OUTER HOUSE, COURT OF SESSION

[2026] CSOH 109

P188/26

OPINION OF LORD SUMMERS

in Petition of

CHRISTOPHER MORAN ENERGY LIMITED

Petitioner

for

interdict and interdict ad interim

Petitioner: D Thomson KC, R Anderson KC; Brodies LLP
Respondent: Tosh; Lindsays LLP

5 November 2026

Introduction

[1] In this petition Christopher Moran Energy Limited, seek interdict and interdict ad interim against Galileo Empower Limited ("GEL"), Diarmuid Twomey and Colin Williams. The petitioner and GEL, the first respondent, are partners in a joint venture company called Dorenell Windfarm Extension Limited ("DWEL"). The second respondent is a director of GEL. The third respondent is a director of DWEL. DWEL is not a respondent in these proceedings. The petition was served on DWEL as an interested party.

[2] The petitioner avers that the Scottish courts have jurisdiction. The petition sets out various grounds of jurisdiction in statement of fact 3. The petitioner avers inter alia that the

place of the apprehended wrong is in Scotland, that the breach of contract upon which it relies occurred in Scotland and that most of the parties are domiciled in Scotland.

[3] The petitioner avers that the second and third respondents acting through DWEL entered into certain memorandums of understanding in connection with the construction of a windfarm in Dufftown, Moray, Scotland. The petitioner avers that they were not entitled to do so. The petitioner avers that the first respondent was in breach of Clauses 4.5, 4.7 and 5.6 of the shareholder agreement between the petitioner and first respondent and DWEL and that the contracts mentioned above were not approved by DWEL's board. The petitioner makes a variety of averments about why the operating sub-committee was not entitled to enter into the contracts in question (see eg statements of facts 5 and 6).

Jurisdiction

[4] The respondents have tabled two preliminary pleas that challenge the jurisdiction of the Scottish courts. The first avers that the courts of England and Wales have exclusive jurisdiction. The respondents found upon the Civil Jurisdiction and Judgments Act 1982, Schedule 4, paragraph 11(b):

> "11. The following courts shall have exclusive jurisdiction, regardless of domicile:-
> (a) […]
> (b) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, the courts of the part of the United Kingdom in which the company, legal person or association has its seat;" (my underlining)

[5] That provision is given effect to by section 16 of the Civil Jurisdiction and Judgments Act 1982. The respondents submit that the proceedings have as their object the validity of the constitution of DWEL.

[6] The petitioner does not dispute that DWEL is a company registered in England and Wales and that if the object of the petition is to challenge the validity of DWEL's constitution the action should be commenced in England and Wales. The petitioner submits that there is no dispute about the validity of DWEL's constitution and that the object of the proceedings is to prevent DWEL acting inconsistently with the shareholders agreement. It falls to me therefore to decide what in substance the petition is about.

The constitution

[7] The first issue to address is what the word "constitution" in paragraph 11(b) means. The respondents referred me to the Oxford English Dictionary (A2) and submitted that the constitution was how the company was constituted or made up, including the arrangement or combination of its parts. The petitioner relied on the definition found in section 17 of the Companies Act 2006. Section 17 states as follows:

> "Unless the context otherwise requires, references in the Companies Acts to a company's constitution include:
> (a) the company's articles, and
> (b) any resolutions and agreements to which chapter 3 applies (see section 29)."

Chapter 3 of the 2006 Act consists of sections 29 and 30:

> "29 Resolutions and agreements affecting a company's constitution
>
> (1) This Chapter applies to–
> (a) any special resolution;
> (b) any resolution or agreement agreed to by all the members of a company that, if not so agreed to, would not have been effective for its purpose unless passed as a special resolution;
> (c) any resolution or agreement agreed to by all the members of a class of shareholders that, if not so agreed to, would not have been effective for its purpose unless passed by some particular majority or otherwise in some particular manner;
> (d) any resolution or agreement that effectively binds all members of a class of shareholders though not agreed to by all those members;

(e) any other resolution or agreement to which this Chapter applies by virtue of any enactment.

(2) References in subsection (1) to a member of a company, or of a class of members of a company, do not include the company itself where it is such a member by virtue only of its holding shares as treasury shares."

[8] Section 30 requires any document falling within section 29 to be sent to the Registrar of Companies.

[9] The word "constitution" has been used over many years to describe the foundational documents of a company. Historically the Memorandum of Association and the Articles of Association were regarded as the key constitutional documents. But the legal requirements of the Companies Acts have changed. A Memorandum of Association is no longer required at the incorporation of a company. When the Civil Jurisdiction and Judgments Act 1982 was enacted, there was no statutory definition of what constituted a company's constitution. I do not consider that section 17 of the Companies Act 2006 is irrelevant however to the definition of a constitution. It supplies useful guidance as to what are considered constitutional documents. The wording of section 17 states that a company's constitution "includes" the Articles of Association as well as the documents to which chapter 3 of the Companies Act 2006 applies. Section 29 provides a list of the sort of document that would be considered constitutional (see (a) - (e)). The special resolutions and shareholders agreements to which section 29 refers have a common feature. They are those which, by virtue of their nature, are fundamental to the workings of the company. This is obviously so with the Articles of Association. Likewise, where a matter is subject to a special resolution or agreement by all members of a company it can be reasonably inferred that the issue is regarded as fundamental to the company's structure or operation. I can see that some

agreements may be hybrid in character and contain provisions that are constitutional and others that are not.

[10] Section 30 requires constitutional documents to be sent to Companies House for registration. As I understand it, the shareholders agreement, that the respondents assert is constitutional and on which the petitioner depends, was not sent to Companies House, and I infer that at the time it was not thought constitutional.

The object of the proceedings

[11] It is evident from the terms of the petition that the petitioner did not think it was challenging the validity of the constitution of DWEL. There are no averments to that effect. The stated object of these proceedings is to interdict the respondents from doing certain acts that it is said are contrary to the shareholders' agreement. I accept however that if the respondent can show that in relying on the shareholders agreement the petitioner is of necessity challenging the validity of the constitution then Schedule 11(b) would be engaged. In order to decide that issue it is necessary to examine the petition. It is apparent that the petition does not set out in detail the contractual case against the respondents. No doubt a detailed account of the claim and the damages sought is for another day. The petitioner does refer, however, to the following clauses:

> "4.5. Board meetings normally shall be held Quarterly (or otherwise by agreement of the Shareholders). At each meeting, the members shall determine the date / location of the next meeting. Meetings may be held at either the Project Company's registered office or elsewhere in another suitable location in the U.K. as may be agreed from time to time. Board meetings may be held in person, or electronically pursuant to clause 4.5.6, or may be hybrid (that is, a combination of in-person attendance and virtual attendance pursuant to clause 4.5.6). Save as otherwise agreed by the Directors:
>
> Clause 4.7 Subject to clause 5, Board decisions shall require the approval of at least one of CMEL's Directors together with at least one of the Developer's Directors.

> Clause 5.6 Any matter referred to in clause 5.5 will require the approval of the Board, and any approval of the Operating Sub-Committee of such a matter will be deemed to be null and void."

[12] I consider that these clauses are operational or administrative in nature. They describe the frequency of board meetings, board approval requirements and the role of the operating sub-committee. They are not subject to special resolution procedure and are permissive in character. Although Clause 5.6 describes any action taken in breach of Clause 5.6 as "null and void" the nullity arises from breach of an operational requirement not a clause that goes to the constitution of the company, as I have defined it.

[13] I notice that the shareholders agreement states as follows at Clause 4.1: "Company decisions shall be made by the Board in accordance with the terms of this Agreement and the Constitution." This suggests that the shareholders agreement and constitution were seen by the authors as separate matters. If that is a correct view of the company's set up, the respondent's submission is misplaced. The respondents did not point to the breach of any clause outside the scope of the shareholders' agreement.

[14] The petitioner also avers that DWEL has acted in breach of the delegated services agreement. The petition does not refer to any specific clauses in this agreement. But again, it is apparent that this agreement covers operational, not constitutional matters. The respondents did not identify in oral argument any clause in the delegated services agreement that they considered to be of a constitutional nature. I do not consider that the respondents have demonstrated that either of these agreements contains clauses of a constitutional nature (see *Gower Principles of Modern Company Law*, 12th Edition, p 210 paragraph 10.12).

The validity of the constitution

[15] Paragraph 11(b) refers to other grounds of exclusive jurisdiction, namely proceedings that have as their object a "nullity" in the company's constitution or proceedings for the "dissolution" of a company. It seems to me that one reason exclusive jurisdiction is given to the courts of the jurisdiction where a company is registered is because an invalidity or nullity goes to the faith of the register. The obvious place to correct an error in a register is in the jurisdiction where the register is situated. In interpreting paragraph 11(b), I consider I should look at these other grounds of exclusive jurisdiction. It seems to me that they involve issues that are fundamental to a company's makeup and not just those that are incidental to the arrangement or combination of its parts. I consider that I should follow the ejusdem generis rule of construction and proceed on the basis that the "validity of the constitution" involves similarly fundamental issues.

The organs of the company

[16] The respondents sought to persuade me that exclusive jurisdiction was also conferred on the courts of England and Wales where there was a challenge to the "validity of decisions of organs" of a company. The respondents submitted that the sub-committee referred to in the introduction was an organ of DWEL and the validity of its decision was subject to the exclusive jurisdiction of the courts of England and Wales.

[17] Schedule 4 of the 1982 Act enacts a modified version of chapter II of the Brussels I Regulation recast. It provides at Article 24(2):

> "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
>
> […]

> (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law".

[18] In the UK the equivalent rule is found in Schedule 4 paragraphs 4 and 11(b). Paragraph 4 provides that proceedings which have as their object a decision of an organ of a company "may" be brought in the courts of that part of the United Kingdom in which that company has its seat. Paragraph 11(b) is in the terms set out above.

[19] The respondents sought to persuade me that I should follow the wording of the regulation which gives exclusive jurisdiction to the courts where the company has its seat in cases where the proceedings have as their object the validity decisions of the organs of the company.

[20] Such a submission flies in the face of Schedule 4. Where the proceedings have as their object the validity of a decision of a company, Schedule 4 does not give exclusive jurisdiction to the courts of the seat of the company, in this case England and Wales. It offers non-exclusive jurisdiction. In such a case proceedings may be brought in Scotland. If there was any doubt about that it is dispelled by Lord Reed in *McGowan* v *Summit at Lloyds* 2002 SC 638 at paragraph 11 where he held that the absence of any reference to decisions of the organs of a company is deliberate and that proceedings with that object may be found in a non-exclusive special ground of jurisdiction in paragraph 4 of Schedule 4 of the 1982 Act. In that situation the task of the court is to give effect to an arrangement under domestic law, with which the jurisprudence of the European Court of Justice on Article 24(2) has no bearing.

[21] I hold therefore that the petition is not subject to the exclusive jurisdiction of the courts in England and Wales in terms of paragraph 11(b). I consider that the averments of jurisdiction in the petition are sufficient to permit the petition to continue. I notice that the shareholders agreement and the delegated services agreement each confer non-exclusive jurisdiction on the English courts. Given my conclusion (above) therefore it is open to the petitioner to elect to litigate in Scotland rather than the courts of England and Wales.

Forum non conveniens

[22] For completeness I should add that the respondents also tabled a plea of forum non conveniens. In order to sustain such a plea, I would need to be satisfied that "there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." *Spiliada Maritime Corporation* v *Cansulex Ltd* [1987] AC 460 at p 474. The petitioner submits that the Scottish courts are the most suitable forum for this dispute. The windfarm is in Scotland, most of the witnesses are in Scotland, and the interdicts are sought against wrongs that are apprehended in Scotland. The petitioner submits that the law is the same on both sides of the border. The principles of contractual construction are the same and the relevant provisions of company law are found in UK statutes. In opposing these submissions, the respondent raised the possibility that they might rely on estoppel and submitted that the English doctrine of estoppel differed from personal bar. That may be so, but I do not have any basis upon which to think that personal bar will be an issue in this case and if so in what way. Given the obscurity that surrounds this point I am not inclined to allow it to get in the way of the progress of the petition. The petitioner points out that despite the present petition having been served some time ago, no corresponding action has been raised in England and there was no need to

consider whether these proceedings should be sisted so as to allow English proceedings to continue unhindered. No evidence was provided to suggest that it would be cheaper to litigate in England. The petitioner submitted that even on the respondents' own analysis, it would be competent for this court to grant an interdict ad interim pending any "contemplated" English proceedings. I agree. I am not therefore minded to sustain the respondents' second plea-in-law.

Conclusion

[23] I will therefore repel the first and second pleas-in-law for the respondent and put the case out by order to allow submissions to be made on expenses and further procedure. I am not clear whether an interim order is sought by the petitioner. Parties can address me on that issue at the by order hearing.