FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 11
XA59/18

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal to the Court of Session

under

Section 239 of the Town and Country Planning (Scotland) Act 1997

by

BRIAN ALFRED TAYLOR

Appellant

against

THE SCOTTISH MINISTERS

Respondents

Appellant: Party
Respondents: N McLean (sol adv); the Scottish Government Legal Directorate)

6 March 2019

Introduction

[1] This is an appeal, under section 239 of the Town and Country Planning (Scotland) Act 1997, against the dismissal of an appeal by the respondents' reporter. The appeal had challenged an Enforcement Notice which had been issued by a local planning authority.

The Notice alleged that the processing of materials or minerals had been carried out in breach of planning control. The issue in this appeal is primarily whether that processing was permitted by certain Classes specified in the Town and Country Planning (General Permitted Development) Order 1992. The appellant criticises the adequacy of the reasons given by the reporter. The appeal is also about the extent to which a reporter requires to deal with matters not raised in an appeal to the respondents, the decision on which has been delegated to that reporter. It also touches upon the concept of legitimate expectation in relation to a substantive, rather than a procedural, right.

Legislation

[2] A planning authority may issue an Enforcement Notice, under section 127 of the 1997 Act, where it appears that there has been a breach of planning control and it is expedient to issue the Notice having regard to the development plan and any other material considerations. The notice requires to state (s 128(1)) the matters constituting the breach and to specify (s 128(3)-(5)) the steps to be taken to remedy the breach or the activities which require to cease.

[3] Paragraph 3 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 provides general planning permission for the "Class" of development specified in Schedule 1. Class 14 (Part 4 of the Schedule) deals with Temporary Buildings and Uses; Classes 18 and 19 (Part 6) with Agricultural Buildings and Operations; Class 22 (Part 7) with Forestry Buildings and Operations; and Classes 65 and 66 (Part 19) with Removal of Material from Mineral Working Deposits.

[4] Thus general permission is granted for:

"

PART 4

TEMPORARY BUILDINGS AND USES

Class

14.–(1) The provision on land of ... works, plant or machinery required temporarily in connection with and for the duration of operations being or to be carried out on ... that land ...

(2) Development is not permitted by this class if –

...

(b) planning permission is required for these operations but has not been granted or deemed to be granted ...

PART 6

AGRICULTURAL BUILDINGS AND OPERATIONS

Class

18.–(1) The carrying out on agricultural land comprised in an agricultural unit of–

…

(b) the ... maintenance of private ways; or

(c) any ... engineering operations,

requisite for the purposes of agriculture within that unit.

…

(3) ... subject to the following conditions–

…

(b) where the development involves-

...

(ii) the removal of any mineral from a mineral-working deposit on the land,

the mineral shall not be moved off the land ...

…

Class

19.–(1) The winning and working on land held or occupied with land used for the purposes of agriculture, of any minerals reasonably necessary for agricultural purposes within the agricultural unit of which it forms part.

...

Interpretation of Part 6

... 'agricultural land' means land which, before development permitted under this Order is carried out, is land in use for agriculture ... 'agricultural unit'

means agricultural land which is occupied as a unit for the purposes of agriculture ...

PART 7

FORESTRY BUILDINGS AND OPERATIONS

Class

22.–(1) The carrying out on land used for the purposes of forestry, ... or in the case of sub-paragraph (c) land held or occupied with that land, of development reasonably necessary for those purposes consisting of–

...

(b) the formation, alteration or maintenance of private ways;

(c) operations on that land, or on land held or occupied with that land, to obtain the materials required for the formation, alteration or maintenance of such ways;

(d) other operations (not including engineering or mining operations).

...

PART 19

REMOVAL OF MATERIAL FROM MINERAL WORKING DEPOSITS

Class

65. The removal of material of any description from a stockpile.

Class

66.–(1) The removal of material of any description from a mineral working deposit other than a stockpile.

...

Interpretation of Part 19

...

'mineral working deposit [means any deposit of material remaining after minerals have been extracted from land or otherwise deriving from the carrying on of operations for the winning and working of minerals ...] (1997 Act, s 277; 'minerals' including all substances of a kind ordinarily worked for removal by underground or surface working' (*ibid*));

...

'stockpile' means a mineral-working deposit consisting primarily of minerals which have been deposited for the purposes of their processing or sale."

[5] The Waste Management Licensing (Scotland) Regulations 2011 are made under the Pollution Prevention and Control Act 1999. They are designed to license, and hence control,

activities, notably the disposal of waste, which are capable of causing environmental pollution giving rise to harm to the health of, *inter alios*, people or the environment. Schedule 1 contains a list of activities which are exempt from the licensing regime. Paragraph 9 of the Schedule includes the treatment of land (including the restoration of quarries) with certain "wastes" contained in a table which includes "waste" gravel, crushed rocks and sand.

Background

[6] The appellant trades as an environmental consultant under the name Grampian Soil Surveys, which is based in Glasgow. In 2017 he was appointed as an adviser to John Ross and PTM Plant Limited, in connection with works to be carried out at the Haddo Quarry, Tarves, Aberdeenshire. This was a sand and gravel quarry which is located partly on Haddo Estates land. Excavations had ceased when the operator (Les Taylor Contractors Ltd) had been placed in receivership without having complied with a condition of the original planning consent to restore the ground for forestry purposes. Planning consent for further quarrying on the Haddo Estates land was granted in January 2017.

[7] Mr Ross was the proprietor of another part of the quarry. PTM Plant acted as his contractors in relation to the proposed works on this land. These works, which were said to have included the importation of top soil, were described by the appellant (letter to the planning authority dated 12 February 2017) as intended "to restore the land back to use in [Mr Ross's] forestry operations". These operations were to take place in the Craigmuir Woodlands, which adjoin the quarry site. The works, according to the appellant, involved the removal of stockpiles of formerly excavated material and its processing by means of, *inter alia*, "rock crushing machinery".

February 2017

[8] By letter dated 6 February 2017, the local planning authority advised Mr Ross that they had information that unauthorised mineral extraction and exportation from the quarry site had taken place. Complaints had been received not only about the extraction and processing of minerals, but also that the materials were being taken off site. Noise was a particular concern. There were substantial stockpiles of extracted material on site. Heavy plant, including "two crushers/graders", consistent with extraction operations, had been introduced onto the site. The letter alleged that there was no planning permission for such activity, since the last known approval for sand and gravel extraction had expired on 13 March 2012 and an application by Mr Ross to extend it had been withdrawn.

[9] By letter dated 12 February 2017, the appellant responded, on behalf of Mr Ross, giving a history of activity at the quarry. The appellant contended that there had been no mineral extraction or exportation of material outwith the Craigmuir Woodlands. What had been going on was the restoration of the land "for forestry and/or agricultural purposes". The operations carried out did not require express planning permission. They were "permitted development" under the 1992 GPDO. Material, which had originally been stockpiled on the part of the quarry site belonging to Haddo Estates, had been moved onto Mr Ross's land. Mr Ross was awaiting a decision by HM Revenue and Customs which would allow him to move the material off-site. Meantime, rock crushing machines were being used to facilitate the repair of access roads to the site and to fields farmed by Mr Ross. This, it was said, involved the repair of roads to provide agricultural or forestry access as permitted under Class 18(3)(b)(ii) or Class 22(1)(b) of the 1992 GPDO. The intention had been to make use of the stockpiled material to repair the roads and for spreading across the

site. Whether to continue with this idea, or whether to re-profile the land and to continue limited extraction and treatment of materials for export off-site, all in order to provide a gentler gradient more suited to forestry or agriculture, was undecided.

[10] On 15 February 2017 the planning authority sent an email to the appellant, acknowledging the appellant's assertion that:

> "no extraction has taken place, that the machinery seen on site is there to allow for the processing of previously extracted and stockpiled material, that none of this material is being exported and that it is being used for agricultural/forestry operations on your clients (*sic*) land".

The authority accepted that, on the basis of this information, what had taken place fell under permitted Classes 18 and 22 of the GPDO. On that understanding, no further enforcement action would be required. It was stressed that the authority reserved the right to take enforcement action if they received information "that the site is not being worked for agricultural or forestry purposes".

January 2018

[11] The planning authority made several site visits in the months following the email. New stockpiles of processed material were noted in March 2017. By November 2017, it had become apparent to the authority that a significant amount of material had been removed off-site, albeit that they had said that this could be done, in respect of material already stockpiled, under Class 65 of the 1992 GPDO. At a visit on 19 January 2018, new material (ie that not previously stockpiled on Mr Ross's part of the quarry) was observed being processed and stockpiled.

[12] On 22 January 2018, the planning authority served an Enforcement Notice. This alleged "The processing of materials or minerals" within Haddo Quarry, which was said to amount to a breach of planning control. The authority served a Stop Notice requiring

Mr Ross and PTM Plant to cease the "crushing, screening or, by any other means, processing of materials or minerals" within the quarry. The Enforcement and Stop Notices were accompanied by a letter stating that they related to an allegation that unauthorised processing of on-site material had taken place using a large screener. Such operations, it was stated, required planning permission in their own right; and no such planning permission had been obtained. At a further visit on 26 January 2018, new material was again noted as having been added to the existing stockpiles; ie this material had not just come from another part of the site.

The Appeal to the respondents

[13] On 20 February 2018, the appellant, on behalf of Mr Ross and PTM Plant, submitted an appeal to the respondents against the Enforcement Notice. It was maintained that no breach of planning control had occurred. The grounds of appeal, which were set out in the planning statement, made reference to Classes 18 and 22 of the 1992 GPDO. The general grounds were that: (1) the matters alleged to constitute a breach of planning control (ie the processing) had not occurred (s 130(1)(b) of the 1997 Act); and (2) if they had occurred, these matters did not constitute a breach of planning control (s 130(1)(c)). It was said that, in terms of Class 65, the removal of previously stockpiled materials was permitted and thus no longer an issue. In relation to the other operations on site, these had all "been directed at the restoration of the site and thus purifying" the earlier planning consent condition. The then appellants (Mr Ross and PTM Plant) had no desire to engage in new quarrying, but had screened "a former spoil heap" to provide material for the maintenance of Mr Ross's "forestry plantations and agricultural fields". This was permitted under Classes 18(1) and

22 of the 1992 GPDO. Under Class 18(3)(b)(ii) the removal of minerals from a deposit was permitted, as it was under Class 66(1).

[14] The planning authority's response identified three arguments. The first related to the then appellants' contention that they were fulfilling the restoration condition of the original planning consent. The answer to that was that the former permission, including any right to rely on any planning condition, had expired in 2012. Restoration of a quarry would require a new consent. In any event, the condition had required the approval of any restoration scheme. The second argument centred on Class 18. The authority maintained that, although it had previously accepted that pre-existing stockpiles could be removed for genuine agricultural uses, a significant amount of material was being removed from the site by PTM Plant and other hauliers for non-agricultural uses, including a house development and the construction of the Aberdeen Western Peripheral Route. Although Class 65 allowed the removal of stockpiled material, that did not cover extraction or processing. The authority's earlier position (email of 15 February 2017) had been flawed. Class 18 allowed development "on agricultural land comprised in an agricultural unit" when "requisite for the purposes of agriculture". The quarry was not in use as agricultural land. The third argument centred on Class 22. The authority had not seen any ongoing or imminent forestry necessitating the formation of an access road. Afforestation of the quarry, and hence the need for an access road, depended upon permission to import waste material onto the site. Restoration was an engineering operation requiring permission. The then appellants could not invoke Class 22 on the basis of hypothetical future afforestation. The primary purpose of maintaining the relevant access road was to allow HGVs in and out of the processing area from the public road.

[15] In a detailed, if repetitive, comment on the planning authority's response, the appellant maintained that the works had consisted only in the maintenance of an existing "private way" and the proposed upgrading of an "internal haul road" to facilitate future restoration operations. It was accepted that neither Class 18 nor Class 22 permitted the processing of materials for use "off-site". On the other hand, the then appellants were entitled to use the crushing and screening equipment to supply base material for the repair of a private road. The then appellants had "never suggested that there are any proposed imminent forestry operations nor have the Appellants began (*sic*) a construction of a new private way". The authority required to provide evidence of their allegation that "extensive processing of materials had been carried out on the site". Although some previously processed material had been moved off-site, and there was processing machinery on-site, this was to separate out rock for crushing from "an existing quarry spoil heap, in order to complete repairs to the existing roadway". The authority had confirmed in their email of 15 February 2017 that this complied with the GPDO. Why, the appellant asked, did the authority now claim otherwise?

Reporter's decision

[16] The appeal was delegated to a reporter appointed by the respondents. On 18 June 2018 she dismissed the appeal. Her reasoning was in short compass. The first ground of appeal (s 130(1)(b)) had been that the matters stated in the notice (ie the processing of material) had not occurred at all. The reporter held that the appellants had stated in their submissions that the processing of material, including the crushing of rock and screening of a spoil heap, had occurred. The appellants had stated that they had not denied that

processing had taken place. On that basis the first ground was rejected. The evidence "plainly" showed that processing had taken place.

[17] The second ground (s 130(1)(c)) was that the works undertaken did not constitute a breach of planning control as they benefited from the permitted development rights under the 1992 GPDO. In particular, the works were said to have been undertaken to provide materials for the maintenance of an existing private access road which served forestry plantations and agricultural fields owned by Mr Ross.

[18] The reporter was satisfied that the processing of materials and minerals constituted development. She determined that, although the site may have been part of a larger land holding, which included agricultural and forestry uses, this site was an unrestored quarry and did not fit within the definition of agricultural land. The processing was not reasonably necessary for the purposes of agriculture.

[19] The reporter had carried out a site inspection, but had seen no evidence of partially restored areas of the site that pointed towards any eventual use for forestry. There was evidence of limited infilling of holes in the road from the quarry which passed Craigmuir House and went through an area of established forest. No obvious evidence of active felling or thinning was seen. In the appeal, no reference had been made to acts of woodland management. Consequently the reporter was unable to conclude that the works to the access road were justified as reasonably necessary for forestry purposes.

[20] The reporter accepted, in accordance with the appellants' submission, that the removal of stockpiled material was permitted development under Class 65, but the "removal" of materials did not permit the processing of such materials. Processing required planning permission. Processing, which had not fallen within any of the permitted development classes, had taken place. The former planning consent did not permit the

processing of materials as part of restoration works. The reporter determined that whether a fresh planning application was required for the restoration of the site was not within her remit. The works specified in the Enforcement Notice constituted a breach of planning control and therefore the second ground of appeal also failed.

Appellant

[21] The appellant advanced five grounds of appeal. The first was that the respondents' reporter failed to identify and comment upon the "principal important controversial issue" (*South Bucks DC* v *Porter (No 2)* [2004] 1 WLR 1953 at para 36) and thus failed to disclose how that "issue of law or fact" had been resolved. It was said that, during the course of the appeal to the reporter, the appellant had raised two important questions; the first relating to the planning authority's volte-face following the email of 15 February 2017 and the second to whether a new planning application for restoration of the quarry had been necessary. There had been no evidence to demonstrate that the works were not required for agricultural or forestry purposes and no adequate reason (*Eildon* v *Scottish Ministers* [2010] CSOH 102 at para 36) had been given, which explained how things had changed between the email and the enforcement proceedings. The authority had decided the matter at the time of the email and were thereafter *functus officio* (*R (Sambotin)* v *Brent LBC* [2019] HLR 5 at para 3). The then appellants had had a legitimate expectation arising from the planning authority's previous approach as described in the email. The decision had left the appellant, as an informed reader, in substantial doubt as to the reporter's findings in fact and conclusions on the main issue (*South Bucks DC* v *Porter (No 2)* (*supra*) at paras 35-36; *Moray Council* v *Scottish Ministers* 2006 SC 691 at paras 28-30; cf *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219 at para 48; *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC

(HL) 33 at 49; and *Save Britain's Heritage* v *Number 1 Poultry* [1991] 1 WLR 153). In response to questioning from the court, the appellant accepted that he had not raised the "principal important controversial issue" with the reporter, but he had given her the facts.

[22] The second ground was that the reporter had erred in holding that, having concluded that processing of materials had occurred, the appeal on the first ground (s 130(1)(b)) failed. No formal permission was required for the use of mobile plant, which was covered by Class 14 of the 2011 (*sic*) GPDO, in relation to operations for which permission had been granted or was not required. It was not for the appellant to raise Class 14. The reporter had been bound to consider all the provisions of the 1992 GPDO. The works were exempt, as involving "waste used in accordance with the requisite planning permission" under the Waste Management Licensing (Scotland) Regulations 2011 (Sch 3 para 9(3)(c)) (*sic*; this does not seem to exist and the correct reference may be Sch 1 para 9(1)(b)). The reporter had failed to take into account the existence of a mobile plant licence, which had been issued to deal with the processing of a "waste spoil heap". That licence controlled noise, dust and other issues. The reporter failed to recognise that not all processing operations required planning permission.

[23] The third ground was that the reporter had failed to take into account the applicability of Class 19 of the 1992 GPDO. It was not for the appellant to raise this, but for the reporter to consider it. The appellant had said that the former quarry formed part of land which was held or occupied with land used for the purposes of agriculture. The reporter had erred in concluding that it was not. It was accepted that this was a question of fact, as was the issue of what constituted a planning unit (*Fuller* v *Secretary of State for the Environment* [1988] 1 PLR 1). The reporter had driven along the 1000m access road to the quarry and inspected the area where the processing activities had taken place. The

appellant had never claimed that the quarry was in agricultural or forestry use, but it was land held or occupied with land in such use.

[24] The fourth ground was that the reporter had placed restrictions on the road repair exemptions which were not contained in the 1992 GPDO. There was no need for prior notification of maintenance works. The reporter had no basis for qualifying her decision by stating that there was no evidence of active felling or thinning. The reporter had failed to ask about the forestry or agricultural activities. She had not obtained the information necessary to exercise a competent planning judgment.

[25] The fifth ground averred that the reporter's conclusion, that the processing did not have the permitted development rights under the 1992 GPDO, was in error. Class 14 permitted the temporary operation of mobile plant and such plant was also licensed in order to treat quarry waste under the 2011 Regulations. The GPDO did not say that planning permission was a prior requirement for the use of mobile plant.

Respondents

[26] The respondents contended, in relation to the first ground, that the matter before the reporter had been an appeal on specific grounds, notably that the operations described in the Enforcement Notice had not occurred and that they did not constitute a breach of planning control. The court was concerned only with the legality of the reporter's decision and not with its merits or any planning judgment (*Tesco Stores* v *Secretary of State for the Environment* [1995] 1 WLR 759 at 764 and 780). The reporter was not barred by any prior decision or conduct of the planning authority. She had the written representations of both the appellant and the authority. She had regard to, *inter alia,* the submissions made by the appellant, the authority's response, including their submission that their earlier view, as

expressed in the email, had been flawed, and both parties' submissions on the applicability of the 1992 GPDO.

[27] The principles in relation to the duty to give reasons were not disputed. The reporter had identified the main or determining issues in the appeal as: (1) whether the processing of materials or minerals had occurred; and, if so, (2) whether that processing had benefitted from permitted development rights in the manner suggested by the appellant. The reporter's reasons, to the effect that the matters specified in the Enforcement Notice had occurred and that they did not benefit from permitted development rights, were set out in the decision, which provided proper, adequate and intelligible reasons.

[28] On the second and fifth grounds (Class 14 of the 1992 GPDO) the respondents maintained that the appellant had not relied on Class 14 in his appeal statement or his grounds of appeal to this court. If the reporter had considered Class 14, then it would not have made any difference to her decision. The appellant had accepted that processing of material had taken place on site. Class 14 was intended to cover situations where an extant planning permission was in place and operations were being conducted on the land benefitting from that permission. Any authorisation for the use of plant under the 2011 Regulations did not exempt the appellant from the need to obtain planning permission. Any such authorisation was a separate matter and irrelevant to the reporter's consideration of the appeal on the grounds advanced by the appellant.

[29] On the third ground, the respondents again maintained that the appellant had not relied on Class 19 in the appeal to the reporter. He had relied on Class 18, which provided for permitted development on agricultural land as defined. The question, of whether land formed part of one agricultural unit or not, was one of fact. It was also a question of fact and degree to decide what constituted an appropriate planning unit (*Fuller* v *Secretary of State for*

the Environment (*supra*)). A site visit had been conducted. The appellant's written submissions did not provide any evidence that the site was in agricultural use. On the basis of the visit and the material presented to her, the reporter concluded that the site did not fit the definition of agricultural land and that the works could not be regarded as reasonably necessary for the purposes of agriculture. That was a matter for her planning judgment. If she had been required to consider Class 19, no different decision would have been reached. Any processing carried out on the site was not necessary for agricultural purposes.

[30] On the fourth ground, Class 22 was only engaged if the land was in use for the purposes of forestry. The reporter concluded that there was no evidence of any partial restoration of the area for the purposes of forestry, nor any obvious evidence of any felling or thinning of the woodland. The appellant's submissions had made no mention of any active woodland management being conducted on site. The reporter concluded, on the material before her, that the site did not fit the definition of land used for the purposes of forestry, or that the works were reasonably necessary for the purposes of forestry. This again was a planning judgment for the reporter to make.

Decision

Context

[31] It is important, when examining issues of natural justice, including fairness, in a statutory appeal process, to consider the context of the statute and the shape of the legal and administrative system within which a decision is to be taken (*R* v *Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531, Lord Mustill at 560; adopted in *Glasgow City Council* v *Scottish Legal Aid Board* 2018 SC 474, LP (Carloway), delivering the Opinion of the Court, at para [46]).

[32] A reporter, to whom an Enforcement Notice appeal is delegated, operates within a statutory framework which sets out the procedure which the adversarial parties must follow. In terms respectively of sub-sections 130(2) and (3) of the Town and Country Planning (Scotland) Act 1997, the appellant must give written notice of the appeal to the respondents and a statement in writing "(a) specifying the grounds on which he is appealing ... and (b) giving such further information as may be prescribed". The categories of ground upon which an appeal can proceed are set out in sub-sections 130(1)(b) to (g); the only ones relevant in this appeal being (b) and (c) (see *infra*). Section 131 allows the Scottish Ministers to prescribe by Regulation the procedure which is to be followed, including the content of the section 130(3) statement, and a requirement for, and the content of, a statement in response by the planning authority.

[33] In terms of regulation 14(2)-(3) of the Town and Country Planning (Appeals) (Scotland) Regulations 2013 (see regs 1(6)(b) and 14(6)) the appellant, in addition to stating the grounds of appeal, "is to give" in the section 130(3) statement:

> "(3) ...
> (a) all matters which the appellant intends to raise in the appeal;
> ...
> (e) a note of the matters which the appellant considers require determination ...".

The statement "is to be accompanied by copies of all documents, materials and evidence which the appellant intends to rely on ..." (reg 14(4)). Apart from the matters set out in the statement and documents, the appellant "may raise matters only in accordance with and to the extent permitted by regulations 11" (a request for information from the reporter) and 15. The latter requires the planning authority to submit a response to the appellant's grounds and a statement of the matters which the authority consider require determination (reg 15(2)(a)). The authority require to lodge copies of the documents which were before

them and were taken into account in reaching the decision (reg 15(2)(b)). The appellant is entitled to comment upon any matters raised by the authority (reg 15(3)). If the reporter proposes to take into account any new evidence, he must afford parties an opportunity to make representations (reg 13(1)).

[34] The purpose of this procedure, which was followed by the appellant and the planning authority, is to focus the issues to be determined by the reporter and to confine the material, which is thought to be relevant to the issues, within reasonable bounds. Given that context, although a reporter may have regard to considerations which are obviously relevant but have not been expressly mentioned by parties, as a generality the reporter's function is to decide the appeal within the framework of the written grounds, as expanded in the statement, response and comments. The reporter is not expected to embark on a frolic of his or her own and thus to seek out and found upon information which has not been placed before him or her (*City of Glasgow DC* v *Secretary of State for Scotland* 1992 SCLR 453, LJC (Ross), delivering the Opinion of the Court, at 456). If a reporter decides an appeal on the basis of a matter not raised, that decision would be open to serious, possibly fatal, criticism, if the losing party had not been given an opportunity to comment on that matter (*Anduff Holdings* v *Secretary of State for Scotland* 1991 SC 385, LJC (Ross) at 389).

[35] In short, at least as a generality, where the procedure for written grounds, submissions, responses and comments is laid out in such detail, the reporter will, as a matter of fairness to both sides, be expected to decide the appeal on the basis of that documentation; no doubt coupled with observations on a site visit. If inclined, despite the absence of any obligation to do so, to engage in other investigations of fact or to raise new legal issues, significant further procedure would be required in order to provide each party

with the mysterious "fair crack of the whip" (*Fairmount Investments* v *Secretary of State for the Environment* [1976] 1 WLR 1255, Lord Russell at 1265-6).

Grounds

[36] It may have been possible for the then appellants to present an argument to the reporter based upon a contention that they had a legitimate expectation that they would be allowed to continue their operations on the quarry site without further interference from the planning authority. Such a contention could have been grounded on the terms of the email of 15 February 2017. The fundamental problem with the attempt to develop that argument before this court is that it was not advanced in the appeal to the reporter. It formed no part of the grounds of appeal or the detailed statement submitted in their support. The existence of the email is mentioned, as an "additional consideration" in the then appellants' response to the authority's submissions, but only in the context of a rhetorical question about why the authority were now claiming that January 2018 processing was not permitted under the GPDO when they had accepted that the 2017 operations had been covered. The statement refers to the then appellants' confusion about the authority's apparent reversal of their views, but nowhere was it said that the terms of the email of 15 February 2017 led to any legitimate expectation on the part of the then appellants, such that the authority had become barred from taking enforcement action. Since the matter was not raised with the reporter, she cannot have been expected to deal with it. She cannot be criticised for not identifying or commenting on this "principal important controversial issue" when she was not asked to do so. The first ground of appeal falls to be rejected on this basis.

[37] If the issue of the effect of the email of 15 February 2017 had been mooted as creating a legitimate expectation, it would nevertheless have failed. Quite apart from any difficulty

in fitting such a contention into the statutory grounds of appeal, in order to create such an expectation in relation to a substantive right, the act of the representor must be "clear, unambiguous and devoid of relevant qualification" (*R* v *IRC ex parte MFK Underwriting Agencies* [1990] 1 WLR 1545, Bingham LJ at 1570). It must also proceed on the accuracy of the information provided by the person who alleges the expectation (*ibid*). The claim here fails on both counts. The email made it clear that it proceeded on the understanding that the assertion, that what was going on was the "processing of previously extracted and stockpiled material" which was then "used for agricultural/forestry operation" on Mr Ross's land, was accurate. The acceptance, that the works therefore fell within Classes 18 and 22 of the GPDO, was qualified by the planning authority expressly reserving its right to pursue formal enforcement action on the receipt of "information that the site is not being worked for agricultural or forestry purposes". The authority did receive such information. As will be seen, in due course the reporter found in fact that the processing was not for agricultural or forestry purposes.

[38] In relation to the appellant's contention, that a second important question was whether planning permission was needed for restoration works, similar considerations apply. This was not a matter which was relevant to the issues presented to the reporter. That issue related not to restoration but to the processing of materials. The reporter correctly held that it was outwith her remit to determine whether permission for restoration works was required, although *en passant* she made it clear that she did not consider that the operations at the quarry involved any restoration of land for forestry purposes. She had seen no evidence of partially restored areas. Any use of the material on site had been confined to filling in some potholes in the access road to the quarry.

[39] On the second ground, the appellant appears to have misunderstood the reporter's rejection of the then appellants' first ground in the appeal to the respondents. Despite it having been accepted by the appellant that processing, of the nature complained of, had been going on at the quarry site, the appeal to the reporter under section 130(1)(b) of the 1997 Act was that, as a matter of fact, that processing had not been going on. The reporter rejected this ground simply because it was quite obvious that it had been going on and the terms of the appeal statement had admitted that this was so.

[40] Identical considerations in relation to the appellant now founding upon Class 14 apply as they do to legitimate expectation. This was not a matter raised before the reporter. It does not appear in the grounds of appeal to this court either. In this context, neither the appeal before the reporter nor that to this court take the form of hearings at which parties are at liberty to raise new matter at will. The detailed rules in the 1997 Act and the 2013 Regulations are, as with the Rules of Court, enacted, in the light of experience, to keep appellate processes within reasonable bounds and to permit each party a "fair crack of the whip" (*supra*). The respondents should not be required to deal with new contentions which are raised late in a process in the absence of some reason being advanced to excuse non-compliance with the statutory provisions on fair notice.

[41] Once again, even if Class 14 had been timeously raised, the reporter would have been bound to find against the appellant. This Class applies in relation to the presence of "works, plant or machinery" required to carry out "operations" for which planning permission has been granted or is deemed to be granted. If there was no actual or deemed permission, which was the planning authority's contention, Class 14 could not apply. If there was such permission, Class 14 was, and is, superfluous. The appellant is, for the reasons given already, wrong in his submission that the reporter had to consider all Classes

in the 1992 GPDO with a view to ascertaining whether the processing might fit into one or other of the sixty nine Classes. It was for the then appellants to advance their case on which Classes applied and, at least in the absence of an obviously applicable class, for the reporter to decide on whether to sustain or reject the then appellants' contentions.

[42] The relevance of the Waste Management Licensing (Scotland) Regulations 2011 was not raised as an issue before the reporter and this part of the second ground also fails. Even if it had been raised, it would have been bound to be rejected. Whether the then appellants required or had a waste management licence had no direct relevance to the questions which the reporter was asked or to the general issue of whether planning permission was required for processing (not disposing of) the material on, or taken into, the quarry site.

[43] On the third ground, there is a little more force in a contention that, when considering the application of Class 18, the reporter might have been advised to have a look at the only other class specifically relating to agricultural land, namely Class 19. If, however, this was done, and was to be regarded as relevant, the reporter would have been bound to draw this to the attention of the parties and allow them to make submissions on the matter. The reporter did not do this and it is not difficult to see why. Class 19 refers, first, to the "winning and working on land held or occupied with land used for the purposes of agriculture". The reporter held as a matter of fact that the quarry site was not land so held or occupied. This finding is not capable of successful challenge. The area under consideration was part of a quarry. Class 19 also requires, secondly, that the extracted minerals must be "reasonably necessary for agricultural purposes within the agricultural unit of which it forms part". The quarry was not at the material time used for agriculture nor was it occupied as part of a larger agricultural unit. The Class under consideration is intended to allow mining or quarrying on a farm where the purpose is to provide materials

for use on that farm. That is eminently sensible. It is not intended to permit such operations on land which, immediately prior to the relevant operation, was not used for agricultural purposes. That was the position here. At the time when the processing began, this was not agricultural land. It was part of a quarry, not a farm. Class 19 could have had no application.

[44] The same reasoning is relevant to the reporter's consideration of Class 18. This Class, so far as relevant, only applies to excavations or engineering operations carried out on agricultural land comprised in an agricultural unit. The processing did not take place on such land. It took place in a former sand and gravel quarry. In addition, Class 18 applies only where the works are "requisite for the purposes of agriculture" and Class 19 applies to works "reasonably necessary for agricultural purposes". The reporter, curiously, actually applied the Class 19 test. That makes no material difference. She held as a matter of fact that the processing was not for agricultural purposes. That is an unchallengeable finding in fact, given that the reporter not only had the parties' submissions, and documents containing photographs of the site, she also conducted a site visit. However cursory the appellant considered that visit to be, the reporter must have regarded it as sufficient for her limited purposes, ie in the context of the appeal. If the appellant had wanted the reporter to conduct a wider survey of the surrounding area in order to prove the applicability of Class 18 (or 19 or 22), he had the opportunity in the written materials to invite her to do so.

[45] The latter observation is relevant to the fourth ground. The appellant had contended that the material had been, and was to be, used for the purposes of bringing the processing within Class 22 which, unlike Class 18, permits "operations" on land "used for the purposes of forestry" or "land held or occupied with that land" which are designed to obtain materials required to form, alter or maintain private ways where the operations are

"reasonably necessary" for the purposes of forestry. The reporter held as a matter of fact, as she had done with the Class 18 contention on agriculture, that the site was neither land used for the purposes of forestry nor was it land occupied for such purposes. She explained her reasons for this. The appeal documents had made no mention of any woodland management. Indeed, the appellant had accepted that there was no active or imminent forestry management in the vicinity. There was no sign of felling or thinning. The existence of a wood on land does not make that land "used for the purposes of forestry". The reporter was entitled to reach the view that the works on the access road (to the quarry) were not for forestry purposes. Once again, contrary to the appellant's contentions, it was for the then appellants to put all the material, which they considered to be relevant, before the reporter. The reporter was not obliged to conduct a wider inquiry beyond the material presented to her.

[46] The fifth ground has already been covered by the reasoning on the earlier grounds. It is true that the reporter's decision is a relatively brief one. It may have assisted if it had made some comment on the import of the email of 15 February 2017. However, an ability to express a decision succinctly should seldom be the subject of criticism (see *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219, Lord Reed at para [48]) provided that the tests of intelligibility and adequacy are met. The reporter's decision letter does not leave the informed reader in any "real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account" (*Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 348). Putting these reasons even more succinctly, the reporter did not consider that the operations being carried out by the appellant's principals were related to either agriculture or forestry. They were not covered

by any previous planning consent or any deemed permission. That being so, they required planning permission. The Enforcement Notice was accordingly justified.

[47] The appeal is refused.