respondent, Breedon Aggregates Scotland Ltd, formerly Ennstone Thistle Ltd ("Breedon") is the proprietor of the minerals on the site and has the right to work them.

9. Both Tullochgribban Mains and Breedon derive title from the same landowner, Lord Reidhaven. By a disposition [66] signed on 21 April 1967 and registered on 6 July 1967 Lord Reidhaven disponed to Breedon's predecessor in title, George MacWilliam and Son (Contractors) Ltd ("MacWilliam") all the deposits of sand and gravel and associated substances (except coal) in, on or under the land delineated in red on an annexed plan [74]. This land ("the red land") is adjacent to and on the north of the Carrbridge road. It is roughly rectangular except that it does not include a small loch, Loch Mor, which juts into the land on the east side. The disposition provided for entry on 1 August 1965. The property disponed included a number of express rights and privileges, including "full right and power . . . to search for work … and carry away" the minerals included in the disposition. Counsel did not find it necessary to make any submissions about the detailed terms of the disposition.

10. The pleadings show that at the time when the proceedings were commenced in 2008, Tullochgribban Mains was in the course of registering its title under a disposition made by Lord Reidhaven. Possibly for that reason, its title has not been formally admitted. But nothing turns on that. The argument has proceeded at every level on the basis that Tullochgribban Mains has a sufficient interest to give it locus standi in the proceedings, and that its rights are subject to the mineral rights in the red land disponed to Breedon's predecessor in title. The dispute is about planning law, not property law.

11. The original planning permission [75] was granted to MacWilliam by Inverness County Council on 12 February 1965. It was expressed in general terms as permission for the working of minerals on land at Tullochgorum, Carrbridge, in accordance with the plan(s) submitted and docquetted. The permission set out eleven conditions in numbered paragraphs, stated to be in the interests of health, safety and amenity. It is common ground that the names Tullochgribban and Tullochgorum are variants of the same name.

12. The docquetted plan is not extant. It is common ground that it has been lost, possibly at the time when responsibility as planning authority passed to the Council. It would be surprising if it had shown an area materially different from the red land shown on the plan annexed to Lord Reidhaven's disposition and Breedon and its predecessors in title appear to have acted consistently with the supposition that they were the same. MacWilliam's immediate successor was Tilcon (Scotland) Ltd ("Tilcon"), and Breedon is Tilcon's immediate successor.

13. The mineral site was worked for some years, but it is common ground that no work has taken place for at least 20 years. The direction of working, when it took place, was towards the north, away from the road. The worked area (which

has come to be called "the green land") was relatively small. Counsel for the appellant put it at about one-sixth or one-seventh of the whole area of the red land.

14. In March 1997 the Council issued its first list of mineral sites [76]. It was then acting under Schedule 13 of the Environment Act 1995, but it is agreed that the procedure was just the same as under the 1997 Act. The Tullochgribban site was not included in the first list, and in May 1997 Tilcon (which had by then acquired the mineral rights from MacWilliam) applied for it to be included as a Phase I active site. It did so by an undated letter, received on 7 May 1997 [77], with enclosures of (i) a copy of the planning permission dated 12 February 1965 [78]; (ii) a plan [79] (apparently copied from the plan on Lord Reidhaven's 1967 disposition) showing the red land; and (iii) a reserve schedule [80] intended to serve as evidence that the site was an active site (that is, one on which some extraction took place after 22 February 1982).

15. The Council (acting by Mr Andrew Brown, who has made an affidavit in the proceedings) replied on 26 June 1997 [107] pointing out that the reserve schedule was inadequate as evidence of working since 1982, and stating that the site would be registered as dormant. Tilcon accepted this by a letter dated 7 July 1997 [108] without further argument and it is not an issue in the appeal. Of more direct relevance, the Council's letter of 26 June 1997 stated:

> "From the information provided, the Council has been able to trace this old planning permission (Reference number ICC/1964/798, approved on 12 February 1965) and has been able to locate a working on the ground as shown by the enclosed map. It would therefore seem appropriate to include Tullochgribban in the first list of sites."

16. The Council then sent Tilcon a letter dated 15 July 1997 [81] framed (as counsel for the appellant pointed out) in the formal language of a decision letter. The substance of the decision was in the first two paragraphs:

> "I refer to your letter of 7 July 1997 in relation to previous correspondence, and hereby give notice that the above mineral site [identified as Tullochgribban Quarry, Carrbridge] has been added to the first list of sites prepared by the Council as a Dormant site. The appropriate reference sheet and site plan relating to this additional entry are enclosed.

> As this site has been classified as Dormant, no development consisting of the winning and working of minerals or involving the depositing of mineral waste may lawfully be carried out until new planning conditions have been submitted to, and approved by, the Council."

The letter was signed by Mr Bob Shannon, who was the Council's Head of Strategic Plans, and Mr Brown's superior. The first of the enclosures, the reference sheet [82], was clear and uncontroversial. It set out particulars, correct in every respect, of the original planning permission. It noted at the foot, "Original definitive site plan not available."

17. The second enclosure [83] is at the heart of the controversy. It was a plan which identified the green land, a roughly kidney-shaped area forming an island within the southern part of the red land. Counsel for the appellant did not accept that the site plan enclosed with the Council's letter of 15 July 1997 was the same as the enclosure with the Council's letter of 26 June 1997 (which referred to the Council being "able to locate a working on the ground as shown by the enclosed map"), and Mr Brown's affidavit (para 4) indicates that the earlier enclosure was probably an extract from the Council's visual record plan [110, which is Appendix 4 of Mr Brown's affidavit, with a better copy at 119]. The site plan [83] enclosed with the letter of 15 July 1997 was headed "Review of Old Mineral Workings" and there is discernible on it, at two places just within the boundary of the green land, the word "spreads" (apparently indicating some sort of land slippage).

18. The site was therefore classified, by a revision of the first list, as a dormant site [109]. Tilcon did not make any comment on the letter of 15 July 1997 and its enclosures. There is no indication that it occurred to any of Tilcon's management that the letter and enclosures were intended to reduce dramatically the extent of the original planning permission, or that it had that effect. Mr Brown's affidavit (para 8) indicates that it was not intended to have that effect:

> "It was not the intention of this site plan to seek to restrict the original planning permission to the area indicated. To have done so would not have been reasonable since the site would have been restricted in extent to its prior workings, thereby excluding any possible reserves, without evidence that this reflected the 1965 permission. The intention as explained in paragraph 5 was that the mineral operator when submitting an application for updated conditions could indicate a larger or more definitive area over which the application should relate, with due justification. The Council would then consider this along with the proposed new conditions in the light of the information to hand."

19. Nothing else material occurred until October 2006, by which time Breedon had acquired the mineral rights. As the site had been classified as a dormant site, there was no time limit for the making of a paragraph 9 application, but in the meantime no further working could take place. On 17 October 2006 Breedon's agents sent to the Council a copy of the plan annexed to Lord Reidhaven's 1967 disposition. On behalf of the Council Mr Brown (then a senior planner engaged on development control) sent a reply dated 24 October 2006 [88] acknowledging the copy of the plan and stating:

> "On this basis, and given that no more definitive information appears to be available concerning the site boundary for Inverness County Council Permission No 1964/798, it is agreed that an application under Section 74 of the Town and Country Planning (Scotland) Act 1997 should be on the basis of this boundary, with the following exception –
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> that the south-eastern boundary should be revised to exclude Loch Mor as it presently extends."

The shape of Loch Mor's shoreline had undergone some change since 1967.

20. On 20 April 2007 Breedon made its paragraph 9 application for approval of a schedule of conditions. After discussion with the Council a final draft of new conditions was prepared [93] which the Council was minded to approve. The first numbered condition was as follows:

> "For the avoidance of doubt, in the absence of a definitive docquetted site plan, the boundary of the site to which these conditions relate under planning permission ICC/1964/798, issued by the County Council of Inverness on 12 February 1965, shall be as outlined in red on the approved plans EG 320/RMP/F/01&2."

But after the application was advertised in May 2007, Tullochgribban Mains contended that it would be ultra vires for the Council to approve conditions in relation to the red land. It contended that the Council had, when it revised the first list so as to include Tullochgribban Quarry, definitively determined its extent as being limited to the green land. Tullochgribban Mains commenced these proceedings seeking declarator, reduction of the Council's purported decision, and interdict ad interim.

The decisions in the courts below

21. In her reserved judgment the Lord Ordinary (Lady Clark of Calton) carefully analysed the provisions of Schedule 9 to the 1997 Act. She stated (para 27):

> "when a planning authority in accordance with paragraph 3 prepares a list of mineral sites within their area (the 'first list') what they are preparing is a list of 'the land to which a relevant planning permission relates'. I consider that the intention of the legislation in relation to review of old mineral planning permissions in Schedule 9, is not to permit the planning authority to change the boundaries of land by reducing or increasing an area of land to which a relevant planning permission has been granted at an earlier date. The listing procedure envisages a listing of something which pre-exists ie the planning permission granted at an earlier date in respect of mineral sites."

The last sentence was criticised by counsel for the appellant as suggesting that the first list was to be a list of planning permissions. But it is clear from the passage as a whole, and indeed from the Lord Ordinary's judgment as a whole, that she well understood that it was to be a list of sites to which a relevant planning permission related (the wording used in Schedule 9, para 1(2)(b)). Normally the boundaries of the site would be identifiable from a plan referred to in the planning permission, but fixing the exact boundaries was not necessary at the listing stage. What was required was identification of the site. The Lord Ordinary considered that the submissions made on behalf of Tullochgribban Mains were not well founded. By an interlocutor of 10 March 2009 she repelled Tullochgribban Mains's first and second pleas in law and dismissed the petition.

22. On 7 January 2011 the Inner House of the Court of Session refused Tullochgribban Mains' reclaiming motion for review of the Lord Ordinary's interlocutor. The Lord Justice Clerk gave an opinion in which Lord Carloway and Lady Smith concurred. The Lord Justice Clerk defined the two issues in the appeal: (i) whether the Council was entitled or obliged to define the extent of the mineral site in the first list; (ii) whether, if it had power to define the extent of the site at that stage, the Council defined it as the green land.

23. On the first issue counsel for the appellant argued (as he has before this Court) that the boundaries of a mineral site fell to be determined by the planning authority in the first list, at what the Lord Justice Clerk called Stage 1 (para 30 of his judgment, summarising counsel's argument):

> "that is to say, an entry in the first list is not merely site-specific but boundary-specific too. It follows, on this submission, that at Stage 2, when it comes to consider the question of conditions, it is too late for the planning authority to define the boundaries of the site."

The Lord Justice Clerk did not accept that argument. He considered the Lord Ordinary's decision to be correct (paras 33-34, with two case references rearranged):

> "Looking at the overall scheme of Schedule 9, I think that the procedure of listing (paras 3 to 6) is administrative in nature (*Dorset CC v Secretary of State* [1999] JPL 633, at pp 642-643). Listing is the qualification that entitles the interested party to apply to the planning authority to determine the conditions that should govern the existing planning permission (cf *R v Oldham MBC and Anr, ex p Foster* [2000] Env LR 395; and *R (Payne) v Caerphilly CBC* [2002 PLCR 496, [2003] Env LR 679 (Court of Appeal). Listing is about preserving an extant planning permission, not about restricting or rescinding it. The first list is a census of the mineral sites in the planning authority's area (para 3(1); *R v Oldham MBC and Anr, ex p Foster, supra* at p 402; *R (Payne) v Caerphilly CBC, supra*; *Lafarge Aggregates Ltd v Scottish Ministers* 2004 SC 524, at para 37). It is not a list of defined areas of land. It is drawn up to identify where the mineral sites are and to classify each of them in order to determine the procedures that are to be followed at Stage 2. The existence of a relevant planning permission relating to it is the condition precedent to the inclusion of the site in the list. Therefore the planning authority is bound to satisfy itself that a relevant planning permission exists; but it need not identify the planning permission in the list itself (*R v Oldham MPC, ex p Foster, supra*) and a fortiori, in my view, it need not define its boundaries. Since the site is by definition land to which a relevant planning permission relates, the extent of it will be defined by the planning permission itself. If the site is then listed, the extant planning permission will remain alive in its entirety.
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> It is only when the site is listed that the extent of the existing development rights over it becomes important. That question will be determined at Stage 2 by reference to the relevant planning permission itself. It is at that stage that planning judgments have to be made on the merits of each case."

24. The Lord Justice Clerk considered that Tullochgribban Mains' case was based on a misinterpretation of Schedule 9, para 6(3). A planning authority could

grant an application for listing in part (giving rise to a right of appeal) only if satisfied, on clear evidence, that part of the land sought to be listed did not enjoy a relevant planning permission at all. That was quite different from a case where the plan on the original planning permission had been lost.

25. On the second issue, the Lord Justice Clerk concluded that the Council did not purport to exercise its power under para 6(3)(b) to list part only of a site for which an application for listing was made. He accepted that on the uncontradicted evidence of Mr Brown, the green land was no more than an indication of the area which had been worked by then. The Council was not at that stage intending to make a definitive statement about boundaries.

Conclusions

26. In my judgment the Lord Ordinary and the Inner House were plainly correct. Counsel for the appellant criticised their reasoning as inadequate. But once the general scheme of Schedule 9 of the 1997 Act is understood the first point is really quite a short one. The procedure at what the Lord Justice Clerk called Stage 1 is administrative and preliminary in nature. It involves the identification of sites and the setting of an order of priority for Stage 2 (with activity on a dormant site being frozen in the meantime). By contrast Stage 2, which is initiated in every case by a paragraph 9 application, requires decisions calling for planning judgment.

27. Counsel for the appellant concentrated in his submissions on para 6 of Schedule 9, and on the right of appeal conferred by it. But the Lord Justice Clerk was correct in his analysis of paragraph 6. It is possible to imagine some circumstances (such as overlapping applications) in which a planning authority might at Stage 1 find it necessary to form a provisional view as to the boundaries of a site. But such cases would be unusual and a provisional determination at Stage 1 could not have the effect of cutting down a valid existing planning permission.

28. The second issue identified by the Lord Justice Clerk does not therefore strictly arise for decision. But the Lord Ordinary and the Inner House were also plainly correct in their observations on this point. Even without Mr Brown's affidavit, the correspondence as a whole, considered objectively, gives no indication that the Council was purporting to exercise a power to cut down an existing planning permission.

29. I would therefore dismiss this appeal. It is not an appeal for which permission would have been given by this Court, had permission been necessary.

It does not raise any point of law of general importance, and the judgments below set out the position clearly and correctly.