Neutral Citation Number: [2009] IEHC 553

THE HIGH COURT

2007 144 JR

BETWEEN

MICHAEL CRONIN (READYMIX) LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

KERRY COUNTY COUNCIL

AND

THE DEPARTMENT OF THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

NOTICE PARTIES

JUDGMENT of Mr. Justice Ryan delivered on the 15th day of December, 2009

1. On a reference by a planning authority under section 5(4) of the Planning and Development Act, 2000 An Bord Pleanála may give a decision as to what, in a particular case, is or is not development or exempted development. The applicant in this case is challenging such a decision, in which Kerry County Council was the planning authority and the decision related to the applicant's quarry at Coolcaslagh, Killarney, Co. Kerry. The Board decided that a block making operation at the quarry was development and not exempted development.

2. The background to the reference can be shortly summarised. The applicant operates a quarry at the above address where it produces readymix concrete and concrete blocks. In late 2003 the County Council as planning authority became concerned that the block making activity within the quarry might be unauthorised development. At an inspection on the 16th September, 2003, an official was informed that block-making was being carried out, that there was no new structure and that the only new work that had been done was the replacement and extension of an old yard for making and storing the blocks. That information did not prevent the Council from sending a warning letter on the 29th September, 2003.

3. A submission on behalf of the applicant also did not convince the Council and there was another inspection on the 10th November, 2003 by a planning enforcement official, who recommended that an enforcement notice be issued, which happened on the 21st November, 2003. There followed correspondence between solicitors for the applicant and the planning authority and at least one meeting was held, but no further steps were taken to prevent the use of the quarry for block making.

4. The applicant company was making the case that the block making was exempted development within the meaning of s. 4(1)(h) of the 2000 Act. It also contended that quarrying and concrete production had been going on at the site since before the 1963 Local Government (Planning and Development) Act came into effect and block-making was not different in kind from producing readymix concrete. Some block making was also part of the quarry's history. The matter remained unresolved when the Council sought a decision from the Board.

5. The planning authority asked for the Board's assistance under s. 5 by way of letter of the 4th May, 2006. It is clear from the heading and the contents of the letter that the principal area of concern to the local authority was the block-making facility. But it did mention the information from the operator of the quarry "that the only new work carried out was the replacing of an old concrete yard, the extension of the yard for the making and storage of blocks." The Council enclosed its enforcement file and the letter set out factual information as well as the Council's understanding of the developer's contentions. There was no adequate factual basis for some of the stated information but neither the Inspector nor the Board relied on those facts and so they are irrelevant to the issues in this case.

6. The respondent's inspector reported on the 17th November, 2006, and the Board's decision is dated 13th December, 2006. The conclusions and decision of An Bord Pleanála are based on and follow the Inspector's report, repeating in the decision all but one of ten recommendations made by the inspector. The decision under s. 5(4) of the 2000 Act is that the block-making operation at the applicant's quarry is development and is not exempted development.

7. The applicant makes his challenge by reference to the inspector's report which is the foundation of the adverse decision made by the Board. There are three issues in the case:-

(a) Did the Board's Inspector apply s. 4(1)(h) correctly?

(b) Did the Inspector apply the correct test in deciding that there was a material change of use and/or was the Inspector's approach to this question irrational?

(c) Did the Inspector fail to distinguish between the concepts of works and use in the 2000 Act in coming to the conclusion that there was a change of use?

8. If any of these questions is answered in the affirmative, the decision was flawed and the applicant is entitled to an order quashing it. As to other minor grounds advanced by the applicant, including an argument as to fair procedures, I do not think that they are of significance.

9. This Court directed that a telescoped hearing be heard in which both the leave and substantive applications are heard. This does not obviate the need for the applicant to meet the criteria in order for leave to be granted, but since all the issues were debated at the hearing, it follows that if the applicant succeeds in its application on the substantive question, consideration of the leave issue is unnecessary.

10. The notice parties took no part in the proceedings. Counsel for the planning authority appeared briefly at the opening of the case to say that his clients associated themselves with the submissions to be made by the respondent and left over the question of an application for costs that might arise at a later stage.

11. I should say at the outset that it is accepted on both sides that the role of this court is and ought to be limited in a case of this kind. If a matter is properly within the field of planning judgment, I should not substitute my own view for that of the respondent even if I felt entitled to come to a different conclusion than the Board did, provided there is a rational basis for the finding. See *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. On the other hand, it is very much the province of the court to see that the Board and its Inspector have properly applied the law and have properly construed the relevant legislative provisions and have as a result asked the right questions.

12. The first question is whether the Board and the Inspector properly construed and applied s. 4(1)(h) in coming to the conclusion that development took place at the quarry that was not exempted development. The Board's conclusions in this respect appear at para. (d), (e) and (g) of the decision which is as follows:-

> (d) the laying out of a hard surfaced area of 2 acres in extent is development,
>
> (e) the laying out of a hard surfaced area of 2 acres in extent does not fall within the scope of s. 4(1)(h) of the 2000 Act, not being works for the maintenance, improvement or other alteration to a structure,
>
> (g) the construction of the yard is development which is not exempted development.

13. It is not disputed that laying out the yard was development. The only question therefore is whether the Inspector applied the right test, asked herself the right question and approached the issue correctly. The Inspector's consideration of this appears on p. 11 of her report as follows:-

> "In relation to the enlargement of the yard, which is stated to be about 2 acres in extent, there is no dispute between the parties that the yard has been extended to facilitate drying and storage essential to the production of concrete blocks. The operator's case is that the replacement of the old yard and the extension of the yard are not visible and that an exemption under s. 4(1)(h) of the 2000 Act applies. Section 4(1)(h) relates to the 'maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure . . .'
>
> "I submit that the replacement/repaving and extension and of a concrete yard would not be described as either maintenance or improvement of a structure as neither description would allow for an extension of the area. The term 'alteration' is defined to include plastering or painting, removal of plaster or stucco or the replacement of a door, window or roof that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures.
>
> I consider that neither the legal definition or the ordinary dictionary definition of 'alteration' encompass the concept of an extension or enlargement as a defining characteristic but rather relates to more minor changes to a structure. I consider that an extension of the yard has taken place and that this is 'works' and is 'development', but would not be described as 'maintenance, improvement or other alteration of any structure' and does not therefore fall within the exempted development provisions set out in s. 4(1)(h) of the 2000 Act and I reject the operator's arguments in this regard."

14. Mr. Galligan SC for the company contends that the work done to the yard surface was an alteration or an improvement of the structure. Structure includes an excavation and a quarry is an excavation. The work clearly amounted to the alteration or improvement or even maintenance of the structure and it was not an extension. This applies whether the structure, the planning unit, is considered to be the quarry as a whole or the concrete yard surface. The Board was obliged to go on to consider the later part of the exempted development provision in s. 4(1)(h) but it did not do so. This is a matter of statutory interpretation that it is for this Court to decide. If the Inspector and the Board misconstrued s. 4(1)(h), the application must succeed. The respondent agrees this point.

15. The Board submits that s. 4(1)(h) does not apply to extensions. Counsel Ms. Butler S.C. draws attention to the applicant's submission documents to the Board for support for her proposition that the company has accepted that the laying down of the yard was indeed an extension. She also contends that this is a planning matter in which the Inspector and the Board have particular expertise and it is for them and not for the court to decide in contradiction of that expert view unless there are strong grounds for doing so and there are no such grounds in this case. An Bord Pleanála by itself and through its Inspector felt that this was a development consisting of an extension and the applicant also treated it as such. The Board's written submissions express the point as follows:-

> Thus a subset of works – those carried out for maintenance, improvement or other alteration of a structure – are exempted provided they do not materially affect the external appearance of the structure. By implication all other works – which must include any act or operation of construction, excavation, demolition, extension, repair or renewal – are not exempted irrespective of whether they materially affect the external appearance of the structure

or not.

At para. E(1), the applicant claims that the Board was incorrect because the exemption under s. 4(1)(h) "extends to any alteration affecting the external appearance of a structure and is, therefore, not confined to alterations of the structure itself". This sentence is a little difficult to parse, but it appears that the applicant contends that the exemption under s. 4(1)(h) extends to all works that do not affect the external appearance. This is transparently incorrect. The Act specifically includes "extension" as a type of works but then specifically omits that type of works from the type that can gain an exemption under s. 4(1)(h). Accordingly, irrespective of whether extension affects the external appearance, it cannot benefit from s. 4(1)(h). The Act draws a clear distinction between "alteration" and "extension". It therefore was not open to the Board or its Inspector to subsume the latter within the former. For the same reason, contrary to what is suggested in para. E (3), the extension could not be treated as an "improvement" and avail itself of s. 4(1)(h) as that would again merge two categories of works which the Act has rendered distinct and separate.

At para. E (5), the applicant complains that the Board and its Inspector did not properly consider the issue of materiality of impact on the external appearance of the structure. Again, however, this misses the point. As the types of works engaged in by the applicant did not come within s. 4(1)(h) in the first instance, the question as to materiality of impact did not arise.

16. It follows that the interpretation of s. 4(1)(h) is central to the decision in this case. I was not referred to any authority that would assist in the construction of the provision. It is necessary at this point to set out some of the relevant provisions of the 2000 Act.

17. Section 4(1)(h) defines exempted development as follows:-

"development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;"

"'alteration' includes-

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof, that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures;

'works' includes any act or operation of construction excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."

18. The Board's argument is that what was done here was that the structure was extended, whether the structure is considered to be the quarry itself or the concreted area of the floor of the quarry. There was an extension. Since s. 4(1)(h) covers "maintenance, improvement or any other alteration," that excludes an extension. The reason it does that is because the definition of "works" includes alteration of a structure as well as extension. Therefore, the argument goes, the fact that there is no reference in s. 4(1)(h) to extension means that it was intended to be excluded so that only alterations that do not constitute extensions or any of the other actions or things in the definition of works, other than alterations, can qualify.

19. I may mention in passing that no argument was advanced as to whether "maintenance, improvement or any other alteration", is to be construed so that other alteration is *eiusdem generis* with maintenance and improvement. Does the paragraph permit all kinds of alterations or only alterations that are related to maintenance or improvement? I am not sure that this question is material to this case, but it seems to me that it could explain why alteration could be given a particular meaning in s. 4(1)(h) that might not apply elsewhere.

20. I want to simplify s. 4(1)(h) to reduce it to the part that is relevant to this case, whereby it reads: -

"the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which do not materially affect the external appearance of the structure."

21. If one inserts into this condensed definition the meaning of "works" from s. 2, exempted development then means the following:-

"the carrying out of works (including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal) for the maintenance, improvement or other alteration of any structure, being works which do not materially affect the external appearance of the structure."

22. I think that this approach makes sense. The word "works" in s. 4(1)(h) has to be given its meaning as set out in s. 2. But the approach suggested by the Board and by the Inspector requires that some of the meanings of "works" must be excluded for no reason that is apparent from s. 4(1)(h). Neither does it make sense from a practical point of view. If we ignore any other alteration and simply consider maintenance or improvement, there are many kinds of construction and extension works that would constitute maintenance or improvement. A person might put on a small extension at the back of his house similar to what his neighbours did and it makes complete sense that that should be considered exempted development. If it were not so, planning authorities would be inundated with applications for very small changes in people's houses simply because they amounted to extensions. Anything that increases the footprint of the original house

is an extension. This would include the slightest porch or outer door at the front and the smallest addition to the building beyond the back wall or indeed the side walls. It seems to me that the proposition contended for by the Inspector and relied on by the Board is untenable. It requires that the word extension be given a special meaning that is independent and exclusive of the terms maintenance, improvement or other alteration and the result of that is worse than meaningless; it is actually impossible to apply. This analysis treats the concept of an extension as if it were a term of art in a criminal statute or a Tax Act and even then in my opinion it might be illegitimate to construe it in the way the Inspector did.

23. The Board was wrong in its interpretation of s. 4(1)(h), in my view. An extension is not excluded as a matter of definition. An extension can be an improvement or an alteration. Maintenance and supervision (and other alteration) are the **purposes** for which the work is done in exempted development. The definition of works in s. 2 lists the kind of **activities** of which any **act or operation** constitutes works. So, an act of demolition amounts to works; so does an operation of renewal etc. An act or operation of construction or repair may be required for the **purpose** of maintenance of a structure and that is obviously intended to be exempted development, but it would be excluded if the Board's submissions are correct. By insisting that the work done must be actual maintenance, improvement or other alteration, rather than for [the purpose of] maintenance etc., the Board confuses purpose and act and overlooks "the carrying out of works" in s. 4(1)(h). The paragraph is best understood first by inserting after "works" the words from its definition that are relevant, that is, excluding references to a protected structure, and secondly by splitting it into its constituent phrases as follows. I have emphasised some words for clarity: -

> "the **carrying out** of works (including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal)
>
> **for** the maintenance, improvement or other alteration of any structure,
>
> being works which do not materially affect the external appearance of the structure so as to **render the appearance inconsistent** with the character of the structure."

24. The first phrase describes **acts**, the second **purposes** and the third **effect**.

25. It is clear when the paragraph is analysed in this way that work that is exempted development can materially affect the external appearance of the structure provided it does not make it inconsistent with its own character or that of neighbouring structures. This is precisely the point that was decided in *Cairnduff v. O'Connell* [1986] 1 I.R. 73, where the Supreme Court was satisfied (although Griffin J. had some reservation on the point) that the works did materially affect the external appearance of the defendant's house. The Court held that the work was not inconsistent with the character of the house itself or adjoining houses and was therefore exempted development. The balcony and staircase at the back of the defendant's house could well be described as an extension, as well as an alteration or an improvement.

26. I should add perhaps that the word "alteration" does in my view have to be understood in a different sense in s. 4(1)(h) from its general definition in section 2. When it is defined in section 2 as including painting etc., it has a different meaning from s. 4(1)(h) which refers to maintenance, improvement or other alteration. The s. 2 definition describes act or activities, including painting or plastering, which result in a material impact on the external appearance of the building so as to make it inconsistent with the character of the building or with neighbouring structures. Alteration in this sense expressly envisages the material impact that is inconsistent with, for example, the character of the building. By contrast with this, alteration in s. 4(1)(h) expresses purpose. Moreover, the provision excludes work that changes the exterior so as to make it inconsistent. If one does not accept the different functions of the word in s. 2 and s. 4 (1)(h), alteration seems to have more or less opposite and certainly conflicting meanings in these two parts of the Act. Even if that were the case, it seems to me that these provisions and definitions are not intended to express legally watertight and hermetically sealed concepts and the expressions have to be given their reasonable meanings in the particular contexts in which they are used. This approach is consistent with proper principles of statutory interpretation, which look to the overall scheme and the context in which expressions are used.

27. In the result, the Inspector and the Board did not ask the correct question or questions. It was clear that works had been carried out. The fundamental question therefore was not about the nature of the work done but rather about its purpose and effect. Did the work make the structure inconsistent with its character? If it did not, the next question was whether the work was done for the maintenance, improvement or other alteration of the structure. In the circumstances of this case, I think that neighbouring structures did not enter into the question of whether the works made the quarry inconsistent with them.

28. This misunderstanding of s. 4(1)(h) in its statutory context is fatal to the decision made by the Board.

29. I now turn to the second issue that has to be considered. The Board's conclusions on this were: -

> "(h) The manufacture of blocks is dependent on the use of a large area of land for drying and storage which gives rise to material planning effects, and
>
> (i) The production of concrete blocks is an intensification of use that consists of a material change of use of the land:"

30. The Inspector's reasoning appears at pp. 11 and 12 of her report. In the following quotation, which is a single paragraph in the original, I have broken the passage into two for ease of discussion.

"Manufacture of concrete blocks

> "I propose to now discuss the manufacture of concrete blocks and whether or not this constitutes a material change of use. In relation to the production of blocks instead of 25% of the production of readymix I accept the

points made on behalf of the operator in relation to the absence of material planning impacts in terms of the type and quantities of raw materials used and the traffic implications. I agree that the development would not constitute an intensification of use above the production level of the concrete in terms of materials sourced from the site and then processed and exported from the site in relation to noise and dust impacts, I note that the hard surfaced yard is close to a dwelling house and consider that the regular movement of blocks would be likely to give rise to some additional noise and dust related disturbance. In addition, as the operators submissions indicate there are material changes in terms of the land use requirements as the concrete block production relies on the use of an extensive area of land for the purpose of open storage and I consider that in this respect there is a significant change in the nature of the process and an intensification of use of the lands.

"The production of concrete blocks is reliant on the laying out of 2 acres of a 130 acres site, of which only 96 acres is used for excavation, and the use of that land for drying and storage of blocks. There are changes in terms of the surface water flows in the area and the extensive nature of the operation in land use terms compared with the production of readymix with possible resulting impact on geology and hydrogeology. The development of an extensive hard surface area at this location would also militate against the development of a habitat which would potentially be of ecological importance and this is a further consequence in terms of the proper planning and sustainable development of the area. I conclude that the development of a 2 acre hard surfaced area has material planning consequences. The process of production of concrete blocks is therefore materially different to that of production of readymix and constitutes a material change of use."

31. The applicant company challenges the decision of the Board and the conclusions of the Inspector in respect of material change of use on the grounds that the Inspector did not approach the question in a legally appropriate or permissible way and, secondly, that she took into account irrelevant considerations and appeared to have confused or conflated the concepts of works and use in the legislation which is of central importance in this case.

32. The Board's responses are summarised in two paragraphs of its written submissions. As to the decision on intensification of use para. 19 says:

The Board followed the Inspector's recommendation in concluding at (h) that the manufacture of blocks was dependent on the use of a large area of land for drying and storage which gives rise to material planning effects and at (i) that the production of concrete blocks was an intensification of use that consists of a material change of use of the land. It is submitted that the Board's conclusion on this point was amply supported by the material before it, principally the inspector's report.

33. On the complaint that the inspector and the Board failed to distinguish works from use in the interpretation and application of the legislation, para. 22 set out the definition of "use" in s. 2(1) and para. 23 submits:

The Applicant's reliance on this measure is misplaced. The purpose of the exclusion in the definition, as noted by Keane J in *Kildare County Council v. Goode* [1999] 2 I.R. 495 is simply to ensure that planning permission is not required for statutorily exempted works merely by reason of the fact that the carrying out of such works would also be a use. The two categories are not mutually exclusive and the Supreme Court recognised that certain activities - in that case notably quarrying- may be characterised as both. Moreover, there is no authority for the proposition that the materiality of a change of use cannot be assessed by reference to impacts associated with works.

34. The applicant's contention is first that the inspector failed to establish an essential baseline for the planning impacts that result from the original use, for the purpose of comparing those impacts with the results of the present use. The earlier use "A" must first be established before it can be compared with the later use "B" and the proper mode of comparison is not simply to assess the difference in the nature of the operations but to contrast the planning impacts of the two different activities or levels of activity. It seems to me that this is requiring too formal an approach by a planning Inspector. I think it is legitimate to consider the available evidence and to deduce to the extent that is legitimately possible the quantum of change that has taken place and the resulting planning implications. And that is primarily a matter for the planning Inspector and not for the court. Mr. Galligan S.C. for the applicant relies on *Galway County Council v. Lackagh Rock Company* [1985] 1 I.R. 120 but I do not read that case as laying down a rigid rule as to the mode of comparison or as excluding reference to relevant evidence. I reject this ground accordingly.

35. Another objection that the applicant makes in relation to the taking into account of irrelevant considerations has more substance. If the Inspector had stopped about half-way down the paragraph I have quoted above, at the point where I have made a break, I think that this error would have been avoided. Although I believe that the evidence is fairly thin, it is nevertheless in the realm of planning to consider all the matters that the Inspector detailed up to that point in her analysis. Had she reached a conclusion as to material change of use at that point, I do not think that it could be challenged since I have rejected the applicant's main complaint that it failed to establish the original use.

36. The problem is that the Inspector then went on to take into account matters that in my view were irrelevant to the issue or that were speculative or confusing and the combination of these inappropriate conclusions and observations with the earlier, legitimate ones contaminated the process and rendered it invalid. Let me be more specific. The visual impact of the development when viewed from surrounding lands is of questionable relevance in this case to the issue of material change of use; the fact that natural regeneration of the site could have occurred if the area was not surfaced is wholly irrelevant – it may be relevant to other aspects of planning process but I simply cannot see how that matter can affect a decision as to whether there has been a material change of use. The next sentence in the Inspector's reasoning deals with changes in surface water flows with "possible" resulting impacts on geology and hydrogeology. The hard surface "would also militate against the development of a habitat which would potentially be of ecological importance". This includes no more than possible impacts and changes that might potentially be of ecological importance. This is not the language or the thinking that is expected of an expert making an assessment for the purpose of reporting to a statutory body such as the respondent. The Inspector's conclusion could have stood on its own but was fatally undermined and devalued by the inclusion of these irrelevant matters, some of them only on a basis of possible or potential impacts. The Inspector's conclusion on this question as to material change of use must also be invalidated.

37. Turning to the third objection that has to be considered, namely, the proposition that the Inspector has invalidly

confused or conflated "works" and "use", I think this complaint is also justified. In the case of an exempted development, the qualifying works can be undertaken because they are excluded from the planning process. It follows that they will often if not always affect the ecology of the land on which the works are carried out. They will do so more or less permanently. If an addition (or extension) is built to the front or the rear of a house, the ground underneath is permanently affected, so are the water flow and the ecology. The same consequences arise where the planning authority gives planning permission. In *Cairnduff v. O'Connell*, Finlay C.J. said with reference to the similar exempted development provision in the 1963 Act:

> "The scheme of the statute, however, appears clearly to me to be that work by way of construction or alteration and a change of user are separately dealt with. Therefore, to construe the section as to permit on unbuilt land the carrying out of works which are an exempted development but are for the purpose of adapting that land for a clear change of user and to prohibit the carrying out of works within the same category on a structure would, in my view, be to create a meaningless anomaly."

38. A planning authority will take into account the use to which developed land will be put when it is considering whether or not to give planning permission. There is therefore an overlap of the concepts of works and use when permission is being granted. The same consideration can arise if the development is exempted. Part of the process deals with the works that are actually carried out on the land and then there is the use to which the developed area is put. If an exempted development were put to a use that was wholly inconsistent with the building then the local authority might challenge it because it was a material change of use of the land.

39. That is the situation that arose in *ESAT Digifone v. South Dublin County Council* [2002] 3 I.R. 585. There, the real issue was not the works but the change of use from a business outbuilding to a centre of communications, which was considered a material change of use and was condemned on planning grounds as a result. Kearns J (as he then was) said, at p. 596:

> "Insofar as the placing of telecommunications equipment is concerned, I cannot see how, insofar as the same may be described as works, it can be seen as going to either the "maintenance, improvement or other alteration of any structure" so as to qualify for exemption under s. 4(1)(g). It seems to me that the activity associated with the placing and utilisation of the telecommunication equipment falls to be considered more properly as a change of use, whether taken together with the placing of the antennae or by itself."

40. Suppose the householder builds a modest extension to his house. If it is consistent with the neighbouring structures that will constitute exempted development, generally speaking. If he uses that as a kitchen or a garage or an extra bedroom that is consistent with the whole structure as extended. However, if a communications company were to load up the extension with sophisticated electronics for the purpose of supplying a major part of a city with a mobile phone service, the situation would be entirely different. It would not be entirely different by reason of the works that were carried out, but because of the radical change to the use of the premises. Applying this thinking to the present situation, it seems to me that the Inspector should have looked at the concreted area and asked the question whether the use of that area of land for storing or resting or drying blocks in connection with block making operations constituted a material change of use in all the circumstances. She did not do that. She addressed herself to the question whether the concreted surface itself amounted to a material change of use and that is where, in my view, she fell into error and did indeed conflate works and use, as submitted by the applicant.

41. My conclusions on these issues mean that the impugned decision by the respondent must be quashed and I propose to order accordingly.