SECOND DIVISION, INNER HOUSE,
COURT OF SESSION

[2013] CSIH 116

P698/12

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK

in the reclaiming motion

in the Petition

SUSTAINABLE SHETLAND

Petitioners and Respondents;

against

THE SCOTTISH MINISTERS

Reclaimers;

and

VIKING ENERGY PARTNERSHIP

Interested Party:

for Judicial Review of a decision of the Scottish Ministers dated 4 April 2012

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Lord Justice Clerk

Lady Smith

Lady Dorrian

Sustainable Shetland: Sir Crispin Agnew QC; Drummond Miller LLP

Scottish Ministers: Thomson QC, Sheldon; Scottish Government Legal Directorate

Viking Energy Partnership: Wilson QC, ME Mackay; Gillespie Macandrew LLP

Trump Organization LLC and others: Steele QC, Burnet; Dundas & Wilson CS LLP

AES K2 Ltd and others: Howie QC; Eversheds LLP

RSPB: van der Westhuizen; Patrick Campbell & Co

The Amicus Curiae (Moynihan QC)

3 December 2013

Background

[1] On 4 April 2012, the Scottish Ministers granted consent to the Viking Energy Partnership for the construction of a substantial windfarm in Shetland. The consent was issued under section 36 of the Electricity Act 1989. At the same time, the Scottish Ministers directed that separate planning permission was not required (Town and Country (Planning) Act 1997 s 57(2)). In or about July 2012, Sustainable Shetland, which is an unincorporated association, presented a petition for judicial review challenging the legality of the Scottish Minister's decision on the basis, *inter alia*, of their failure to take "proper account" of the effect of the windfarm on the whimbrel, a migratory bird of the curlew genus. A contention that the Scottish Ministers ought to have held a public inquiry was ultimately rejected and is of no relevance now.

[2] The case called before the Lord Ordinary for a four day First Hearing in January 2013. Sundry procedural and substantive arguments appear to have been presented over a period of several days in January, February and April 2013. In May 2013, the First Hearing was continued to a further four day diet in June 2013 with a two day hearing on "the competency" to be heard on 20 and 21 June 2013. There appears to have been no point of "competency" raised until the Lord Ordinary questioned whether, looking at the Electricity Act as a whole (including, in particular, schedule 9), consent could be given to a person who did not already have a licence to generate electricity.

[3] According to Sustainable Shetland, they were brought under pressure by the Lord Ordinary to introduce this competency point into the pleadings. They bowed to that pressure, for reasons which were not entirely clear, and lodged a Minute of Amendment on 19 June 2013 (see correcting interlocutor of 4 October 2013) which contained a new eighth plea-in-law. This rather cryptically states that the application for consent had been incompetent "for the reasons condescended upon". In due course, the Lord Ordinary sustained this plea-in-law.

[4] It is of importance to note that, notwithstanding that it was they who introduced the new plea-in-law and thus the issue into the pleadings, at the hearing on the applications before this court, Sustainable Shetland specifically stated that they were not insisting upon this plea and would not be presenting any argument based upon it. Just exactly where this leaves the competency argument will be a matter for the court at the Summar Roll hearing to determine. Meantime, however, an *amicus curiae* (GJB Moynihan QC) has been appointed at the suggestion of the Procedural Judge, should the court wish to hear argument on the point.

The Applications to Compear and Intervene

[5] As will be seen, the Lord Ordinary's decision has caused a degree of consternation amongst windfarm developers and, perhaps, others. Hitherto, it has not been the understanding of developers, objectors or the granters of consents (the Scottish Ministers), that a developer requires to be the holder of a generating licence before consent can be applied for or granted. Following upon the reclaiming motion against the Lord Ordinary's decision, a variety of parties sought to intervene in the process under and in terms of Rules of Court 58.8 and 58.8A.

[6] RCS 58.8 is headed "Compearing Parties". Sub rule (1) provides that persons, to whom intimation of a petition for judicial review has been made, and who intend to appear in the process, should intimate that intention and lodge answers and any relevant documents. The next stage in the proceedings is the First Hearing, which will have been fixed in advance of intimation (RCS 58.7) and at which the court requires to hear all the parties at first instance. However, RCS 58.8 continues:

"(2) Any person not specified in the first order made under rule 58.7 as a person on whom service requires to be made, and who is directly affected by any issue raised, may apply by motion for leave to enter the process, and if the motion is granted, the provisions of this Chapter shall apply to that person as they apply to a person specified in the first order."

[7] RCS 58.8A is headed "Applications for public interest intervention". It states that:

"(1) A person to whom rule 58.8.(2) does not apply may make an application to the court for leave to intervene -

(a) in a petition for judicial review;

(b) in an appeal in connection with such a petition...".

The court may grant leave only if it is satisfied that the applicant wishes to raise an issue "of public interest" which is relevant to the cause and likely to assist the court and that the intervention will not cause undue delay (RCS 58.8A.(6)). If it grants the application, the mode of intervention, other than in exceptional circumstances, is by way of a written submission not exceeding 5000 words.

THE TRUMP ORGANIZATION

[8] The Trump Organization (Trump) seek to enter the process and to intervene under respectively both RCS 58.8.(2) and 58.8A. They have presented their own petition for judicial review of decisions of the Scottish Ministers to grant a section 36 consent for the construction of a windfarm off the coast at Balmedie, Aberdeenshire, in view of their golf course and residential development on the Menie Estate. A hearing took place on 12 to 15 November 2013. Trump advanced the competency point at that hearing and await the Lord Ordinary's decision on that matter. They had sought to persuade the Lord Ordinary to report the issue to the Inner House, but that application was refused.

[9] Trump's concern is that Sustainable Shetland have now stated that they do not seek to argue the competency point under reference to their eighth plea-in-law. This could have the effect of the plea being repelled; thus affecting their own plea in their parallel petition. It would, contend Trump, be advantageous if the court were to have a contradictor on what is an important point. Accordingly, they wish to fulfil that role in this reclaiming motion. They could, in addition to the points specifically raised already, address the issue of offshore windfarms. It was of some note that there had been a proposal in Parliament that the Energy Bill, currently before the House of Lords, be amended so as to remedy any apparent deficiency identified by the courts in the existing electricity legislation. However, it had been argued that the House of Lords should not anticipate the decision of the Inner House.

AES K2 LTD AND OTHERS

[10] These applicants are various developers of "larger scale" onshore and offshore windfarms. It is stated that they have a "clear interest" in the competency issue, which has implications for the development of such windfarms and which may have a commercial impact on their businesses. Reference was made to *AXA* v *Lord Advocate* 2012 SC (UKSC) 122 (Lord Hope at para [63], Lord Reed at paras [170] - [174]). It was maintained that all applicants for the construction of electricity generating stations were "directly affected" by the issue of competency. They all had cases at various stages of the consent process and could stand to lose large sums of money. The Rules of Court had to be read as if they gave the applicants the same rights as those parties already involved in the appellate process.

ROYAL SOCIETY FOR THE PROTECTION OF BIRDS

[11] The RSPB applied to intervene under RCS 58.8A. They had been consulted at the stage of the application to the Scottish Ministers and had made representations at that time. These representations had been rejected. They had considered applying for judicial review themselves but, having regard to the potential expense, had decided not to do so. They had also determined not to enter the process at the Outer House stage. However, having regard to the focus on the proper interpretation of the Birds Directive (Council Directive 2009/147/EC), they had considered that, after all, there were wider considerations, of which the RSPB had an unique understanding. They could assist the court on the proper interpretation of the Directive. Their intervention would not unduly delay the process, given that, notwithstanding the written terms of the motion, they would be content to submit a written submission, although they would prefer to have the ability to lodge a 10,000 word presentation.

SCOTTISH MINISTERS

[12] The Scottish Ministers opposed the application for Trump. Applications under RCS 58.8.(2) and 58.8A involved different considerations and both could not be invoked at the same time. Trump had their own proceedings in which they had addressed the competency point. It could not be the case that every objector to a windfarm was entitled to intervene in applications for other windfarms. The application from AES K2 and others was not opposed given their financial interests in the consents which they held or were applying for. Although it had not been explained why the RSPB had not come in at the Outer House stage, there was force in the point that the interpretation of the Directive had not been put in issue prior to that stage.

VIKING ENERGY PARTNERSHIP

[13] VEP are a partnership between Scottish & Southern Energy plc and a trust managed by Shetland Council and set up for the benefit of the islands in the era after the oil industry. They opposed all of the interventions. The submission of the Scottish Ministers was adopted in relation to Trump. VEP were concerned that the six day hearing set down for February 2014 would be put in jeopardy by the interventions. The RSPB intervention was problematic because, by their reference to their expertise, it seemed that they intended to introduce new factual matter. If they had been concerned that the Habitat Management Plan devised would not conform to the Birds Directive, they ought to have pursued that objection by way of judicial review. The RSPB had issued a press statement after the decision to grant the consent to the effect that, although they were disappointed, they would work with VEP on an appropriate management plan. The implications of allowing the RSPB in now was that it would give objectors an ability to intervene at a much later stage than that envisaged by the rules.

SUSTAINABLE SHETLAND

[14] As noted above, Sustainable Shetland stated that they would not be insisting on their new eighth plea-in-law. They would be appearing at the Summar Roll only to resist the reclaiming motion on its environmental merits. On that matter, they did not oppose a written submission, but did resist an oral submission, from the RSPB.

Decision

[15] The issue of whether a party has title and interest (or "standing" as it may now be) to take or resist judicial review proceedings in the modern era has been examined in some detail in *AXA* v *Lord Advocate* 2012 SC (UKSC) 122, where the court determined that the principles set out almost a century ago by Lord Dunedin in *D & J Nicol* v *Dundee Harbour Trs* 1915 SC (HL) 7 (at pp 12-13) were no longer to be taken as definitive in judicial review petitions involving issues of public, as distinct from private, law. Lord Dunedin had referred to the need for a person to be "a party (using that word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies". Lord Hope (at para [62]) and Lord Reed (at para [170]) agreed that title and interest should no longer rest upon a concept of rights but on one of interests.

[16] Lord Hope considered that "a person could have sufficient interest to invoke the court's supervisory jurisdiction in the field of public law even although he cannot demonstrate that he has a title, based on some legal relation, to do so" (para [62]). However, "the words 'directly affected' which appear in RC[S] 58.8.(2) capture the essence of what is to be looked for" (para [63]). Lord Reed stressed (at para [169]) that "the essential function of the courts is ...the preservation of the rule of law, which extends beyond the protection of individuals' legal rights". A principle of standing based on "the concept of interests" was needed (para [170]) and this required that each case be decided in its particular context. Thus:

"In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought to court, and that in turn might disable the court from performing its function to protect the rule of law. ...What is to be regarded as sufficient interest to justify a particular applicant's bringing a

particular application before the court, and thus conferring standing, depends therefore upon the context, and in particular what will best serve the purposes of judicial review in that context."

In dealing with the question of standing to take part in proceedings other than as petitioner or respondent, Lord Reed stated (para [172]) that "standing should depend upon demonstrating sufficient interest in the issues raised by the application".

[17] Applying the interest based approach to applications to enter the process under RCS 58.8.(2), there can be little doubt that, at the stage of the lodging of the petition, there was no question of Trump or AES K2 and related companies having any interest in the cause. Whether or not the Shetland windfarm consent was unlawful or not was, so far as is known, of no concern to them. It is probably of no concern to them now either and that may be significant in deciding whether they have any interest to enter this process. They have only become interested, in a broad sense, because of the Lord Ordinary's decision that the application for consent was itself incompetent. Yet had the Scottish Ministers not reclaimed the decision of the Lord Ordinary, neither Trump nor AES K2 would have had any prospect of any remedy in respect of her judgment, since the process into which they now seek to enter would have been at an end.

[18] The question is whether it can be said that either Trump or AES K2 and the related companies are "directly affected" by the issues raised in the petition. There are many litigations in the public and private law spheres in which the legal reasoning of the court may turn out to "affect" other persons, were that reasoning to become established as universal principle applicable to everyone's affairs. However, that cannot result in every person, who is, potentially, affected by such reasoning, being able to enter any process in which a decision might turn out to have a bearing, however peripheral, on their own private interests. As a general rule, if a public law decision is challenged, for whatever reason, the range of persons able to enter the process remains limited to those who can show an interest in the outcome of the case; that is to say not in the potential legal reasoning employed by the court in reaching a decision, but in the decision itself. Neither Trump nor AES K2 and the related companies have any interest in the outcome of whether the Shetland windfarm goes ahead. They may conceivably be "affected" but they are not "directly affected" by the issues in the petition. For that reason, the applications to enter the process under RCS 58.8.(2) are refused.

[19] That having been said, Trump have already raised the competency point in their own litigation. The case is at avizandum. Whatever the outcome of the decision on competency, it (as distinct from the decision in this case) will be binding on the parties in that process. If the decision does not favour Trump, they are at liberty to reclaim and to seek to conjoin that reclaiming motion with the current process, in which a hearing is scheduled for February 2014. If at any stage, AES K2 and the related companies have an application refused on the basis that it is incompetent for the reasons given by the Lord Ordinary in this case, they may challenge that decision in judicial review proceedings of their own. Should the decision of the Lord Ordinary be upheld in this process, that may provide an obstacle in their way, but that is no different from the effect of any precedent old or new. The remedy of appealing further would still be open to them, if so advised.

[20] It is worth adding that, whilst there are undoubtedly peculiarities in this case because of the manner in which the competency of the application for consent was raised, RCS 58.8.(2) is designed primarily as an Outer House procedure. It is intended to catch the situation where a person, to whom intimation ought to have been given, has had no notice of an application, the issues in which have a direct effect upon him. If the application is granted, the assumption in the rule is that the applicant will become a respondent, lodge answers and appear at a First Hearing. As distinct from the express terms of RCS 58.8A, the rule is not designed to be invoked at the appellate stage, when the first instance procedure has come to an end. It may be that there will be cases in which a person, who has had no knowledge of a petition affecting him, will seek to enter the process at the appellate stage. He may be allowed to do so. If so, the procedure, which should normally follow upon such permission, is a return to the First Hearing stage to enable the court to determine at first instance the issues raised in any answers lodged by the new party.

[21] RCS 58.8A raises different considerations. It is intended to deal with public interventions in which the applicant is not "directly affected" by the issues raised. A party cannot both enter and intervene in the same process. In the case of Trump, they are not advancing a public interest point. However altruistic Trump may be, the point which they seek to make is one intended as a protection of their private interests in the marketing of the Menie development. The application from Trump under this rule must therefore fail.

[22] In relation to the RSPB, the peculiarity is that their interest, in the protection of the birdlife potentially affected by the windfarm, was recognised at a very early stage when they were consulted by the Scottish Ministers. They objected to the development. Their objection was not sustained, but they could have raised their own judicial review petition to challenge that decision. They could have sought to intervene in that process, having regard to the birds issue focussed in it. They elected not to do so. In these circumstances, the court does not consider it appropriate to allow them to enter the process at the appellate stage under the guise of a public interest intervention. Had they considered that their objections ought to have been sustained, or challenged any other aspect of the consent, they had the opportunity to do so at least in the Outer House proceedings. In any event, standing the positions of Sustainable Shetland and the Scottish Ministers, the court does not consider that any propositions advanced by the RSPB are likely to assist the court. The court will be hearing full argument upon the birds issue as focused in the grounds of appeal and the answers to them.

[23] The court has accordingly refused the motions from all parties to compear and/or intervene.