EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 33
P843/14

Lady Smith
Lord Brodie
Lord Drummond Young

OPINION OF LADY SMITH

in the Petition

by

JOHN MUIR TRUST

Petitioners and Respondents;

against

SCOTTISH MINISTERS

Respondents and Reclaimers;

and

SSE GENERATION LIMITED, AND SSE RENEWABLES DEVELOPMENTS (UK) LIMITED

Interested Parties:

Petitioners and Respondents: Agnew of Lochnaw QC; Drummond Miller LLP
Respondents and Reclaimers: Mure QC, Byrne; Scottish Government Legal Directorate
Interested Parties and Reclaimers: Wilson QC, Gill; Cameron McKenna LLP

29 April 2016

Introduction

[1] This is a motion under Rule of Court 58A, for a Protective Expenses Order ("PEO").

[2] The applicant ("JMT") is a charity which has as its principal object the conservation and protection of wild places with their indigenous animals, plants and soils for the benefit

of future generations. Put shortly, it is a non governmental organisation ("NGO") which promotes environmental protection. Accordingly, a fundamental and key aspect of its policy actions is the monitoring of developments which would impact on wild land and taking whatever they consider to be appropriate action: Affidavit of Helen McCabe, JMT's Head of Policy, para 3. It is, accordingly, not disputed that they have standing to bring the present proceedings which are a petition for judicial review of a planning decision in relation to a proposed wind farm to be sited at Stronelairg in the Monadhliath Mountains in Invernesshire: *Directive 2011/92/ EU arts 1(2)(e)* and *11(3).*

[3] Nor is it disputed that JMT is, in these circumstances, entitled to make an application for a PEO under Rule of Court 58A.

Outer House

[4] JMT made an application for a PEO in the Outer House. By interlocutor dated 31 October 2014, it was refused. At paragraph 9 of his opinion, the Lord Ordinary explained:

> " ….Sir Crispin 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."

It was, at that stage, estimated that the expenses in relation to the proceedings in the Outer House would be likely, in total, to be in the order of £160,000. It was not suggested that that figure was objectively unreasonable given the number of parties and the forthcoming debate hearing which was due to last three days.

[5] JMT's application for a PEO was, however, refused by the Lord Ordinary who, put shortly, appears to have considered that from what he could glean of the resources then

available to them, he was not satisfied that the proceedings would be prohibitively expensive.

[6] JMT proceeded notwithstanding their indication to the Lord Ordinary that they could not do so without the benefit of a PEO. They were successful. In his interlocutor of 4 December 2015, reducing the relevant planning consent, the Lord Ordinary reserved meantime all questions of expenses.

[7] By referring to the fact that JMT proceeded notwithstanding the lack of PEO protection, I do not mean to suggest that that is determinative of the issue of whether or not the proceedings are prohibitively expensive ; to do so would conflict with what was said by the CJEU in *R (Edwards)* v *Environment Agency* [2013] 1 WLR 2914 C – 260/11 at paragraphs 43 and 47, namely that the fact that a claimant has not in fact been deterred "is not of itself sufficient to establish that the proceedings are not prohibitively expensive..". That does, however, indicate that it is nonetheless of some relevance.

[8] The respondents and the interested parties have reclaimed. JMT has cross reclaimed in respect of the Lord Ordinary's decision to refuse to grant a PEO.

Rule of Court 58A

[9] An application for a PEO may be made in relation to a reclaiming motion: Rule of Court 58A.3(3).

[10] The court must make a PEO if it is satisfied that the proceedings are "prohibitively expensive" for the applicant. Proceedings are prohibitively expensive "if the applicant could not reasonably proceed with them in the absence of such an order": Rule of Court 58A.1.

[11] Any PEO must provide for the applicant's liability in expenses to be limited to £5,000 or, on cause shown, less: Rule of Court 58A.4(1) and (2). Accordingly, the import of "in the absence of such an order" in the definition of "prohibitively expensive" in RC 58A.1 is that the applicant could not proceed in the absence of an order restricting their liability to other parties to no more than £5,000. A PEO must also, by way of a reciprocal cap, limit the respondent's liability to £30,000 or, on cause shown, a higher sum: Rule of Court 58A.4(3) and (4). If the applicant seeks to invoke the court's power to lower the cap on his liability or increase the reciprocal cap, he requires to set out his grounds for doing so in the motion: Rule of Court 58A.3(4)(e).

[12] JMT seeks to increase the reciprocal cap to £50,000. In the motion, the justification provided is that JMT estimates that their expenses in the reclaiming motion are likely to be in the order of £50,000.

[13] Finally, when determining an application for a PEO, the court must take into account all the circumstances including the need to ensure that it is not prohibitively expensive for the applicant to continue with the proceedings, the extent to which the applicant would benefit if successful, the terms on which the applicant is represented, whether and to what extent the applicant is acting on behalf of another person and whether and to what extent the applicant is agreeable to the imposition of a reciprocal cap (Rule of Court 58A.5(1)).

[14] Parties are agreed that the total expenses in relation to procedure in the Inner House are likely to be in the order of £150,000 (£50,000 each).

Relevant authorities

[15] Article 11(1) of Directive 2011/92/EU ("the EIA directive") requires Member States to

ensure "in accordance with the relevant national legal system" that members of the public with a sufficient interest:

> "have access to a review procedure before a court of law or another independent or impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive….".

Article 11 also requires that "any such procedure shall be fair, equitable, timely and not prohibitively expensive." The latter reflects the provisions of article 9.4 of the Aarhus Convention.

[16] The application of article 11 was the subject of a reference to the CJEU in R (*Edwards)* v *Environment Agency (no 2)(ECJ)* [2013] 1 WLR 2914. The judgment of the court includes the following: the issue of whether costs are prohibitively expensive may be considered at a preliminary stage, on a possible capping of costs, or at any later stage when the court is considering an award of costs (paras 35 and 48); the requirement that costs be not prohibitively expensive does not prevent courts making an order for costs provided they are reasonable in amount and, taken as a whole, not prohibitively expensive for the party concerned (paras 25-6); the objective is to ensure effective judicial protection without excessive cost (para 38); the costs must not exceed the financial resources of the party concerned nor appear, in any event, to be objectively unreasonable, bearing in mind that persons and associations require to play an active role in defending the environment (paras 39 and 40); the fact that an applicant has not been deterred from litigating is not in itself sufficient to establish that the proceedings are not prohibitively expensive (paras 43 and 47); the court must take account of an applicant's financial circumstances (para 40); the court must also carry out an objective analysis of the costs – when doing so it may have regard to the situation of the parties, whether the applicant has reasonable prospects 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/procedure, the potentially frivolous nature of any claim, and any availability of legal aid or a costs protection scheme (para 46). Expenses which are disproportionate to the proceedings – as may be demonstrated by one or more of those factors listed by the CJEU and subsequently endorsed by Lord Carnwath (*R(Edwards)* v *Environment Agency (No 2)* [2014] 1 WLR 55 at para 23) – are to be regarded as prohibitively expensive, even if subjectively viewed, it would be reasonable for the applicant to pay them out of his financial resources.

[17] Article 11 was also discussed in *European Commission* v *United Kingdom* C-530/11 [2014] 3 CMLR 6 when the CJEU considered whether or not the UK had failed to transpose the directive into national law. The judgment of the court confirmed that affording a discretion to the court when applying the national costs regime in a specific case was not, of itself, incompatible with the requirement that proceedings be not prohibitively expensive. Affirming what had already been said in *Edwards*, it stated the requirement that costs be not prohibitively expensive does not prevent the courts from making an order for costs provided they are reasonable in amount and, taken as whole, not prohibitively expensive for the party concerned (para 44) and that where a court is making an award of costs in an environmental dispute, it must satisfy itself that the requirement that those costs be not prohibitively expensive has been complied with (para 45). The CJEU also observed that the possibility of a PEO ensures greater predictability with the relevant predictability being referred to as "reasonable predictability" (para 54 and 58) in the context of the UK having acknowledged that lawyers' fees are high. I do not – contrary to what, at one point, Sir Crispin seemed to suggest - read that desire for reasonable predictability as reducing the threshold for intervention by the court to anything less than prohibitively expensive or

mandating the use of a costs capping order rather than any other tool that is available to the court.

[18] In *Djurgården – Lilla Värtans Miljoskyddsforening* v *Stockholms kommun genom dess marknamnd* C - 263/08, the CJEU addressed the issue of whether Swedish procedure – which required an organisation to have at least 2000 members before it had a right of appeal in an environmental matter – contravened article 10a of Directive 85/337, whose terms are now contained in article 11. The court concluded that it did because national rules must not be liable to nullify EC provisions which provide that parties who have a sufficient interest to challenge a project are to be entitled to bring actions before competent courts. The context was, accordingly, not consideration of the imposition of a costs protection order.

Hearing on the Single Bills

Information available regarding the petitioners' circumstances

[19] As indicated above, parties were agreed that the proceedings in the Inner House were likely to involve legal costs amounting to about £50,000 each, £6,000 of which has already, in the case of JMT, been paid. Also, they agreed that the proceedings in the Outer House are likely to have involved legal costs totalling about £228,000, £76,000 of which has already been paid by JMT.

[20] Accordingly, if JMT is not successful in the cross reclaiming motion, its risk in relation to Outer House expenses will be in the order of £152,000. Its risk in relation to Inner House expenses is currently in the order of £144,000.

[21] JMT has run and continues to run a campaign – the "Stop Stronelairg Appeal" - to raise money specifically so as to fund their legal expenses in relation to the current proceedings. The JMT website states that donations:

> "will be spent on our **Stop Stronelairg Appeal.** If we raise more than we need to fund our legal challenge, the money will be spent on protecting wild land in the UK against appropriate development."

In the responses to "Frequently Asked Questions", JMT refers to its success before the Lord Ordinary and regarding "What next?", states: "…we are asking for financial pledges to give us an idea of the level of donations we can expect if our legal costs exceed the money already donated." and it repeats the statement that if donations exceed what is required for Stronelairg, they will be spent on protecting other wild land. These entries were on the website by January 2016 and continue to feature. The campaign is an ongoing one.

[22] Although an affidavit from Fiona Kindness, JMT's Director of Resources indicated that £192,000 plus pledges of £27,000 were restricted funds for Stronelairg, that was subject to some amendment in the course of the hearing. It seems that their final position is that donations of some £140,000 had been made to the Stronelairg campaign before the end of 2015. Donations of some £52,000 had also been made to support a campaign to stop development of a wind farm at Talladh – a Bheithe; whilst those funds were still regarded by JMT as allocated to that campaign, Scottish Government had returned the application to the developer who, according to a statement dated 7 April 2016, had decided not to challenge Scottish Government's decision. The developer was considering its options. Bringing forward another project at an unspecified future date was not ruled out. When JMT decides that Talladh – a Bheithe is no longer at risk, the £52,000 will be available for Stronelairg and/or other wind farm developments. The total of some £192,000 is shown in the 2015 accounts as restricted funds. Also, pledges of £27,000 had been received for Stronelairg by that date. The petitioners did not demur from the suggestion that, in the circumstances, at least £140,000 plus £27,000 of campaign money should be regarded as currently available for Stronelairg expenses.

[23] According to their accounts, JMT had designated funds of over £1.4m at the end of 2015. Whilst a substantial part of those funds can properly be regarded as operational assets and also as relating to a fund in relation to which the donor has given an indication of particular wishes, just over £163,000 is explained only as "earmarked for a number of projects" between 2011 and 2017 and just over £38,000 are "other funds" in relation to which no explanation is provided. Regarding the designated funds, they are not the same as restricted funds. The latter connotes obligation to use the funds in a particular way but the JMT trustees may, at their discretion, elect to re-designate funds to a purpose different from the original one.

[24] JMT had free reserves (ie not restricted and not designated) of £833,000 as at 31 December 2015. We were told that, according to their budget, that was the equivalent of 4.8 months of budgeted expenditure for 2016. JMT's policy on free reserves is to operate with a lower limit of 4 months and upper limit of 6 months of budgeted expenditure, that being seen as sufficient to absorb any peaks or troughs in income and expenditure over the year. Four months free reserves would, on those figures, be about £694,000. Ms Kindness states, in her affidavit, that JMT's free reserves are required for ongoing day-to-day work and cannot be made available to cover legal fees. Regarding the former, whilst I can see that that comment may legitimately apply to the £694,000, given JMT's free reserves policy, I do not accept that it applies to the remainder particularly given the lack of specification. Regarding the latter, as Mr Sinclair states in his affidavit, it is not possible to understand it since free reserves can be used for whatever purpose trustees decide. In the circumstances, I consider that it is appropriate to proceed on the basis that JMT have free reserves, at least £139,000 of which would be available for legal expenses if required.

[25] During 2015, the petitioners chose to put £720,000 of their available cash into investments.

Submissions for petitioner

[26] Sir Crispin relied heavily on a submission that, under EU law NGOs had been chosen for and given a special supervisory role of defending the environment. The submission was based on a comment by the Advocate General (Sharpston), in the Swedish case referred to above, at paragraph 64 of her opinion:

> " …I take the view that the Aarhus Convention and Directive 85/337, as amended by Directive 2003/35, have deliberately chosen to reinforce the role of non-governmental organisations promoting environmental protection."

and a statement by the CJEU, in the same case, at paragraph 45 of its judgment that:

> "…national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before competent courts."

He submitted that the proceedings would be prohibitively expensive on an objective basis because: JMT, as an environmental NGO, have been given a special role by the EU; that, having been successful in the Outer House, they have reasonable prospects of success; that what is at stake is protection of the environment; that if they are not granted a PEO, JMT is likely to be deterred from raising similar proceedings in the future; the amount of money involved - total Outer House and Inner House expenses of £376,000 - is substantial; JMT's current financial position would make it difficult to fund the expenses.

[27] Sir Crispin submitted that the proceedings would be prohibitively expensive on a subjective basis because : the financial risk involved is the total of both Outer and Inner House expenses; whilst JMT has various reserves, as shown in their accounts for the year to

31 December 2015 and in previous years' accounts, much of those reserves is either restricted funds or has been designated for other purposes; the free reserves as at that date whilst totalling £833,000 amounted to only 4.8 months of budgeted expenditure in terms of the 2015 budget; it would not be easy for JMT to reallocate resources; whilst they have raised £219,000 so far, that will not be sufficient once the Outer House expenses are taken into account; it would be unreasonable to redesignate funds if a donor had indicated a preference for a purpose other than the Stronelairg matter; and it would be unreasonable to expect the petitioners to realise assets or borrow money.

[28] With regard to a report from French Duncan LLP, Chartered Accountants and an affidavit from Antony Sinclair, one of its partners, lodged by the interested party, they involved the sort of detailed investigation that was not appropriate for PEO purposes: *J Mark Gibson* v *Scottish Ministers* [2016] CSIH 10, Lord Menzies at para 71.

[29] Sir Crispin did not state that, absent a PEO, JMT could not and would not proceed with their defence of the reclaiming motion or their pursuit of the cross reclaiming motion.

[30] Regarding the reciprocal cap, in oral submission, Sir Crispin did not expand on the reason given in the motion for seeking an increase, namely that £50,000 was the petitioners' estimate of their whole expenses in the Inner House.

Submissions for Scottish Ministers

[31] Mr Mure QC submitted that the application should be refused. JMT had not shown that the proceedings were prohibitively expensive. It was clear that they are not.

[32] Considerable weight should be placed on JMT's financial resources. They had received substantial donations and pledges for Stronelairg, they had designated funds which could be redesignated, they had free reserves which could be drawn upon, the

campaign to raise funds for the Stronlairg legal costs was continuing and if expenses are awarded against JMT that is not likely to occur for many months, probably not so as to be exigible before the end of 2016. Further, JMT had chosen to invest a substantial amount of cash in 2015; even if some of it represented restricted funds, it did not all do so. Thus, on a subjective test alone, JMT could not demonstrate prohibitive expense. So far as objective assessment was concerned, it was not suggested that the level of expenses was disproportionate to the nature of the proceedings: *J Mark Gibson* v *Scottish Ministers; RSPB* v *Scottish Ministers,* Lord Jones 12 May 2105. Otherwise, it was not irrelevant for these purposes that JMT had pursued the proceedings for 20 months without a PEO, it would be difficult for the court to reach any view on prospects of success at this stage, and there were important matters at stake for the environment from the Scottish Minister' point of view namely the reduction of carbon emissions and meeting renewable energy targets.

[33] Mr Mure QC submitted further that it should be remembered that neither the Aarhus convention nor article 11 of the Directive affected the power of national courts to award reasonable costs: *R(Edwards)* v *Environment Agency* C – 260/11 [2013] 1 WLR 2914, CJEU paras 25 – 26; *European Commission* v *UK* [2014] 3 CMLR 6, CJEU at para 44. If the observations of the Advocate General in *Edwards* were to be relied on notwithstanding Lord Carnwath's statement in *R (Champion)* v *North Norfolk District Council and anr* [2015] UKSC 52, the whole of the sentence had to be read. The concern expressed was that the person should not be pushed to spending up to the limit of their resources. That would not, on the information provided, occur here.

[34] The reciprocal cap was not, he submitted, justified at all.

[35] Ms Wilson QC, for the interested party submitted that JMT had not shown that it was entitled to a PEO in circumstances where it was for JMT to put forward a credible basis

for it. So far as the expenses in the Outer House were concerned, JMT had cross reclaimed against the refusal of a PEO. So far as the reciprocal cap was concerned, it was not justified.

[36] Ms Wilson resisted any suggestion that the interested parties had fallen foul of Lord Menzies' guidance in *Gibson*. The report and affidavit produced by them were about publicly available accounts on which JMT were relying and they simply provided explanation from a person who specialises in charity accounting work.

[37] The problem with JMT's approach was, according to Ms Wilson, that it consisted only of broad assertions. So far as reliance on the Swedish case was concerned, the observations referred to were taken out of context. So far as the observations of the Advocate General in *Edwards* were concerned, they were not the law: *R (Champion).* In any event, the accounts disclosed that the legal expenses involved could comfortably be met by JMT. Having drawn our attention to the information summarised above, Ms Wilson submitted that it was clear that JMT could reasonably proceed; the proceedings were not shown to be prohibitively expensive.

Decision

[38] The issue is whether JMT has shown that the proceedings in relation to which the motion is made - namely, the proceedings in the Inner House - are prohibitively expensive for the trust. That is: has it been shown that JMT could not reasonably proceed with the proceedings in the Inner House in the absence of an order capping their potential liability to the respondents and interested parties at no more than £5,000? The onus is on JMT.

[39] I refer to the proceedings in the Inner House for two reasons. First, in terms of Rule of Court 58A.3(1), this is a motion "in relation to a reclaiming motion". Secondly, the issue of whether JMT were entitled to a PEO at the Outer House stage was determined by the

Lord Ordinary. JMT have cross reclaimed against his decision and will seek, in the forthcoming hearing on the Summar Roll, to have it overturned and replaced by a PEO to cover their liabilities in relation to the Outer House proceedings. If, after full argument in the reclaiming motion, the court agrees that a PEO should have been granted, the failure to provide that protection can be corrected. It is not appropriate to seek, in effect, to have it corrected now, on the Single Bills. Further, I note that the issue of expenses in the Outer House has yet to be determined. On any motion for JMT to pay expenses in relation to the proceedings in the Outer House, not only would the absence of a PEO not preclude JMT praying in aid all the principles that derive from the Aarhus Convention and the EIA Directive as discussed in the authorities including *Edwards* and *EC* v *UK*, the court would be bound to have regard to them when considering what award, if any, ought to be made against JMT. Likewise, the court will require to have regard to those principles when considering any motion for expenses that is made by the respondents or the interested parties in relation to the reclaiming motion.

[40] As is clear from the terms of Rule of Court 58A.1.1(b) and from the authorities referred to, both a subjective and objective test has to be applied. Taking subjective matters first, it is clear from the financial details in the 'Information' section above that JMT's potential liability in relation to expenses in the Inner House (£144,000) amounts to less than the funds already raised by the Stronelairg Appeal (£167,000). For the reasons explained above, I do not accept that, at this stage, allowance ought to be made for JMT's potential liabilities in relation to the Outer House but if I am wrong about that, the total potential liability of £296,000 amounts to less than would be available from those appeal funds and free reserves whilst maintaining the latter at a figure that is higher than four months' budgeted expenditure. Resort to redesignation of designated funds would not be required

although I accept that, on the information available including the French Duncan report and Mr Sinclair's affidavit (neither of which, in my view, contravened the guidance in *Gibson*), redesignation would be possible.

[41] Also, I accept that regard should be had to the fact that the Stronelairg appeal is continuing with potential for those reserved funds to be increased beyond £167,000 and to the fact that any awards of expenses will not require to be met for many months. Mr Mure's estimate of about the end of 2016 seemed to be a fair assumption.

[42] Regarding objective factors, no party suggested that the fees quoted were not justified by the nature and complexity of the issues raised in multi-party proceedings at either Outer House or Inner House stage or that they were somehow out of line. I turn then to the other specific matters referred to in *Edwards* by the CJEU and by Lord Carnwath. I appreciate that JMT were successful in the Outer House but the respondents and interested parties have reclaimed, challenging the decision with substantial arguments which all parties agreed require the usual limit of 10 authorities to be raised to 30. It seems to me that, at this stage, prospects of success has to be regarded as a neutral factor. As for the importance of what is at stake, JMT rely heavily on the protection and preservation of wild land being at stake whilst the respondents, by way of balance, refer to the environmental importance of reducing carbon emissions and meeting renewable energy targets. Again, it seems to me that, when assessing objective factors for PEO purposes, this also ought to be regarded as a neutral factor. I accept that it must be recognised that the land cannot speak for itself and that that has to be done by individual members of the public or NGO's, such as JMT; in so doing, they perform an important role. That does not, however, mean that what is at stake must always be regarded as a factor weighing heavily in favour of opting for a costs capping order such as a PEO. Even if one relies on the Advocate General's comments

at paragraph 43 of her opinion in *Edwards* - which are not, of course, a statement of the law - there is no suggestion that the fact that an NGO performs an environmental role of itself entitles it to the benefit of a costs cap. Nor do I accept that either those comments or the discussions in the Swedish case relied on by Sir Crispin show that, if an NGO is litigating in the public interest, the threshold for the assessment of what is prohibitively expensive must be taken to be lower. As for complexity, parties seemed to agree that the fee estimates quoted are not disproportionate, given what is involved in the issues raised. Finally, JMT have proceeded with this litigation for 20 months. That is not, of course, the whole answer but it is not irrelevant, particularly since they did so notwithstanding having made representations to the Lord Ordinary about their inability to do so without the protection of a PEO (see above).

[43] In all these circumstances, I cannot conclude that JMT could not reasonably proceed with the reclaiming motion in the absence of a PEO. For the avoidance of doubt, I do not consider that it would be correct to ask, in effect, whether JMT could reasonably have proceeded with the Outer House proceedings *and* reasonably proceed with the reclaiming motion. Any question of what could reasonably have been expected at Outer House stage did not feature in the submissions before us; that is not surprising since it is an issue for the cross reclaiming motion, not for now.

[44] I would only add that the fact that JMT are not, in my view, entitled to a PEO does not in any way foreclose the consideration of whether and how any ultimate award of expenses accords with article 11 of the EIA.

[45] Had I been satisfied that JMT had shown that they were entitled to a PEO, I would not have been persuaded that they had shown cause for the reciprocal cap to be increased

to £50,000. Simply pointing to that being what they estimate their costs as likely to be does not, in my view, afford sufficient support.

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29 April 2016

[46] I am grateful of having had the opportunity of considering the opinion of your Ladyship in the chair in draft. I agree with your Ladyship's opinion that the application for a PEO under Rule of Court 58A should be refused and I agree with your Ladyship's reasoning. I agree that even had JMT established that it was entitled to a PEO, a case for an

increase in the reciprocal cap was not made out. Moreover, I agree with your Ladyship's observation, at paragraph [44] of your opinion that refusal of this application in no way forecloses how any eventual award of expenses might be determined. I see the possibility of applying for a PEO under Rule of Court 58A as merely one way whereby the United Kingdom's obligations under the EIA directive may be complied with.

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Factors that are relevant to the construction of Rule of Court 58A

[47] Rule of Court 58A was promulgated in order to implement obligations undertaken by the United Kingdom under the law of the European Union, and must in my opinion be

construed in that light. The starting point is the Aarhus Convention in 1998. The object of the Convention was to encourage public participation in decisions on environmental matters, including in particular access to the courts. The Convention was followed by EU legislative measures, which were largely consolidated in Directive 2011/92/EU, passed on 13 December 2011, on the assessment of the effects of certain public and private projects on the environment. The principal concern of the Directive was to facilitate challenges to planning decisions that might have an impact on the environment. In particular, article 11 of the directive provides as follows

> "1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
> (a) having a sufficient interest… have access to a review procedure before a court of law… to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive…
> 4.… Any such procedure shall be fair, equitable, timely and not prohibitively expensive".

Article 11 sets out the EU law basis for Rule of Court 58A. The article must in my opinion be construed in a manner that has regard to its fundamental purposes, and in the context of measures to protect the environment.

[48] In my opinion the correct approach to the interpretation of article 11 is that set out by Advocate General Kokott in *R (Edwards)* v *Environment Agency (No 2)*, [2013] 1 WLR 2914, at paragraphs 40 and 42-44:

> "40 Legal protection in environmental matters… generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims….
> …
> 42 Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organizations.

> 43 The two-fold interest in environmental protection precludes risks in terms of prohibitive costs from being prevented only having regard to the capacity to pay of those who seek to enforce environmental law. They cannot be expected to bear the full risk in terms of costs of judicial proceedings up to the limit of their own capacity to pay if the proceedings are also, or even exclusively, in the public interest.
> 44 Consequently, in assessing whether costs of proceedings are prohibitive, due account must be taken of the respective public interest".

Those remarks were referred to with approval by Lord Carnwath in the subsequent proceedings in the United Kingdom Supreme Court, *R (Edwards)* v *Environmental Agency (No 2)*, [2014] 1 WLR 55, at paragraph 28. Similarly, in *Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening* v *Stockholms Kommun Genom dess Marknämnd*, Advocate General Sharpston expressed the view at paragraph 64 that the Convention and the then relevant Directives

> "have deliberately chosen to reinforce the role of non-governmental organizations promoting environmental protection. They have done so in the belief that such organizations' involvement in both the administrative and judicial stages not only strengthens the decisions taken by the authorities but also makes procedures designed to prevent environmental damage work better".

[49] Although these statements do not express the views of the Court of Justice of the European Union, they conform in my opinion to the clear intent of the Convention and the relevant Directive. That was to ensure that administrative decisions with environmental implications are subject to proper legal scrutiny by the courts. In some cases private individuals will obviously act to ensure proper scrutiny of environmental decisions by taking action in their own name in the courts. In some cases, however, this will not be practicable. The present case provides an excellent illustration of such a situation. The affected area is wild land in the Monadhliath Mountains, an area where there is no settlement, and consequently no individuals, other perhaps than local landowners, who have any interest to challenge the grant of planning permission for a wind farm (and the

landowner may be a beneficiary of the development of the wind farm). In areas like that effective challenge by non-governmental organizations assumes particular importance.

[50] It is in my view important to bear in mind that the grounds for judicial review now extend beyond the relatively limited scope of *Wednesbury* unreasonableness to issues of conformity with Convention rights, rights under European Union legislation, and proportionality; these frequently involve scrutiny of the substance of the decision, rather than a mere assessment of whether it is one that a reasonable minister or body in the position of the decision-maker could make. That gives judicial review a greater significance than it has previously had, and strengthens the case for ensuring that, where individuals cannot or will not take action, non-governmental organizations may bring environmental decisions under review. In my opinion the expression "prohibitively expensive", which is used both in article 11 of the Directive and in Rule of Court 58A, must be construed against that background. For that reason the expression should not in my view be construed unduly strictly. What is required is that, in the wording of Rule of Court 58A.1(2), the applicant "could not reasonably proceed… in the absence of such an order". In applying that test, I am of opinion that it is necessary to have regard to the important role that environmental charities and the like are expected to play under the scheme of the Aarhus Convention and the Directive. For that reason, it appears to me to be essential to ensure that such bodies are able to retain sufficient funds to carry out their general environmental functions, including the possibility of challenging other environmental decisions by public authorities. It is not appropriate to insist that they exhaust their reserves, or run major deficits; that would threaten the continuing viability of such a body, and that appears to me to be contrary to the basic scheme of the Convention and Directive.

[51] In this connection, the system that is used in Scotland, and elsewhere in the United Kingdom, to regulate the incidence of legal expenses of some significance. The general rule is that a losing party pays the taxed expenses of the winning party as well as its own expenses. This can itself impose a severe burden on the losing party. Furthermore, the level of expenses in the United Kingdom is relatively high by comparison with many other European states in view of the adversarial system that is used in our courts. That means that the burden of establishing the case is placed on each party, individually, with relatively limited intervention by the court until the time comes to make a decision on the parties' contentions. In an inquisitorial system, by contrast, much of the burden of establishing a case will fall on the court, especially in administrative law matters, where specialist administrative courts will be involved. Rule of Court 58A is concerned primarily with the liability of the losing party to pay the expenses of the winner, in that it permits the court in advance to limit potential liability to a maximum of £5,000. The party that obtains the protective expenses order will nevertheless, if it is unsuccessful, be liable for its own expenses. As a *quid pro quo* for the reduction of the liability in expenses of the party with the protective expenses order in the event that it fails, if the party with the protective expenses order is successful, its ability to recover expenses from the other party is limited, normally to £30,000, as provided in Rule of Court 58A.4(3). The effect of the Rule of Court is thus relatively limited, in that an unsuccessful environmental charity must still find the funds to pay for its own legal expenses, and even if it is successful it must normally find its own expenses beyond the basic limit of £30,000.

[52] It is also necessary in my opinion to have regard to the importance of the general work carried out by agencies such as the Trust. The purposes of the Trust encompass environmental protection work in many parts of Scotland, which may obviously involve

dealing with a substantial number of applications in the course of a year where the environment may be threatened. I consider that it is necessary to have regard to that other work in assessing the available resources of the Trust for the purpose of determining whether funding the full costs of a particular case would be prohibitively expensive. If, for example, the expenses of one unsuccessful case were to deplete the Trust's funds to a major degree, that would obviously have an impact on its ability to challenge what it sees as other undesirable environmental decisions. That would clearly be contrary to the purposes of the Convention and the Directive. For that reason I think it important that, in dealing with protective expenses orders, the court should ensure that environmental charities have sufficient funds to continue their work in an effective manner that permits a response to new cases as they arise. That may involve taking urgent action where time limits for objections or court proceedings are involved.

[53] For the foregoing reasons I consider that the question of whether the expenses of litigation are "prohibitively expensive" should be approached in a practical manner that has regard to the overall financial requirements of an environmental charity. It might be said that there is a danger that such orders will be abused, to impose unmerited expenses on those who seek to promote economic development of various forms. The answer to this is I think that in considering whether to make a protective expenses order the court may consider the importance of the proceedings for the protection of the environment. Awards of expenses fall within the discretion of the court, and in my opinion the court may have regard to what is at stake in the proposed proceedings; if those proceedings appear relatively unimportant, or the applicant appears to have little prospect of success, such an order might be refused. This provides a practical control mechanism to discourage trivial or unmeritorious environmental litigation. That cannot apply to the present case, however,

where the Trust has been successful in the proceedings before the Lord Ordinary. That at least indicates that it has reasonable prospects of success, and in view of the scale of the wind farm that is proposed I do not think that it can be said that the present issue is unimportant.

Application of the Rule of Court

[54] In the light of the foregoing considerations, I am of opinion that the test in Rule of Court 58A is satisfied: if the Trust is unsuccessful in the contemplated reclaiming motion, the resulting liability in expenses would be "prohibitively expensive" for the Trust. In this connection I think that it is relevant to take the potential expenses of the proceedings in the Outer House into account in assessing the Trust's overall financial position. These have been the subject of a separate application for a protective expenses order, which was refused. Nevertheless, if the Trust loses the reclaiming motion, which is the hypothesis contemplated in an application for a protective expenses order, unless expenses are modified it will be liable not only for its own expenses in both the Outer House and Inner House but also for the taxed expenses of Scottish Ministers and the interested parties. It is the totality of that liability that will have an impact on the Trust's financial position. For this reason, in assessing the Trust's resources and liabilities, I think it unrealistic to leave the expenses of the Outer House proceedings out of account.

[55] In assessing whether possible liability in expenses would be "prohibitively expensive", the starting point for an environmental charity must in my opinion be the latest annual accounts, in this case the Trust's audited accounts for the year ended 31 December 2015. The consolidated statement of financial activities, which incorporates the income and expenditure account, discloses a substantial deficit, amounting to nearly 25% of total income

received. That is clearly of importance in assessing the financial position of the Trust and its ability to continue its activities in the future. In the preceding financial year, that ended 31 December 2014, the deficit amounted to nearly 10% of total income received. The court was informed in an affidavit provided by the Trust's Director of Resources that the deficit has been met out of existing reserves. The Director of Resources also indicates, and this is borne out by the accounts, that the great bulk of the Trust's expenditure is spent directly on its charitable activities. A deficit of nearly 25% of income is clearly a serious matter, and is unsustainable in the long term.

[56] In addition, I am of opinion that the Trust can expect to maintain a reasonable level of liquidity. In her affidavit the Director of Resources stated that the Trustees have a reserves policy which aims to maintain four to six months of budgeted expenditure as free reserves. As at 31 December 2015 the Trust had reserves amounting to the equivalent of 4.8 months of budgeted expenditure. The figures adopted by the Trustees appeared to me to lie within reasonable levels, and indeed the overall policy in relation to the maintenance of reserves was not seriously challenged. The reserves must, however, be assessed against the deficits that are currently being incurred on the Trust's revenue account. Against that background, it is in my opinion quite unrealistic to expect the Trustees to reduce reserves right down to the minimum of four months' budgeted expenditure; the current financial situation of the Trust calls for a high level of financial prudence.

[57] The Trust has raised a significant amount of what are described as restricted policy funds, which have in large measure resulted from an appeal aimed at funding the present litigation, the Stop Stronelairg Appeal. As at 31 December 2015 the Trust had £192,000 in such funds, and had pledges totalling a further £27,000 which could be used if necessary to fund the present litigation. The terms of the appeal document, which calls for donations,

states that the donations will be spent on the campaign to stop the proposed Stronelairg wind farm, but that if more was raised than was required for the legal challenge the donations would be spent on protecting wild land in the United Kingdom against inappropriate development. Thus, as a matter of trust law, those making donations must contemplate that the funds will be used so far as necessary in the campaign against the present wind farm, but that there is the possibility that the funds will be used to protect other wild land from inappropriate development. That is a normal provision in an appeal for funds of this nature; it is clearly impossible to predict the precise expenses of a legal challenge, with the result that some form of destination over is necessary. In the present case that is clear from the terms of the appeal.

[58] The court was provided with figures for the likely cost of the litigation, an estimated £144,000 in the Inner House and £296,000 for both Outer House and Inner House. It was not contended that those estimates were in any way unreasonable. For the reasons that I have already explained, I consider that it is appropriate to have regard to the total potential liability in expenses in the litigation, including the Outer House expenses that have already been incurred. On that basis the total cost, in the event that the Trust is unsuccessful, will amount to nearly £130,000 in excess of the sum of £167,000 raised by the Stronelairg appeal. That is in my view a substantial liability in the light of the Trust's overall financial position. It has general reserves, but they are largely used in carrying out its day-to-day environmental work. For that reason I do not think it reasonable to expect the Trust to have significant recourse to those reserves. In this connection, I consider it significant that the Trust has important activities in other parts of Scotland, and it must maintain reserves that are adequate to deal with other environmental issues that may arise. The fundamental purpose of the Convention and the Directive is to permit effective scrutiny, in court if

necessary, of environmental decisions, and that will be frustrated if a charity such as the Trust is compelled to expend a substantial sum on one particular case, especially if a large part of the expenditure must be met from general reserves. It is also I think important that the Trust has for at least the last two years been operating with a substantial deficit on revenue account.

[59] In the light of the foregoing factors I am of opinion that the total expenses of the present proceedings, in the event that the Trust is ultimately unsuccessful, would be prohibitively expensive for it in its current financial position, within the meaning of Rule of Court 58A, read in the light of the Convention and Directive. I am conscious that the present decision is not the end of matters. In the event that the Trust is ultimately unsuccessful in the litigation, the question of expenses is at large for the court, and in that event it would be open to the court to take the objectives of the Convention and Directive into account by reducing any liability that the Trust might incur, possibly as far as the limit of £5,000 that is referred to in Rule of Court 58A.4. The purpose of the Rule, however, is to permit the potential liability in expenses of a party litigating in the interests of environmental protection in advance. If that is not done, the resulting uncertainty is likely to serve as a major deterrent to litigation. To that extent the objectives of the Convention and Directive would in my opinion be significantly threatened. For that reason I do not think that the possibility of reducing liability in expenses after the conclusion of litigation is an answer to the claim for a protective expenses order.

[60] Consequently, in respectful disagreement with the majority, I would have granted a protective expenses order in respect of the proceedings in the Inner House.