Are Protective Expenses Orders delivering access to justice in Scotland?

26th May 2017

At a Glance

- Protective Expenses Orders (PEO) were brought into Scots law, implemented through Court Rule 58A, to comply with the Aarhus Convention requirement that there be access to justice in environmental cases which are taken for the public good.
- The Stronelairg development case demonstrates that it can be excessively difficult for an environmental organisation to gain a PEO, or assess whether it will gain one.
- The costs of the court case plus the costs of the PEO process, if the PEO application is unsuccessful, can be huge for a small organisation.
- The risk and the uncertainty throughout the process cannot be mitigated against.
- Scotland is not compliant with the Aarhus Convention, in the author's opinion.

Protective Expenses Orders (PEOs) were brought into Scots law to address the third pillar of the Aarhus Convention,[i] i.e. access to justice, regarding decision-making in environmental matters. PEOs are intended to ensure that legal action regarding the environment and taken for the public good is not prohibitively expensive - by restricting liability for the other side's costs if the case is lost. Chapter 58A of the Rules of Court[ii] states that 'proceedings are prohibitively expensive for an applicant for a protective expenses order if the applicant could not reasonably proceed with them in the absence of such an order' [underlining is my emphasis]. In this article I consider the cost of access to justice in environmental cases in Scotland, although I believe there are other specific problems for environmental cases in Scotland within the current judicial process.

The John Muir Trust's experience of applying for and being refused three PEOs, suggests that PEOs can be very difficult for an organisation to obtain; but also that the process of seeking a PEO can massively increase the cost exposure. What I observed, in some of the judges considering our case, demonstrated considerable ignorance of the Aarhus principles and a poor understanding of the planning system, including of Environmental Impact Assessment.

In this article I ask

- whether the principles and the process of PEOs, as implemented, make legal action easier for individuals or environmental organisations?
- are PEOs now a routine tool in the toolbox when seeking environmental protection?
- or is it still a last stand?
- can individuals or environmental organisations know which of the above it is at the outset, or estimate risk during the very prolonged process?

Challenging the Stronelairg development through the courts

Stronelairg will be an industrial-scale windfarm development, of 66 turbines (originally 83 were proposed), mostly 135m high, in the Monadhliath mountains, south of Loch Ness. The John Muir Trust is a relatively small charity, with a staff of around forty and a turnover of £2.4 million to cover all its work areas of land management, public engagement and policy work –

the latter being a small part of the portfolio. The Trust does not have any legally-qualified staff. Only three of the staff work on policy and campaigns and, as head of policy, I was the member of staff co-ordinating the case with the legal team.

There were a number of grounds of challenge in the Trust's case against Stronelairg, but in this article, I focus on the PEO process and its impacts, only giving a brief outline of the case for clarity.

Application for a PEO for Judicial Review against the Highland Council in 2013

In 2013, the Trust began the process of its first-ever legal challenge seeking a judicial review against the Highland Council, which was a statutory consultee in the Stronelairg windfarm Electricity Act 1989, Section 36, application process and had not objected. If the Council had opposed the scheme, a Public Local Inquiry (PLI) would have been mandatory, which the Trust believed was essential for the facts to be properly examined. The Trust believed the Council Planning Officers had not properly taken into account the wild land nature of the site or Scottish Natural Heritage's strong objection when writing the Officers' Report. The Report had recommended to Highland Council that the Council did not oppose a revised scheme from the developer, Scottish and Southern Energy (SSE). The Council committee accepted the recommendation. This recommendation was made despite a lack of consultation with the public on the revisions. Without the revisions, the Officers acknowledged they would have recommended objection.

The Trust sought a PEO for the judicial review but it was refused. As a consequence, the Trust dropped the case against Highland Council at that stage due to cost, but also in the hope that the government would send the case to the Department of Planning and Environmental Appeals for a PLI. The Trust and the Highland Council agreed to pay their own costs, and the Trust's costs at that stage were about £20,000.

One factor which is not obvious to most lay people is that a significant part of the case for judicial review needs to be worked up before making the case for the PEO. The judge's decision was delivered orally and, since the Trust did not appeal the PEO decision, was not explained in writing – something which seems extra-ordinary to me. I realised later this was unfortunate as it meant that, as a Trust, by the time of the next phase, we were unclear on the grounds of that first refusal.

Scottish Government's decision in 2014

On 6th June 2014, the Scottish Government consented the amended scheme of Stronelairg, without any further public consultation. Until the development was consented, the area was included, by Scottish Natural Heritage, in a draft map of Wild Land Areas. On 23rd June, Scottish Government published their Scottish Planning Policy 2, which included strengthened protection of Wild Land Areas –

> 200. Wild land character is displayed in some of Scotland's remoter upland, mountain and coastal areas, which are very sensitive to any form of intrusive human activity and have little or no capacity to accept new development. Plans should identify and safeguard the character of areas of wild land as identified on the 2014 SNH map of wild land areas.[iii]

A response to a Freedom of Information request confirmed that the Stronelairg area had been removed from the Wild Land Areas map which was published on 23rd June 2014 as a consequence of the windfarm approval two weeks previously.

Judicial Review against the Scottish Government

The Trust believed that, if left unchallenged, this consent would undermine any improved protection for Wild Land Areas and there would be a continued significant loss of wild land. Following legal advice and after major fundraising for the case, the Trust decided to seek judicial review of the Scottish Government (SG)'s consent, seeking a PEO for that. Scottish and Southern Energy (SSE) came in to the case as an interested party.

PEO hearing in 2014

PEOs exist so that access to justice is not prohibitively expensive. The Court rules say this - 'proceedings are prohibitively expensive for an applicant for a protective expenses order if the applicant could not reasonably proceed with them in the absence of such an order'. However, a 2013 Supreme Court ruling[iv] concluded that the fact that the claimant has not in fact been deterred for carrying on the proceedings is not itself determinative. The devil is in the detail of the judge's interpretation of 'prohibitively' and 'reasonably'.

This PEO hearing for the Trust's judicial review lasted an astonishing three days in court and included extensive discussion of the Trust's accounts. The Trust lodged up-to-date accounts, signed off by our Director of Resources who is a Chartered Accountant and member of the Institute of Chartered Accountants of England and Wales. The Trust was transparent throughout about the fundraising for the case and the Trust's total turnover. Over 1000 people donated to the case, including major donors. Throughout the case, this prudent approach by the Trust seemed to count against us – an attitude of "well, you've already raised this much, you can raise more" came across from the judges' comments.

SSE's QC picked out various lines in the accounts and questioned their validity, accuracy or availability for the legal expenses. She implied the accounts presented were not a true picture and more funds might exist – focusing on a legacy of £300,000. The judge was most interested in this, saying, "I knew that lady. Is she dead?" I was one of the Trust representatives present and, although I thought this legacy was included in the presented accounts, there was no way to confirm this 'on the hoof'. No warning or opportunity was given to enable the Trust's director of resources, who was away on holiday, to answer.

The SG's QC said that the Government's costs for the judicial review would be similar to the Trust's costs - estimated before the case at £53,000. SSE claimed their costs would also be similar.

The Judge for the PEO Hearing, Lord Philip, refused the PEO for the Trust[v] specifying that the estimates would bring the total costs to the Trust, including their own, if they lost, to 'approximately £160,000' based on the estimates. In his written judgment, Lord Philip had continued his interest in the legacy highlighted by SSE's QC by mistakenly adding it in to the legacy total the Trust had presented, thus double-counting £300,000. (One of the Judges in the later PEO hearing for the appeal voiced the opinion that 'that might not have been his fault' although she did not explain whose fault it might have been). Lord Philip did not take into account the costs of the three days already spent in court. Leave to appeal was refused.

The Judicial Review in 2015

For a few weeks in 2015, it seemed as if this might not matter, as the Trust won the Judicial Review[vi]. The Scottish Government and SSE appealed. This is the point in the court process when the bizarre (to this layperson) 'inverse rollover lottery' effect comes into play. I'm not sure when I realised that, although we had won the judicial review, if we lost the Appeal we could be liable for most of the costs throughout all 'rounds' of the case. Naively, I had thought that winning in the Outer House would show that our case had some merit, even if we lost the Appeal, and that costs would be allocated accordingly. I know now that that could happen but whether such a distribution would be allocated wouldn't be known until court costs were argued over at the end of the process. This end of the line risk is one thing which gaining a PEO would have mitigated against.

2016 - Scottish Government and SSE Appeal – PEO hearing

The Trust's choices, once the government had lodged an Appeal, were either:

- to drop out of the case due to the potential costs, despite the Outer House win, leading to an almost inevitable liability for costs;
- to assess the risk of the second round in court and proceed if the risk to the Trust was not too high, considering the 'fighting fund' raised, and/or
- to apply again for a PEO for this Appeal.

The Trust decided to proceed and try again for a PEO since the costs already incurred were considerably more than had been estimated for the first Hearing. Due to court holidays and availability, the PEO hearing was heard only a week before the Appeal hearing.

Both SG and SSE said once again, in this PEO Hearing for the Appeal, that their costs would be similar to the Trust's costs, estimated at £50,000. Comparing the numbers of lawyers on each team, this seemed impossible. Both SG and SSE had a Senior and Junior Counsel and at least 1 solicitor. The Trust had a Senior Counsel and a solicitor.

By that stage, all Parties agreed that costs for the first stage of the judicial review proceedings in the Outer House were likely to total about £228,000. Nevertheless, when considering what the Trust could afford for the Inner House Appeal, Lady Smith excluded consideration of any costs in the Outer House, despite, on the other hand, including all the funds which had been raised to date for the Stronelairg case. The Inner House refusal of the PEO for Appeal was based on costs estimates for the Inner House Appeal 'amounting to about £50,000 each'.

The judges gave this oral refusal of the PEO[vii] two days after hearing the case, with no reasons given at the time and no mention of a split decision. There was one working day left before the case as the decision was given on a Friday before a holiday Monday. The written judgment from two of three judges refusing the PEO was given 24 hours before the Appeal. Twelve hours before the Appeal hearing, the dissenting opinion of Lord Drummond Young[viii] was released, supporting the Trust case on Aarhus principles. Clearly, by the time the PEO decision was released there would have been little point withdrawing from the case as most of the cost had been incurred and we could still win.

It was frequently stated throughout the legal process that the Trust could always argue their case against costs later after the judgment, if circumstances had changed.

May 2016 - Scottish Government and SSE Appeal

Lady Smith, the lead judge on the PEO Hearing (and one of the two judges who had ruled against awarding the Trust the PEO only days before the Appeal), was also on the panel to consider the Appeal. The Trust had an hour or so to decide whether to challenge her inclusion. We felt her inclusion on the Appeal panel was prejudicial but also felt that to challenge it would risk prejudicing our case. We didn't challenge. The government and interested party's Appeal was heard over three days.

The Trust lost the Appeal, leaving us potentially liable for most of both the Scottish Government's costs and SSE's from both rounds of the case. The Trust could not risk appealing to the Supreme Court.

In late 2016, the SG produced an itemised account of costs of £189,000. At that time, SSE said they 'had spent more'. The Trust's position was that SSE, an interested party which had not brought substantive new arguments to the case but had considerably lengthened the time in court, should not get significant costs.

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The Scottish Government agreed to accept a settlement of £75,000. SSE then said they had spent £350,000 and more and enrolled a Motion for expenses on behalf of the interested parties. (To this day, I've seen no evidence of SSE's costs claim). After some exchange of letters, and letters sent to SSE by supporters of the Trust who were share-holders and customers of SSE, SSE agreed a settlement of £50,000 which they are 'giving' to another charity.

Lawyers may say, 'well, you could have gone to court and they would have made a reasonable judgment on how much should be paid, taking into account increased costs, etc.' However, SSE had already started the next round of 'urgent' questions about 'how are the Trust's finances this year?' and 'We urgently need audited accounts of Stronelairg funds'. The Trust might have won a fair settlement, considering that the Parties had stated in court estimates that, I believe, they knew were a gross under-estimate. Could we take that risk though?

Learning points

Of course, the financial risks of any court case are huge and a PEO brings costs of another day or several days in court but I have realised there is an additional, important, factor with a PEO application which comes into play. It is the distraction from focusing on the main case. It allows the 'big boys' to distract both the petitioner and the judiciary from the substantive points of the case. Even if the legal team for the petitioner restricts their costs, as ours did, everyone working on a charitable organisation's case is conscious of the cost of preparation work. If the lawyers are working on income and expenditure sheets, they're not working on the arguments around the case itself. Moreover, and I think this is critical, the judges pre-form their opinions of the substantive case even if the arguments for that are not being formally put.

What is 'prohibitively expensive'? It clearly doesn't mean the same thing to me as it does to the judiciary. I would suggest that the average man in the street would think the costs that the Trust was exposed to were prohibitive, unless the petitioner was a millionaire. The Trust's own costs alone for the judicial review and the Appeal, and both PEO Hearings, were just under £150,000, even before the potentially, unlimited exposure to the other Parties' costs.

What is 'reasonably'? Again I realised it meant something different to the legal profession. It was said frequently that the costs being discussed and estimated by the Parties were reasonable because it was a complex case. I don't think that is what Court Rule 58A use of the word 'reasonably' is about. Surely it means 'reasonable to the Petitioner'? Regardless, the costs were two or three times higher in the event than the costs considered in the PEOs.

My conclusion is that this wasn't accessible justice and that Scotland is definitely not Aarhus compliant with regard to "access to justice" because of:

- the uncertainty in the process of applying for a PEO;
- the huge costs of judicial review anyway, and;
- the extra costs of applying for a PEO.

Author

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[i] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or Aarhus Convention

[ii] [ii] Chapter 58A of Rules of Court
"The court must make a protective expenses order where it is satisfied that
(a) the applicant is a member of the public concerned;
(b) the applicant has a sufficient interest in the subject matter of the proceedings;
and (c) the proceedings are prohibitively expensive for the applicant."

[iii] SNH Wild Land Areas mapping http://www.snh.gov.uk/protecting-scotlands-nature/looking-after-landscapes/landscape-policy-and-guidance/wild-land/mapping/

[iv] R (Edwards & Pallikaropoulos) v. Environment Agency et al, Supreme Court, 11 December 2013

[v] Opinion of Lord Philip https://www.scotcourts.gov.uk/search-judgments/judgment?id=fe4fb9a6-8980-69d2-b500-ff0000d74aa7

[vi] Opinion of Lord Jones https://www.scotcourts.gov.uk/search-judgments/judgment?id=f297faa6-8980-69d2-b500-ff0000d74aa7

[vii] Opinions of Lady Smith and Lord Brodie https://www.scotcourts.gov.uk/search-judgments/judgment?id=d6db13a7-8980-69d2-b500-ff0000d74aa7

[viii] Opinion of Lord Drummond Young https://www.scotcourts.gov.uk/search-judgments/judgment?id=d6db13a7-8980-69d2-b500-ff0000d74aa7