APPENDIX ONE

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION
[2016] CSIH 10

P1328/14

Lady Paton
Lord Menzies
Lady Clark of Calton

OPINION OF THE COURT
delivered by LORD MENZIES
in the Reclaiming Motion of
J MARK GIBSON

Petitioner and Reclaimer;

for judicial review of a decision of the Scottish Ministers, Energy and Climate Change Directorate, dated 23 July 2014

Petitioner: Findlay, Burnet; Morton Fraser LLP
Respondents: (The Scottish Ministers) Johnston QC, M Ross; Scottish Government Legal Department
Interested Party: (Scottish Power Renewables (UK) Ltd) Armstrong QC, A Sutherland; MacRoberts LLP

10 February 2016

Introduction

[1] The petitioner lives at Craigengillan House, on the Craigengillan estate near Dalmellington in Ayrshire. On 27 April 2005 Scottish Power Renewables (UK) Ltd ("the Interested Party") applied for consent under section 36 of the Electricity Act 1989 for the construction and operation of Dersalloch Wind Farm ("the wind farm development"). The wind farm development is approximately 4.2km from Craigengillan House. The nearest proposed turbine in the wind farm development would be 4.6km from the Scottish Dark Sky Observatory, which is located within the boundary of the Craigengillan Estate and is said to be one of only eight dark sky parks in the world.

[2] The Scottish Ministers, who are the respondents, received about 4,746 public representations about the wind farm development; of these, 4,723 were objections to the application, and 23 were letters of support. The objectors included South Ayrshire Council, East Ayrshire Council, local community councils, Historic Scotland, community bodies, and many individuals, including the petitioner.

[3] By letter dated 23 July 2014 the respondents decided not to hold a public inquiry in respect of the application, and granted consent, subject to conditions, under section 36 of the Electricity Act 1989 for construction and operation of the wind farm development, and directed under section 57(2) of the Town and Country Planning (Scotland) Act 1997 that planning permission be deemed to be granted for the wind farm development.

[4] East Ayrshire Council raised proceedings for judicial review to challenge the respondents' decision not to hold a public inquiry, and to grant consent for the development. In light of this, the petitioner decided not to raise proceedings for judicial review himself. A hearing in East Ayrshire Council's petition was set for 18 and 19 December

2014, but on the afternoon of 17 December 2014 East Ayrshire Council decided to withdraw. On 24 December 2014 the petitioner raised the present petition for judicial review.

[5] In early 2015 the petitioner enrolled a motion for a protective expenses order ("PEO") in terms of Rule of Court 58A.3, in which he sought to have his liability in expenses to the respondents and the interested party limited to a cumulative total of £5,000 and limiting the liability of the respondents and interested party in expenses to the petitioner to £30,000. This motion was opposed on behalf of the respondents and the interested party; after a hearing in March 2015, by interlocutor dated 14 April 2015 the Lord Ordinary refused the petitioner's motion. It is against this interlocutor that the petitioner now reclaims.

Chapter 58A of the Rules of the Court of Session

[6] There was no dispute that the petitioner's application for a PEO was made in terms of Rule of Court 58A.2, nor that Chapter 58A applied. (It should be noted that Chapter 58A has been subject to significant amendments with effect from 11 January 2016). Rule of Court 58A.2 before amendment, as it applied at the time of the application to and decision of the Lord Ordinary and at the time of the hearing of the reclaiming motion before this court, is in the following terms:

"**Availability of protective expenses orders**

58A.2- (1) Subject to paragraph (2), a petitioner in an application or, as the case may be, an appellant in an appeal to which this Chapter applies may apply for a protective expenses order.

(2) The applicant must be –

(a) an individual; or
(b) a non-governmental organisation promoting environmental protection

(3) A protective expenses order is an order which regulates the liability for expenses in the proceedings (including as to the future) of all or any of the parties to them, with the overall aim of ensuring that proceedings are not prohibitively expensive for the applicant.

(4) Subject to paragraph (6), where the court is satisfied that the proceedings are prohibitively expensive for the applicant; it must make a protective expenses order.

(5) For the purposes of this rule, proceedings are prohibitively expensive for an applicant if the applicant could not reasonably proceed with them in the absence of a protective expenses order.

(6) The court may refuse to make a protective expenses order if it considers that-

(a) the applicant has failed to demonstrate a sufficient interest in the subject matter of the proceedings; or
(b) the proceedings have no real prospect of success.

Applications for protective expenses orders

58A.3-(1) An application for a protective expenses order shall be made by motion.

(3) An application for a protective expenses order may be made in relation to a reclaiming motion at any stage of the proceeding whether or not an application for such an order was made, or an order granted, at first instance.

(4) A motion mentioned in paragraph (1) shall –

(a) set out why the applicant is seeking the order;
(b) be accompanied by any supporting evidence, which the applicant intends to refer to in making the application.
(c) set out the terms on which the applicant is represented;
(d) be accompanied by a schedule estimating –
(i) the expenses of the applicant in relation to the proceedings in respect of which the order is sought; and
(ii) the expenses of each other party for which the applicant may be liable in relation to the proceedings in respect of which the order is sought;
(e) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.4, set out the grounds on which that lower or higher figure is applied for.

…..

Determination of terms of a protective expenses orders

58A.5-(1) In deciding the terms of a protective expenses order, the court shall (subject to rule 58A.4(1) take into account all the circumstances, including-

(a) the need to ensure that it is not prohibitively expensive for the applicant to continue with the proceedings;
(b) the extent to which the applicant would benefit (whether financially or otherwise) if successful in the proceedings to which the order would apply;
(c) the terms on which the applicant is represented;
(d) whether and to what extent the applicant is acting on behalf of another person which would have been able to bring the proceedings himself, herself or itself; and
(e) whether and to what extent the applicant is willing to limit the expenses which he or she would be able to recover from another party if successful in the proceedings to which the order would apply.

(2) The court shall not make a protective expenses order until it has given all of the parties an opportunity to be heard".

The evidential material before the Lord Ordinary

[7] A very significant amount of documentary material was provided on behalf of the petitioner, relating to his financial circumstances and his interest in Craigengillan Estate and the Dark Sky Observatory. We do not consider it appropriate for us to set out at length the content of this material, much of which might be described as confidential to the petitioner. However, it was indicated at the hearing before us that the petitioner consented to the inclusion in this opinion of such material as we considered necessary to give the factual context for this opinion. The following is a summary of the salient points in the documentary materials before the Lord Ordinary.

[8] The petitioner lodged two affidavits setting out the background of his involvement with Craigengillan, and his financial circumstances. He described himself as a chartered surveyor, organic sheep farmer and forester. He bought the Craigengillan Estate in about 2000, funding the purchase from his own earnings as a chartered surveyor. At the time of purchase Craigengillan was in a derelict state; the petitioner has restored it and used it as a catalyst for community regeneration in the former mining community of Dalmellington. Craigengillan is included in the inventory of Historic Gardens and Designed Landscapes compiled by Historic Scotland. It is described as a rare example of a complete and unfragmented estate landscape started in the 16th century and held in one family for almost 400 years. It is one of only four designed landscapes in the country to achieve the highest rating (outstanding) for each of the seven criteria employed by Historic Scotland in its assessments. It lies within the Galloway and Southern Ayrshire UNESCO Biosphere; the petitioner is a board member of the Biosphere Partnership Board and chair of the Galloway and Southern Ayrshire Biosphere Scottish Charitable Incorporated Organisation.

[9] In 2009 the International Dark Sky Association designated a large part of the Galloway Forest which adjoins Craigengillan, as the first gold tier Dark Sky Park in Britain and only the second in Europe. The petitioner was the founder, and remains a trustee, of the Scottish Dark Sky Observatory; he owns the land on which the Observatory is sited, and lets it to the Observatory at a rent of £1 per annum. The Observatory attracts increasing numbers of visitors and brings employment and economic benefits to the community.

[10] The petitioner farms the Craigengillan Estate, producing organic lamb and managing the woodlands. He has developed a riding stable and has restored two cottages for holiday letting. The petitioner practises as a sole practitioner chartered surveyor in addition to running the Craigengillan Estate; all his income as a chartered surveyor goes into the Craigengillan account. He draws a personal income of £18,000 per annum from the estate. He has a SIPP pension fund created from his savings over the last 35 years, which should provide an income of about £20,000 a year when he is aged 65. He has no other capital or sources of income. He has three separate borrowing facilities – (1) a bank overdraft currently standing at about £116,000 (with a borrowing limit of £140,000) which provides emergency funding for the running of the estate, (2) a short term bank loan of £330,000 which currently has a balance outstanding of £76,000 for the specific purpose of planting new native woodland on the estate and, (3) a term loan of £146,000 to fund a new biomass heating system.

[11] The petitioner sees no scope to raise funds by breaking up Craigengillan Estate and selling parts of it – first, because to do so would reduce the modest income which he derives from the estate and requires to meet his living expenses, and second because Craigengillan's value as a heritage asset is intrinsically linked to the fact that it is intact, and to sell off all or parts of the estate to meet the costs of these proceedings would destroy the very thing he is trying to protect.

[12] The petitioner lodged a schedule of anticipated expenses, which estimated that his

legal expenses for a three day hearing were estimated at around £54,000; the expenses of the respondents and the interested party were each estimated at about £59,000, giving a total anticipated expense of over £170,000. From the petitioner's annual income of £18,000, he had to meet annual outgoings of about £17,700. His financial circumstances were vouched by accounts for the years to 30 November 2013 and 2014, tax returns for the years to 5 April 2013 and 2014, and statements of taxable earnings for the years ended 2013 and 2014. These last showed that his total taxable earnings (after loss claimed and personal allowance) amounted to £2,288 in the year 2012/13, and £644 in the year 2013/14.

[13] The productions before the Lord Ordinary included two letters from the petitioner's bankers. The first, dated 23 February 2015, was from the agricultural director of the bank and confirmed the three borrowing facilities mentioned above. The author stated that he had a working knowledge of the petitioner's account for approximately 8 years, and considered the petitioner to be a trustworthy and reputable individual. The second, dated 3 March 2015, confirmed that one of the loans was available only to fund the approved forestry costs and is expected to be repaid in full on receipt of the relevant grant on completion. It also confirmed that the bank would not fund any additional borrowing for potential litigation/legal costs due to lack of ability of existing business to evidence debt serviceability. (We were also provided with a third letter from the bank, dated 18 August 2015, which was not before the Lord Ordinary. The author of this letter was the same as the author of the two previous letters. The letter confirmed that although the author knew the petitioner well and had knowledge of his assets, liabilities and annual accounts, he confirmed that the bank would not be prepared to provide additional facilities for the purposes of meeting legal fees, for an action which will not improve the financial viability of Craigengillan/the petitioner).

[14] Included in the documentary materials before the Lord Ordinary was a valuation report dated 19 February 2015 instructed by the interested party, which expressed the opinion that the market value of the estate as at that date with vacant possession was within the range of £2.85 - £3.65 million.

[15] There was conflicting material provided on behalf of the petitioner and the interested party as to the ability of the petitioner to withdraw money from his pension fund. As at March 2015 the fund had a value of £694,942. Brewin Dolphin advised that this would be sufficient to allow payment to the petitioner of a pension in the gross sum of £19,049 per annum. However, if the petitioner withdrew approximately £173,000 to meet the costs of litigation, the pension payable would be reduced to about £14,000 per annum gross. However, Barral Sheppard, financial advisers instructed on behalf of the interested party, took issue with these figures; they were of the opinion that if the petitioner used £180,000 of his pension fund to cover legal expenses, this would leave him with a fund of £514,942, which, if invested in a fairly cautious fund, could provide an annual income of £24,000 gross per annum. In response, Brewin Dolphin challenged the assumptions underlying the opinion of Barral Sheppard, and adhered to their earlier opinion.

The Lord Ordinary's assessment and decision

[16] After summarising the factual background, the Lord Ordinary indicated that there was no dispute that Lord Drummond Young properly set out the manner in which Rule of Court 58A.3 is to be interpreted in light of Directive 2011/92/EU in the case of *Carroll* v *Scottish Borders Council* [2014] CSOH 30, 2014 SLT 659. He also made reference to the case of *John Muir Trust* v *Scottish Ministers* [2014] CSOH 172A. Having summarised the competing submissions for parties, the Lord Ordinary discussed the issues at paragraphs [57] to [64] of his opinion. He agreed with Lord Drummond Young's view in *Carroll* that account should be

taken of capital which is actually or potentially liquid, but that it is not realistic to take account of an applicant's home or business assets. With regard to the petitioner's argument that the estate could not realistically be broken up as this would reduce the petitioner's income and would have an adverse effect on its value as a heritage asset, he observed that certain lands were disposed of in 2006 and that it was averred that the boundary of Craigengillan was extended in April 2012; he concluded that the extent of the lands had not been static. He also observed that it was not for him to undertake a minute examination of the various entries in the accounts, and that at best he could only adopt a broad brush approach. He pointed out that the draft accounts for the year to November 2014 referred to substantial expenditure on legal and professional fees, building repairs and maintenance and fencing, roads and bridges. It appeared to him that there exists the potential to expend large sums of money and to dispose of parts of the estate when required. He found that the criticisms of the letter from the petitioner's bank in relation to the provision of a facility to pay legal fees were well founded, and indicated that it was not clear to him that the bank was aware of the value of any securities which they might hold.

[17] The Lord Ordinary did not think that the pension fund could be ring fenced from his consideration of the petitioner's financial position, and observed that if the funds which are represented in it were to be found in a savings account he had no doubt that they would have to be taken into consideration, albeit that the savings might have been put aside over many years to assist in the petitioner's retirement. Assuming the estimates for the expenses of the litigation are accurate, it appeared to the Lord Ordinary that a withdrawal from the pension pot of sums to meet those expenses would leave a fund "which might be a few thousand less or a few thousand more than the income which the petitioner currently draws". The Lord Ordinary left the observatory out of consideration, but stated that:

"nonetheless I do not think that the petitioner has established that he would be unable to meet the expenses when I look at his assets as a whole. Doubtless the risk of incurring a six figure sum in judicial expenses is a disincentive to proceeding but that is not the test".

Having regard to the petitioner's financial position as a whole, the Lord Ordinary was not satisfied that he had made out that he could not reasonably proceed with the proceedings in the absence of a PEO, and he refused the motion.

Submissions for the parties in the reclaiming motion

[18] Each of the parties helpfully submitted a very full written note of argument, which we have taken into account but which we do not seek to rehearse in detail. The parties' submissions may be summarised as follows.

Submissions for the petitioner and reclaimer

[19] If the court is satisfied that the proceedings are prohibitively expensive, it must make a PEO. The words "prohibitively expensive" are not defined in the rule, so must be construed in light of Directive 2011/92/EU and the case law. Counsel relied on the observations of the CJEU in *R (Edwards & another)* v *Environment Agency and Others (No.2)* [2013] 1 WLR 2914, in which the court observed (at paragraph 40):

"That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since, as has been stated in para 32 of the present judgment, members of the public and associations are naturally required to

> play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable".

[20] This point was reiterated in *European Commission* v *United Kingdom* [2014] 3 CMLR 6, in which the advocate general observed that "even applicants with the capacity to pay may not be exposed to the risk of excessive or prohibitive costs", and the court (particularly at paragraph 47) observed that "the court cannot limit its assessment to the financial situation of the person concerned, but must also conduct an objective analysis of the amount of the costs". The same point was made by the UK Supreme Court in *R (Edwards)* v *Environment Agency (No.2)* [2014] 1 WLR 55, particularly at paragraphs 23 and 28.

[21] Considering the issues raised by Lord Carnwath JSC at paragraph 28 in *Edwards*, it was not contended in the present case that the petitioner did not have a reasonable prospect of success. With regard to the importance of what is at stake for the claimant, the petitioner is not seeking to protect his own economic interests – his purpose in raising these proceedings was solely to protect the environment. His own economic interests would not be significantly affected by the wind farm development. His sheep farming and forestry activities will be no less productive if the development proceeds. With regard to any possible effect of the development on the value of the Craigengillan Estate (which both the respondents and the interested party assert will not occur) the petitioner does not intend to sell the estate but rather intends to pass it to a charitable organisation. The valuation report does not suggest that the wind farm development would reduce the value of the estate. With regard to any possible economic impact on the petitioner's letting income from the two cottages used for holiday lets, the respondents' position is that wind farms do not affect tourism, so it cannot be argued that any such impact would be significant.

[22] By contrast, the importance of what is at stake for the protection of the environment is considerable. The principal reason for East Ayrshire Council's objection to the wind farm development was environmental, and the petitioner adopts the Council's reasoning in this regard, as well as South Ayrshire Council's concerns about adverse impact on the integrity of the Dark Sky Park.

[23] Counsel submitted that the total estimated expense of about £170,000 went well beyond what is objectively reasonable for an ordinary member of the public. The Lord Ordinary erred in his approach because he failed to consider whether this sum was objectively reasonable. Despite the fact that the issue of objective reasonableness was raised in submissions for the petitioner before the Lord Ordinary, and despite the court's obligation to apply the EU Directive, the Lord Ordinary did not carry out any objective analysis at all. It did not matter whether the court dealt with the objective test or the subjective test first, but the court did require to consider both. If the proceedings were prohibitively expensive on either the objective or the subjective test, the court required to grant a PEO, even if the applicant was wealthy.

[24] Applying the subjective test, although the petitioner owns an estate and has farming and holiday letting interests, it is not reasonable to expect him to raise money to meet litigation costs of £170,000. The profits from the estate are very limited, and so is the petitioner's income; the total tax which he was liable to pay in the year to April 2013 was £457.80, and in the following year this fell to £128.80. When the petitioner was working full time as a chartered surveyor, all his income was devoted to the estate; since then, the estate

has contributed to his past tax liabilities. There is nothing to suggest that he is able to raise a large sum of money. He has installed a biomass heating system only with financial assistance from his bankers; similarly, expenditure on estate fencing was funded by means of a bank loan. It is clear from the letters from the bank that the bank will not fund any additional borrowing for potential legal costs. The sale of land would risk breaking up the designed landscape, which is one of the things which the petitioner seeks to preserve; it would also reduce his ability to obtain an income.

[25] The Lord Ordinary also erred in his approach to the petitioner's pension. The arguments advanced for the interested party were based on legislation that was not yet in effect when the hearing on the motion for a PEO was held. Moreover, the pension which the petitioner would receive is relatively modest. It is not reasonable that an individual should have to forego an element of his pension in order to bring proceedings to protect the environment. Moreover, the availability of funds depends on the age of the individual; it is arguably unlawful to discriminate against the petitioner when a younger person would not suffer the same fate. By virtue of article 21 of the EU Charter, discrimination based on any ground such as age "shall be prohibited"; in any event, the right to non-discrimination on grounds of age is a general principle of EU law. The Lord Ordinary has taken into account the "lump sum" which the petitioner is able to access by virtue of the amendments brought about by the Taxation of Pensions Act 2014, which applies only to individuals aged 55 or over. By taking this into account, the Lord Ordinary has acted contrary to EU law including article 21 of the Charter.

[26] The Lord Ordinary also erred in undertaking an intrusive investigation into the petitioner's assets and income/expenditure. The court should not second guess the motives and actions of a law abiding responsible individual – see paragraph [25] of Lord Philip's opinion in the petition of the *John Muir Trust*.

[27] Counsel for the petitioner submitted that the Lord Ordinary had fallen into error in several respects. First, he failed to address the objective test. Second, he erred in his approach to the subjective test by reaching unreasonable conclusions regarding the petitioner's ability to fund the litigation by bank borrowing or from his pension. Third, he asked himself the wrong question, namely whether the petitioner was able to raise the funds, when the proper question was whether it was reasonable for him to be required to do so. For all these reasons counsel submitted that the reclaiming motion should be allowed, and a PEO granted as sought.

Submissions for the respondents

[28] Senior counsel for the respondents accepted that when considering whether the proceedings are prohibitively expensive for the applicant, the court requires to apply both an objective test and a subjective test. However, the issue for the Lord Ordinary was "whether the proposed proceedings were prohibitively expensive *for the applicant*" (emphasis added). The hearing before the Lord Ordinary was concerned only with the "financial resources of the person concerned". The Lord Ordinary properly focused his attention on the reclaimer's financial resources.

[29] The factors identified in *Edwards* are only factors - some may not be relevant, and additional factors may arise in a particular case. These are factors which may, if appropriate, be taken into account. In the present case the Lord Ordinary adopted the approach of Lord Drummond Young in *Carroll* v *Scottish Borders Council*, particularly at paragraph [12] *et seq*. The four features there identified are derived from the case of *Edwards* in the CJEU. Senior counsel confirmed that in the present case there was no issue between the

parties on the first (that the proceedings fall within the scope of the rule), the second (sufficient interest) and the third (no real prospect of success) features. The real issue before the Lord Ordinary was the fourth feature, namely the financial resources of the applicant and the likely expenses of the proposed proceedings. The petitioner did not submit to the Lord Ordinary that the estimates of the costs of litigation were unreasonable (see paragraph [19] of the Lord Ordinary's opinion). However, senior counsel accepted that there was very little in the Lord Ordinary's opinion regarding an objective assessment of reasonableness - the only place that this may be found is in paragraph [19].

[30] Senior counsel went on to address those features mentioned by Lord Carnwath JSC at paragraph 28 of *Edwards* in the UK Supreme Court which are in dispute in the present case. With regard to the importance of what is at stake for the claimant, the submission for the reclaimer that this relates only to economic importance is too narrow. This is clear from the terms of Rule 58A.5(1)(b), which makes it clear that the court shall take into account all the circumstances, including the extent to which the applicant would benefit (whether financially or otherwise). Non-financial benefit is relevant to this exercise. The petitioner would derive economic benefit from the wind farm development not proceeding, as described by the Lord Ordinary in paragraphs [17] and [25] of his opinion.

[31] Turning to what is at stake for the protection of the environment, the petitioner's concerns focus on three aspects - (i) the effect on the Dark Sky Park, which is considered at pages 8 and 9 of the decision letter, (ii) the effect on the Scottish Dark Sky Observatory, which is considered at pages 10-12 of the decision letter, and (iii) the effect on the Craigengillan Estate itself, which is addressed at pages 13/14 of the decision letter. It should be noted in this last regard that both Scottish Natural Heritage and Historic Scotland withdrew their objections; close consideration has been given to these environmental concerns by various bodies, and the court should conclude that the proposal would not have a particularly serious impact on the environment.

[32] Bearing these factors in mind, how is the objective test to be applied? It is intended to protect those who, subjectively, can afford to proceed with litigation at the estimated level of expense; even they are not to be exposed to prohibitive costs. The starting point is to consider what the anticipated cost is in the particular jurisdiction; article 3(8) of the Aarhus Convention expressly states that "this provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings." The Rule requires that a motion for a PEO shall be accompanied by a schedule estimating the expenses of the applicant and each other party in relation to the proceedings in respect of which the order is sought. The assessment of reasonableness is an entirely objective exercise, and is not a matter of impression: *Health Care at Home Ltd* v *Common Services Agency* 2014 SC UKSC 247 at paragraph [3]. Various factors identified by the CJEU may be used to increase or reduce what may be reasonable expenses in a particular case; for example, if there is a lot financially at stake for the applicant, it may be fair to increase the level of expense considered to be reasonable, and conversely, if the public interest and the effect on the environment are very great, it would be fair to reduce what is regarded as "reasonable expense". The overall objective was to preserve the public interest in the protection of the environment.

[33] Turning to the subjective test, the question is whether the amount of likely expense goes beyond what it is reasonable to expect the petitioner, with his particular resources, to pay. The assessment of this was a matter for the Lord Ordinary in the exercise of his discretion. The key paragraphs in this respect begin at paragraph [58] of the Lord Ordinary's opinion. When looking at the financial circumstances of the petitioner, he owned a sizeable

estate (over 1,000 hectares) and it was apparent from the accounts before the court that there were a number of facets of the petitioner's business. The Lord Ordinary was well entitled on the evidence before him to conclude that there was a potential for the petitioner to sell assets. There is nothing to suggest that his decision was plainly wrong, or that he exercised his discretion on the wrong principle. The Lord Ordinary's conclusion at paragraph [65] cannot be faulted.

Submissions for the interested party

[34] Senior counsel submitted that it was for the applicant to decide what case to advance in support of a motion for a PEO, and on what grounds to advance it. The petitioner did not seek to rely on the objective test before the Lord Ordinary. With regard to the subjective test, the court must consider details of the applicant's capital and income, and assess the extent to which the capital is actually or potentially liquid and whether a capital asset is essential to the applicant's existence. In relation to income, the applicant's living expenses and liabilities should be considered on the basis of this information, the court must decide whether the likely expenses of the proceedings exceed the applicant's means.

[35] The objective test allows applicants who do not succeed on the first test - ie applicants who have a capacity to pay - to argue that the expenses are objectively unreasonable when taking account of the public interest in environmental protection in the case at issue. In this regard the court may take into account the prospect of success, the importance of what is at stake for the applicant and for the protection of the environment, the complexity of the relevant law and procedure, and the potentially frivolous nature of the claim at its various stages. Where there is an extensive individual economic interest at stake in the proceedings, the applicant may reasonably be expected to bear higher risks in terms of cost.

[36] Because the petitioner made no submissions to the Lord Ordinary on the objective test, the Lord Ordinary cannot be criticised for not considering arguments not put before him. He was not informed of the extent to which the petitioner represented the public interest, but he was told that Scottish National Heritage and Historic Scotland had withdrawn their objections to the proposal, that East Ayrshire Council had not progressed with its challenge to the decision, and South Ayrshire Council lodged a late objection in relation to one issue, which was not supported by any expert report. The petitioner stated in his reasons for applying for a PEO that he acted on his own behalf and not on behalf of anybody else, and that he was directly affected by the development. He averred that he objected on the basis of an unacceptable impact on Craigengillan.

[37] The Lord Ordinary had before him evidence on the various components of the petitioner's capital and their market value; it was clear that the petitioner had substantial capital assets. The Lord Ordinary also had before him evidence on the petitioner's income, expenditure and liabilities. This showed that the petitioner had considerable income, and was able to withdraw a substantial amount of money. It was not suggested on behalf of the petitioner that the Lord Ordinary had made any factual errors in his summary of evidence. On any view of the petitioner's assets he is a wealthy individual. His assets are between £3 million to over £4 million, and he can realise assets, borrow against them or spend his income. The Lord Ordinary was entitled to reach the view that the proposed litigation was not prohibitively expensive for a person with the applicant's resources of income and capital.

[38] The Lord Ordinary was correct to include the petitioner's pension in his assessment of

whether the litigation would be prohibitively expensive. He had financial information from Brewin Dolphin and Barral Sheppard about the liquid nature of the asset and the extent to which the use of that asset would affect the petitioner's future income. No argument was advanced before the Lord Ordinary about age discrimination. It is an inherent feature of pension schemes (and legislation) that they benefit people later in their lives. Any assessment of resources could be argued to be discriminatory because older people have had the opportunity to build up resources because of their age and are therefore less likely to obtain an PEO than younger people.

[39] With regard to the possibility of bank borrowing, the letters from the bank do not indicate whether the author of the letters was aware of the market value of the estate or the individual components of it. There is no indication as to whether the author of the letters was aware of the most up-to-date profit and loss accounts or the extent to which the petitioner chooses to put his income back into the estate. There is no indication that the author knows the petitioner's pension position or the extent to which he could have access to his pension. In the circumstances the Lord Ordinary was entitled to find (as he did at paragraph [60]):

"that the criticisms of the letter from the petitioner's bank in relation to the provision of a facility to pay legal fees are well-founded. It is not at all clear to me that the bank is aware of the value of any securities which they might hold."

The letter from the bank dated 18 August 2015 which is before this court still does not clarify whether the bank is aware of the market value of the petitioner's property.

[40] Senior counsel submitted that the Lord Ordinary did not err in law in his interpretation and application of Rule of Court 58A, and that the conclusions which he reached on the basis of the submissions and evidence before him were not unreasonable. It cannot be said that he exercised his discretion upon a wrong principle or that he exercised it wrongly. The submissions on behalf of the petitioner in the reclaiming motion differ significantly from those advanced before the Lord Ordinary.

[41] Senior counsel advanced a final argument on the basis that Rule 58A.2(6) gives the court a discretion to refuse to make a PEO if it considers that the proceedings have no real prospects of success. He pointed out that work started on the wind farm development shortly after the respondent's decision was intimated in July 2014. In these proceedings the petitioner has never applied for *interim* interdict or *interim* suspension. The decision of the Scottish Ministers is now 16 months old; in the intervening period, senior counsel informed the court that 20.5 kilometres of site roads had been completed, about 147,000 cubic metres of stone have been extracted, 16 crane hard standings have been completed, 10 foundation levels have been excavated, and the interested party has spent £19.8 million and has committed itself to spend a further £45.8 million, from a total estimated spend of £74.1 million. The first export of electricity from the development will commence in July 2016. At any substantive hearing on the petition for judicial review, the court will have to consider whether it is likely that the Scottish Ministers would refuse to grant consent for the development if the existing approval were to be reduced and a further application made. Standing the advanced stage at which the development has already reached, senior counsel submitted that it was highly unlikely that the Scottish Ministers would, in those circumstances, refuse to grant consent for the development. This is a relevant factor for this court to take into account when considering an application under Rule 58A.

Reply on behalf of the petitioner

[42] Counsel submitted that the approach of the respondents was unduly restrictive and started from the wrong point. The correct starting point is the public interest in the protection of the environment. As it was put in paragraph 31 of the Advocate General's opinion in *European Commission* v *United Kingdom*:

"The public interest in the protection of the environment is considerably better served if actions with some merit but whose success is uncertain are furthered. In general, those cases are based on a legitimate interest in the protection of the environment but as their outcome is uncertain the risks in terms of cost are particularly substantial."

[43] Although senior counsel for the respondents referred to the discretion enjoyed by individual member states, that is not unlimited - see the observations of the CJEU in *Edwards* at paragraphs 23 - 25. The Lord Ordinary was not exercising some general discretion, but was rather obliged to apply the law as set out by the CJEU and the UK Supreme Court. Properly categorised, this was not a discretionary judgment.

[44] The likely level of expenses in a litigation is just one factor in the objective test - see the opinion of the Advocate General at paragraph 43 and the judgment of the court at paragraph 47 of *Edwards*, and Lord Carnwath JSC at paragraph 23 of *Edwards* in the UK Supreme Court. It must be borne in mind that Lord Drummond Young's opinion in *Carroll* v *Scottish Borders Council* predated the case of *European Commission* v *United Kingdom*, and also predated *Edwards* in the UK Supreme Court.

[45] Contrary to the submission of senior counsel for the respondents, the primary focus when considering the personal interests of the petitioner is on his economic interests. This is clear from paragraph [45] of the Advocate General's opinion in *Edwards* before the CJEU, and reiterated by Lord Carnwath JSC at point (ii) of paragraph 28 of *Edwards* in the UK Supreme Court.

[46] Senior counsel took issue with three aspects of the submissions for the respondents regarding the objective test. First, he said that Mr Johnston had put a gloss on Lord Carnwath's distillation of the proper approach to the objective test. There was no need to do this - Lord Carnwath's suggestions were clear and should be applied. It was important to bear in mind that the purpose of both the objective and subjective tests was to ensure that environmental challenges should be facilitated. Second, Mr Johnston had placed too much importance on the likely cost. Cost is just one of the factors to which Lord Carnwath had regard. Third, the observations of the court in *Healthcare at Home* were made in a different context. We have the guidance given by Lord Carnwath in this context - see particularly point (ii) of paragraph 23 of *Edwards* in the UK Supreme Court. There is no need to go to *Healthcare at Home* for guidance.

[47] Mr Johnston drew attention to the Lord Ordinary's remarks at paragraph [60], and in particular to his conclusion that there exists the potential to expend large sums of money. However, the petitioner obtained bank loans for specific projects which brought economic benefits - the installation of a biomass boiler, the erection of fencing and the planting of woodlands. That is not an indicator of cash being readily available; the loans were made for particular purposes, in circumstances in which the bank was confident that they would be repaid and could be serviced. The payment of tax liability arose from the petitioner's previous income as a chartered surveyor, and bank borrowing was obtained to facilitate the payment of this tax burden. The petitioner draws a salary of £18,000 per

annum; it would not be possible to afford to employ someone to run the estate. The reason that the estate is more or less breaking even is because the petitioner is drawing a very reduced salary. With regard to the possibility of a bank loan to fund the cost of litigation, the Lord Ordinary had more information than just the letter from the bank dated 3 March 2015 - he knew that the author of the letters had a working knowledge of the account for about 8 years and had approved these loans.

[48] With regard to the submissions for the interested party, counsel disputed that no argument had been advanced before the Lord Ordinary about an objective test. The Lord Ordinary was referred to Lord Drummond Young's observations about an objective test at paragraph [18] of his opinion in *Carroll* v *Scottish Borders Council*, and reference was made to the need for an objective test in both *Edwards* before the CJEU and in *European Commission* v *United Kingdom*. In any event, the matter was a point of European law and the court was obliged to apply it. On a fair reading of the petition, the petitioner's affidavits and the motion for a PEO, it is clear that the petitioner's motivation is not to protect his own economic interests but to protect the public interest.

[49] Mr Armstrong suggested that the petitioner had sold and purchased parts of the estate recently, and drew attention to the last two sentences of paragraph [58] of the Lord Ordinary's opinion. Since the petitioner purchased the estate, only two derelict cottages have been sold. Apart from these, there have been no sales of land, and Historic Scotland still considers the estate to be unfragmented. There have been no purchases of land; all that happened in 2012 was that the boundary of the defined landscape was extended to include the whole estate.

[50] The question of age discrimination regarding withdrawal from pensions is a matter of European law, to which the court is obliged to give effect. It was clear from the correspondence that the assumptions about growth rate and the effect of sums withdrawn from the pension which were made by the advisors instructed by the interested party were much more ambitious and optimistic than those adopted by Brewin Dolphin.

[51] Mr Armstrong's final point about the ability of the court to refuse to make a PEO if it considers that the proceedings have no real prospects of success is a new one - it was not advanced before the Lord Ordinary, nor was it contained in the note of argument for the reclaiming motion nor even in Mr Armstrong's speaking note. It was made at the bar on the second day of the reclaiming motion, and some 8 months after the submissions to the Lord Ordinary. In any event, there is no force in the argument. East Ayrshire Council lodged their legal challenge to the decision on 23 October 2014, having informed the respondents that they were contemplating a challenge to the decision on 1 October 2014. East Ayrshire Council's challenge was withdrawn on 17 December 2014, and the petitioner raised the present proceedings within days of this happening. Accordingly, the interested party have been aware of a challenge to the decision since October 2014, yet they have chosen to proceed with the development pending the present proceedings. If the decision is quashed and goes back to the Scottish Ministers, they will have a duty to determine whether it will have adverse effects on the environment, and, if appropriate, to refuse it. There is no substance to the point.

Discussion

[52] It is clear from the authorities to which we were referred (in particular, *Edwards* in the CJEU at paragraph 40, *European Commission* v *United Kingdom* at paragraph 47, and *Edwards* in the UK Supreme Court at paragraphs 23 and 28) that when considering whether

proceedings are prohibitively expensive for the applicant in terms of chapter 58A of the Rules of the Court of Session, the court must apply both a subjective and an objective test. This was not disputed by any of the parties before this court.

[53] Lord Drummond Young's opinion in *Carroll* v *Scottish Borders Council* was issued before much of the guidance contained in the above authorities was published. However, Lord Drummond Young touched on the argument that an objective test should be applied where an application is brought by a wealthy person that was clearly conceived in the public interest, in order that the underlying purpose of the directive should not be frustrated. The Lord Ordinary in the present case referred to the decision in *Carroll* with approval; moreover, his decision post-dated the decisions in the CJEU and the UK Supreme Court to which we have referred. However, we are unable to find any analysis of the objective test (such as the points discussed by Lord Carnwath JSC at paragraph 28 of *Edwards* in the UK Supreme Court) in the Lord Ordinary's opinion. He set out his views on several factors which may be relevant to a subjective test, but he does not appear to have considered the objective test.

[54] Moreover, we consider that there is force in the point raised in the sixth ground of appeal for the reclaimer that the Lord Ordinary appears to have addressed himself to the wrong issue. At paragraph [64] of his opinion he stated that:

"I do not think that the petitioner has established that he would be unable to meet the expenses when I look at his assets as a whole".

When considering the subjective test, it appears that the Lord Ordinary addressed the question of whether the petitioner was able to meet the expenses; we agree with counsel for the petitioner that the test is not the petitioner's ability to pay, but whether it is reasonable, in all the circumstances, that he should be required to do so. The focus of the Aarhus Convention, the 2011 Directive and the authorities to which we have referred is the protection of the environment, and the removal of unreasonable financial barriers which may act as a disincentive to members of the public (whether individuals or organisations) from playing an active role in protecting and improving the quality of the environment.

[55] In these respects, we consider that the Lord Ordinary fell into error, and that the matter is open to us to review. We propose to consider the petitioner's application for a PEO under both the subjective and objective tests. If the court is satisfied that the proceedings are prohibitively expensive for the applicant, (and provided that the court does not consider that the applicant has no real prospect of success), the court must make a protective expenses order. It may not matter in which order these tests are considered. However, in the circumstances of the present case, it is convenient to consider first the issue of prohibitive expense applying the subjective test.

[56] No doubt by many standards the petitioner may be said to be a wealthy man. Craigengillan House is an A listed mansion, set in its own estate of over 1,000 hectares. The petitioner has a pension with a value of about £695,000 which Brewin Dolphin, who manage the portfolio for the petitioner, consider would produce an estimated gross income of about £19,000. Taking the petitioners' assets as a whole, it appears that they may amount to between £3 million and £4 million. He draws an income from the estate of £18,000 per annum. He has been able to borrow quite significant sums from his bankers in the past. *Prima facie* it might be thought that the petitioner is able to pay expenses estimated in total at about £170,000.

[57] However, it does not follow from the above that it is reasonable that he should be

required to meet this cost. Craigengillan Estate may properly be described as unusual, in that its importance and value lies in the fact that it is unfragmented; it is a nationally important designed landscape, and to sell off parts of the estate in order to fund these proceedings would be to destroy the very thing which the petitioner seeks to preserve in these proceedings.

[58] The Lord Ordinary observes that it is obvious that the extent of the lands has not been static. However, there have been only two insignificant plots (namely derelict cottages) which have been sold; we are not persuaded that these two small sales have detracted from the unfragmented character of the estate, nor can it be inferred from these two small sales that it is reasonable to expect the petitioner to sell off other parts of the estate to meet the costs of litigation. The Lord Ordinary appears to have understood that the estate was added to or extended in April 2012; having regard to the letter from Historic Scotland dated 25 January 2012 we consider that this is a misunderstanding, and that the only thing that happened in 2012 was an extension of the boundaries of the designed landscape. The Lord Ordinary's conclusion that "the extent of the lands has not been static" is in our view not justified; we consider that the extent of the lands has indeed been substantially static.

[59] The Lord Ordinary concluded from the estate accounts and the letters from the petitioner's bankers that it would be open to the petitioner to borrow more money from his bank in order to fund the litigation. It appeared to him that there exists the potential to expend large sums of money and to dispose of parts of the estate when required.

[60] On the basis of the materials available, we do not consider that this conclusion is justified. The bank has been prepared to lend money to the petitioner, but only for projects which result in economic benefit to the estate and where they are satisfied that the loan can be serviced (eg by receipt of Government grant funding). The loans were made for the installation of a biomass boiler, for fencing, and for planting of woodlands. The author of the letters from the bank has a detailed knowledge of the petitioner's business extending over approximately 8 years; he stated that the bank would not fund any additional borrowing for potential litigation/legal costs. We see no reason to doubt that statement.

[61] With regard to the petitioner's income, it is not disputed that his only income is the sum of £18,000 which he draws annually from the estate. This income is not such as to allow him to fund costs of £170,000. He has liabilities and living expenses which consume almost all of his income. The schedules and tax assessments for the years to 2013 and 2014 are supportive of the assertion that the petitioner has relatively modest income.

[62] Despite the submissions for the petitioner regarding age discrimination, we consider that it is appropriate to include the petitioner's pension fund in the assessment of the petitioner's assets and liabilities. However, having included them, we are not persuaded that it is reasonable to require the petitioner to withdraw £170,000 from his pension fund to pay for the costs of these proceedings; this would result in a significant diminution of the annual pension ultimately payable. Matters might be different if the pension fund were significantly larger than it is; however, whether on the more "ambitious" or optimistic assumptions adopted by Barral Sheppard, or the more cautious approach of Brewin Dolphin, the value of the pension fund and the annual pension ultimately payable from it are not such as to persuade us that it would be reasonable to require the petitioner to withdraw £170,000 from the fund to pay for litigation costs.

[63] Having regard to all the information before us about the petitioner's individual financial circumstances we are satisfied by applying the subjective test that the proceedings are prohibitively expensive for the applicant. It follows that we must make a PEO.

[64] We turn now to the objective test, as it is discussed in paragraphs 23 and 28 of

Edwards in the UK Supreme Court. It is not suggested in this case that the claim at any stage is potentially frivolous. We address the other points mentioned in Lord Carnwath's paragraph 28 as follows.

[65] The importance of what is at stake for the claimant. We agree with the submission for the petitioner that the principle focus of this point is directed at the petitioner's individual economic interests, and not to wider, perhaps less tangible, benefits. The impact of the wind farm development on the petitioner's economic interests appears to us likely to be small. The development will have no impact on the organic sheep farming business, nor on the forestry business. To the extent that it might have some impact on the holiday letting business of two cottages, standing the position of the respondents that wind farms have no negative impact on tourism, and in the absence of any arguments or evidence to the contrary, we consider that any adverse impact on the petitioner's income from this source may be regarded as insignificant. There is no evidence, in the valuation report or elsewhere, to suggest that the wind farm development would have an adverse impact on the value of the Craigengillan Estate. We conclude that the petitioner's individual economic interests are unlikely to be significantly affected by either the wind farm development or these proceedings.

[66] We have rehearsed the importance of what is at stake for the protection of the environment. Essentially, this appears to fall into three parts - impact on the Dark Sky Park, impact on the Dark Sky Observatory, and impact on the designed landscape of the Craigengillan Estate. Concerns about these issues have not been confined to the petitioner; they were referred to in the objections on behalf of South Ayrshire Council and East Ayrshire Council and we note that there were 4,723 objections to the application. As Advocate General Kokott observed, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest. We are persuaded that the petitioner may properly be described as one of these concerned citizens.

[67] No party has suggested that the petitioner has no reasonable prospects of success in the present proceedings. However, senior counsel for the interested party advanced an argument, for the first time at the end of his submissions to this court, to the effect that even if the petitioner was successful in the present proceedings, having regard to practical realities and the fact that when the Scottish Ministers came to consider a fresh application for this development it would have been completed, it would be producing electricity, and some £74 million would have been expended on it, they would be most unlikely to refuse to grant consent for the project.

[68] We are not persuaded by this argument, for two reasons. First, in the event that the petitioner is successful in these proceedings and that the decision is reduced, the respondents would be obliged to consider any fresh application on its merits. We do not consider that it should be assumed that the respondents will ignore this obligation and simply "rubber stamp" approval of the development because of the amount already expended on it and the fact that it may by then be operational. Such an argument might be said to betray an element of cynicism. We note that it was not advanced by the respondents themselves. Second, and in any event, the discretion conferred on the court to refuse to make a PEO if it considers that the proceedings have no real prospects of success is directed at the prospects of success in these proceedings. The court is not enjoined to look to the prospects of success in future or hypothetical proceedings, nor to possible consequences resulting from success in these proceedings. What may or may not happen in the event that the petitioner is successful in these proceedings is not a matter for our consideration.

[69] Having regard to all of these factors, and to the fact that it is not disputed that the likely total costs of these proceedings may exceed £170,000, in applying the objective test we are satisfied that the proceedings are prohibitively expensive.

[70] It follows from the above that the court must make a PEO. We shall accordingly grant the reclaiming motion, recall the interlocutor of the Lord Ordinary dated 14 April 2015, and grant a PEO in the terms sought by the petitioner. We shall continue the question of expenses to another date.

[71] By way of postscript we express our concern about the length of time that this application for a PEO has taken, and the expense incurred by the lengthy hearings before the Lord Ordinary and this court. Applications for a PEO have been few and far between in Scotland, but we consider that in the particular circumstances of this case, a more expeditious disposal should have been achieved. Looking to the future, we express the hope that such applications can be disposed of much more quickly. They are dealt with by motion, with a limited amount of documentary material being required in support of the motion. It is not an opportunity for a respondent to subject an applicant to intrusive and detailed investigation of financial circumstances. In most cases, we do not consider that it will be appropriate for the court to look behind this material, or (as happened in this case) to require parties to provide competing valuations of assets such as pension funds. In exercising its powers under Chapter 58A, the court is not engaged in an analysis of evidence, nor is it hearing a proof. In most applications for a PEO we would expect submissions for all parties to be capable of being concluded within a total of about 1½ hours (as is the case in an application for leave to appeal), with the court usually being able to give an immediate *ex tempore* judgment.