OUTER HOUSE, COURT OF SESSION

[2014] CSOH 172

P843/14

OPINION OF LORD PHILIP

In the Petition of

THE JOHN MUIR TRUST

Petitioners;

for

Judicial Review of a decision of the Scottish Ministers dated 6 June 2014 to grant consent for the erection of 67 wind turbines and Stronelairg, Garrogie Estate, Whitebridge, Fort Augustus

Respondents:

Petitioners: Agnew QC; Drummond Miller LLP
Respondents: Mure QC, Byrne; Scottish Government Legal Department
Interested Party: Ms Wilson QC; CMS Cameron McKenna LLP

31 October 2014

[1] The petitioners are a company limited by guarantee and a registered charity. Their principal object is "to conserve and protect wild places with their indigenous animals, plants and soils for the benefit of present and future generations." They are a non-governmental organisation promoting environmental protection and, by virtue of article 1(2)(e) and article 11(3) of Directive 2011/92/EU of the European Parliament and of the Council of the European Union of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, are deemed to have an interest in the environmental decision-making procedures with which this petition is concerned.

[2] They have lodged a petition for judicial review of a decision of the respondents, the Scottish Ministers, dated 6 June 2014, by which the respondents decided not to hold a public inquiry, but granted consent to the interested party, Scottish & Southern Energy Renewables (SSER), under section 36 of the Electricity Act 1989, together with deemed planning permission under section 37(2) of the Town and Country Planning (Scotland) Act 1991, for the erection of 67 wind turbines at Stronelairg, Garrogie Estate, Whitebridge, Fort Augustus.

[3] The petition for judicial review is based on a number of grounds. The petitioners contend *inter alia* (i) that the decision not to hold a public enquiry was unlawful in respect that it denied them access to judicial or other procedure for challenging the substantive legality of the decision; (ii) that the respondents acted unlawfully in granting consent in the face of an objection by Scottish National Heritage on the grounds of the impact the wind farm might have on wild land, and in failing to give adequate reasons as to why they had declined to follow SNH's advice; (iii) having concluded that the project would have a significant impact on the "wildness qualities" of the Monadhliath Search Area for Wild Land (SAWL) it was unreasonable for the respondents to grant consent, contrary to their expressed policy of protecting areas of wild land; (iv) that in the absence of a fact finding process in the form of a public local inquiry, the petitioners did not have an effective opportunity to participate in the decision-making process, contrary to article 6(4) of the 2011 Directive; (v) that without a public local inquiry the petitioners had been denied a fair hearing; (vi) that the respondents failed to cause SSER to advertise new environmental information which had come to them, or to consult upon it; (vii) that the reasons given in the decision were inadequate.

[4] The petitioners have enrolled a motion under Rule of Court 58A.3 for a protective expenses order limiting their liability in expenses to the respondents, and any other party

entering the process, to £5,000; and limiting the liability in expenses to the petitioners of the respondents, or of any other party entering the process, to £30,000 in total. Alternatively, they seek a protective expenses order in such terms as the court considers appropriate.

[5] Protective expenses orders in environment appeals and judicial reviews are provided for by chapter 58A of the Rules of the Court of Session. In terms of Rule of Court 58A.1 the provision applies to applications to the supervisory jurisdiction of the court which include a challenge to a decision which is subject to the public participation provisions of the 2011 Directive. The applicant must be an individual or a non-governmental organisation promoting environmental protection. Paragraph (3) of Rule 58.2 defines a protective expenses order as an order which regulates the liability for expenses in 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. Paragraph (4) of Rule 58.2 provides, subject to the provisions of paragraph (6), that the court is obliged to make a protective expenses order where it is satisfied that the proceedings are prohibitively expensive for the applicant. Paragraph (5) of the same rule provides that for the purposes of the 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. The final paragraph of rule 58A.2 allows the court to refuse to make an order if it considers that the applicant has failed to demonstrate a sufficient interest in the subject matter or that the proceedings have no real prospects of success.

[6] Rule 58A.4, provides that, subject to paragraph (2), a protective expenses order must contain a provision limiting the applicant's liability in expenses to the respondent to the sum of £5,000. Paragraph (2) enables the court on cause shown by the applicant to lower that sum. Paragraph (3) is also subject to the ensuing paragraph (4) but provides that a

protective expenses order must also contain a provision limiting the respondents' liability in expenses to the applicant to the sum of £30,000. Paragraph (4) enables the court, again on cause shown by the applicant, to raise the sum mentioned in paragraph (3). Paragraph (5) permits the court to take various other orders, for example, to exclude or to limit any party's liability in expenses to the other party, or to provide that no party will be liable for the expenses of any other party. These orders may be made dependent on whether the applicant is successful or unsuccessful in the proceedings or can be made regardless of the outcome of the proceedings.

[7] Rule 58A.5 provides that in deciding the terms of a protective expenses order, the court shall 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.

[8] In this case it is not disputed that the petitioners have a sufficient interest in the subject matter of the proceedings, nor is it argued on behalf of the respondents that the

proceedings have no real prospect of success. The sole issue in the application therefore is whether the proposed proceedings are prohibitively expensive for the applicant.

[9] On behalf of the petitioner, Sir Crispen Agnew of Lochnaw QC submitted that the petitioner, as a charity, needed certainty as to its potential liability in expenses. They could not risk a potential open-ended liability. As I understood him, counsel said that petitioners *probably* could not go ahead on the basis of financial information at present available, but they certainly could not go ahead in the present circumstances in which they found themselves. If the court found that the petitioners could afford £5,000 it was within the court's power to increase that sum. The estimated expenses which the petitioners would incur for the three day hearing which had been fixed for December were approximately £53,000. The sum which was likely to be incurred by the respondents and by the interested party were £53,000 in each case, bringing out an total of approximately £160,000. These figures might be underestimates.

[10] In relation to the funds available to the petitioners for the conduct of the litigation, a figure of £5,000 had been budgeted for. Donations of £48,000 had been received in response to their appeal for assistance with the litigation, and in addition they had pledges of £51,500. There was no guarantee that these pledges would be honoured. The total amounted to approximately £100,000. There would therefore be £47,000 available to meet expenses of other parties. These figures did not take account of the motion before me which lasted for the greater part of two days. The estimate of the petitioners' expenses for one day on the motion roll was £7,000.

[11] The petitioners' accounts showed that their funds were committed to charitable work and that much of the funding it received was restricted to specific projects. The budget of £5,000 for this litigation was set on the basis that a loss of £700,000 could be

carried for one year. The year to date had been difficult financially as the level of donations had not been as expected with the result that the petitioners had been required to cut expenditure. Only £460,000 was available for general expenditure and that figure was being drawn upon every month to meet ongoing expenses.

[12] Counsel for the petitioners referred to the judgment of the ECJ in the case of *R (Edwards)* v *Environment Agency (No. 2)*, a reference to the court by the Supreme Court of the United Kingdom, in which the ECJ said that in assessing whether proceedings would be prohibitively expensive it was necessary to ensure that the anticipated cost of proceedings was not objectively unreasonable. As I understood counsel's submission, this gave the court a discretion to make a protective expenses order in appropriate circumstances even although the cost of the proceedings were not prohibitively expensive for the petitioner. In support of this submission, he relied on rule 58A.5(i) which required the court to take account of *all* the circumstances, and not only those listed in that paragraph, including the importance of what was at stake for the protection of the environment. The objective of the Directive was that NGOs should play an active role in preserving the quality of the environment.

[13] Opposing the motion for the Scottish Ministers, Mr Mure QC emphasised that it was for the petitioner to satisfy the court that the expenses of the proceedings were prohibitive. It was not contended that the land in question was subject to statutory protection either in the United Kingdom or in the European Union. The test was, could the petitioners not reasonably proceed with the proceedings in the absence of a protective expenses order? The question whether the likely expenses were beyond the applicant's available income and capital required to be decided objectively, not on the petitioners' own subjective views. The petitioners were intending to instruct senior and junior counsel and two sets of solicitors.

Was such duplication necessary? If an order were to be refused at this stage, the petitioners could seek a further order at a later stage on the basis of a change of circumstances.

[14] On the basis of the petitioners' accounts for the year ended 31 December 2013 and material on their website relating to the proposed development, Mr Mure submitted that the petitioners did not appear to rule out continuing with the litigation in the absence of a protective expenses order. The petitioner should disclose whether they had a potential guarantor. The documents lodged also disclosed that Miss Perpetua Pope, who had died in early 2014 had left a legacy of £300,000, and that the petitioners were awaiting payment of a total of £980,000 in legacies from the estates of donors who were already dead. In any event the payment of any expenses would not fall due for approximately one year by which time the petitioners' circumstances would have improved. Approximately £100,000 had been collected in donations in 2014 to date. Future donations could be expected to continue at that level.

[15] Referring to the petitioners' accounts, Mr Mure noted that as at December 2013 the petitioner had available, free reserves of £1,043, 245 which, according to him, would have been available to meet the expenses of this litigation. The petitioners could have structured their resources to prepare for what they clearly regard as an important campaign. In any event since there was no EU or UK protection for wild land the campaign itself was not so important. In relation to Rule of Court 58A.4, while the court may lower the £5,000 limit, there was no provision for raising it as suggested by counsel for the petitioners.

[16] Miss Wilson QC for the interested party argued that the petitioners' real concern was that the first hearing might last in excess of the three days and they were seeking insurance against liability for any extra days. They were seeking a level of certainty as to their exposure of expenses. That was not an appropriate basis for the motion. Their assessment

of their resources was entirely subjective. On an objective analysis, their resources far exceeded the estimates of the expenses for the first hearing. The motion should accordingly be refused.

[17] The question arose as to whether the court should take account of the petitioners' other charitable activities in considering whether these costs were beyond their means. The answer was that the wider financial situation of the petitioner was relevant as opposed to the snapshot provided by the unaudited statement of the petitioners' financial position as at 31 August 2014. While the petitioners' income was unpredictable they had nevertheless maintained surpluses or a small loss over the years. Their legacy income continued at a high level. They had provided insufficient information as to the possibility of redirecting funds from one purpose to another. They had already sought judicial review of the Highland Council decision and must have anticipated that they would be challenging the Scottish Ministers' decision. Provision should have been made in the budget for that.

The petitioners had investments valued at £779,255 and net current assets as at 31 December 2013 of £263,900. These sums could be made available to meet the expenses of the litigation. In addition to the £43,000 donated for these proceedings, the accounts showed that £121,538 had been gathered under the heading of "Wild Land Campaign Appeal". The petitioners had failed to explain why that sum could not be used in these proceedings.

Decision

[18] A three day first hearing has been fixed in this case. The petitioners estimate that their own expenses for that hearing will be £53,000. The estimate for each of the other two parties was said to be the same, so the total figure for the expenses of the first hearing is

estimated at approximately £160,000. There was a suggestion that this figure might be an under-estimate. Mr Mure at one point submitted that the expenses of two counsel and two firms of solicitors whom the petitioners proposed to engage might be seen as objectively unreasonable. The force of that submission was somewhat diminished by the acknowledgement that the respondents and the interested party would be likely to incur the same figure as the petitioners.

[19] In the circumstances I shall proceed to consider the motion on the basis that the hearing will last three days and the figure of £160,000 is not objectively unreasonable.

[20] I first consider the resources which might be available to the petitioners to meet the expenses likely to be incurred. They launched an appeal some time ago for donations to enable them to fund an application for judicial review and, as I understand it, that appeal is still open. In response they have to date received donations totalling £48,000, together with pledges amounting to £51,500, bringing out a total of approximately £100,000. Sir Crispin Agnew raised the possibility that these pledges might not be honoured, but gave no indication of the extent to which such pledges made to the petitioners in the past has suffered that fate. Accordingly I treat the suggestion as mere speculation and attach little weight to it.

[21] In addition the petitioners are due to receive a legacy of £300,000 from the estate of the late Miss Perpetua Pope who died early this year. They are also due to receive legacies totalling £989,000 from estates in course of being wound, the testators having already died. Counsel for the petitioners submitted that it could not be predicted when these legacies might be received but I did not understand him to say that the proceeds could not be used to meet the expenses of the judicial review. Miss Pope's will was produced and appeared to be in straightforward terms which might indicate that payment of the legacy might not be

too long delayed. Moreover, as Mr Mure suggested, any liability for expenses would be unlikely to arise for some time. If the matter were to go beyond the Outer House the period of a year might be a realistic interval during which time the petitioners could be expected to receive some further income from donations. It is not unreasonable to assume that at least some of the £989,000 will be received within that time as well as Miss Pope's legacy. Although the petitioners' income from donations has reduced in 2014 the petitioners' accounts indicate that a reasonable stream of donations is maintained although it rises and falls from time to time.

[22] I understood counsel for the petitioners to argue that the court had a discretion to make a protective expenses order even although the predicted expenses of the proceedings would not be prohibitively expensive for the applicant. This submission was based on Rule of Court 58A.5(1) which requires the court to take account of all the circumstances, not only those listed in the paragraph, and on the stated objective of the 2011 Directive that the participation of non-governmental organisations promoting environmental protection should be fostered.

[23] I reject that submission. The fundamental pre-requisite for the granting of a protective expenses order is that the court should be satisfied that the expenses to be incurred would be prohibitively expensive for the applicant. How the various factors listed in paragraph (1) will fall to be taken into account remains to be seen in individual cases, but there is no question of the requirement for prohibitive expense being departed from.

[24] Both Mr Mure and Ms Wilson argued that the petitioners should have foreseen that a petition for judicial review would be lodged and should have made provision in the organisation of their financial affairs for the necessary expenses. They questioned why funds could not be transferred from one project or purpose to another within the applicant's

activities and pointed to various entries in the accounts which they asserted could provide funding.

[25] As I understand it, this is the first case in which this question has had to be considered in an application by a NGO for a protective expenses order. In *Carroll* v *Scottish Borders Council*, in which the applicant for the protective expenses order was an individual, Lord Drummond Young said:

> "The court must consider the applicant's living expenses, liabilities and the like….while the starting point must be the applicant's living expenses, if these appear extravagant as disproportionately high on an objective basis the court would in my opinion be entitled to take that into account".

By analogy, in relation to an NGO, the court in my opinion requires to consider, as far as it can on the information available, the nature and extent of the work of the NGO and to proceed on the basis that the organisation should be able to continue with its activities so long as it does so in good faith and not extravagantly or imprudently. The motion roll does not lend itself to a detailed examination of the way an organisation carries on its business nor should the court normally attempt to second guess the business decisions of a responsibly run charitable organisation.

[26] Accordingly I am not in a position to decide whether the petitioners should have transferred sums of money for one purpose to another. That said, I was given very little information by counsel for the petitioners as to the status, legality or rigidity of the restrictions or designations put on individual donations and funds, other than the assertion that if funds are transferred from one project to another, the work already done on the original project may be damaged and the project itself adversely affected.

[27] Ms Wilson drew attention to an entry in the statement of funds as at 31 August 2014 of £121,538 under the heading "Wild Land Campaign Appeal 2010", a figure which had

increased by approximately £10,000 during 2014. Counsel for the petitioners was unable to say for what purpose that sum of money was being held or whether it was available for the petition for judicial review.

[28] In the absence of further explanation, and standing the existence of pending legacies totalling approximately £1.3 million, I consider that this petition can be reasonably proceeded with by the petitioners in the absence of a protective expenses order. Accordingly I am not satisfied that the envisaged proceedings will be prohibitively expensive for the petitioners. The motion is therefore refused.