OUTER HOUSE, COURT OF SESSION

[2017] CSOH 142

P895/17

OPINION OF LORD DOHERTY

In the Petition of

COMMUNITY WINDPOWER LIMITED

Petitioner

for

Judicial Review of a decision of East Ayrshire Council of 9 August 2017 to issue a Stop Notice dated 9 August 2017 to the petitioner in terms of section 140 of the Town and Country Planning (Scotland) Act 1997

Petitioner: Steele QC, O'Carroll; Balfour + Manson LLP
Respondent: Gale QC, Dunlop; Ledingham Chalmers

6 October 2017

Introduction

[1] On 5 October 2017 I heard a substantive first hearing in this judicial review. The parties indicated their desire for an early decision. At the close of submissions I continued the matter overnight. I gave my decision and reasons orally when the case resumed on 6 October 2017. I dismissed the petition, and I found the petitioner liable in expenses.

[2] On 11 October 2017 I was informed that the petitioner had enrolled a reclaiming motion in respect of the interlocutor of 6 October 2017, and that it had requested that I prepare an Opinion.

The Planning Permission

[3] On 28 February 2013 East Ayrshire Council ("the respondent") granted the petitioner planning permission for a wind farm of 15 turbines and associated development at Seddon Law. The permission was subject to 47 conditions. The petitioner applied to the respondent for variation of certain of the conditions (conditions 29, 30, 31, 32 and 33). The respondent did not determine that application within the statutory period, with the result that it was deemed to be refused. The petitioner appealed to the Scottish Ministers against that deemed refusal. On 24 October 2014 the reporter appointed by the Scottish Ministers, Michael Shiel, allowed the appeal and granted planning permission for the erection of the 15 turbines and associated development without compliance with conditions 29, 30, 31 32 and 33 previously imposed, but subject to further conditions and to a revised condition 29.

[4] Condition 36 of both the original and the varied planning permission provided:

> "Private Water Supplies
>
> 36. Prior to commencement of development the Operator shall submit a water risk assessment of the effects of the development on the quantity and quality of water supplied to all properties with a private water supply that may be affected by the development for the written approval of the planning authority in consultation with SEPA. The water risk assessment shall include, but not exclusively, details of any necessary mitigation measures and monitoring arrangements prior to commencement of development, during construction and upon completion of construction. Thereafter any mitigation measures identified in the approved water risk assessment shall be implemented and maintained by the operator.
>
> *Reason: To ensure the protection of the quantity and quality of private water supplies.*"

[5] On 28 October 2015 the petitioner submitted a water risk assessment ("WRA") to the respondent together with an application to vary the planning consent by discharging condition 36. By notice dated 14 January 2016 the respondent refused the application.

[6] The petitioner appealed against the refusal to the Scottish Ministers. The reporter appointed to hear the appeal was Michael Cunliffe. Mr Cunliffe was not satisfied with the petitioner's initial WRA. During the appeal process revised versions of the WRA were submitted with a view to addressing Mr Cunliffe's concerns. Mr Cunliffe issued two Procedure Notices (on 30 November 2016 and 20 January 2017) proposing further amendments to the mitigation measures proposed in the WRA. Ultimately, he issued his decision on 23 February 2017. The decision letter began:

> "**Decision**
>
> I allow the appeal and discharge Condition 36 of Planning Consent 13/0198/PP on the basis of the Technical Report on Private Water Supplies: Consolidated Water Risk Assessment dated 15 November 2016, as read with the Response for the Appellant to Procedure Notice dated 20 January 2017, which I hereby approve subject to the four conditions listed at the end of this decision notice."

In his reasoning the reporter noted (para 5) that in relation to properties served by Blackshill Spring "the only safe course is to provide a replacement water supply before the start of the development." A mitigation strategy was also required in relation to properties supplied from the Airtoch supply (para 6). Mitigation was also required for Tayburn and Muirburn (para 7), and for Alton Farmhouse and Alton Lodge (para 8). He narrated (para 15) that the second Procedure Notice asked the petitioner for amendments to the proposed mitigation measures in the WRA that would secure that five things were in place before development began. He noted (para 16) that the petitioner's Response to the Notice set out proposals aimed at meeting the requirements; but he concluded that there remained valid concerns which still needed to be addressed (para 18). He continued:

> "19. By making the discharge of Condition 36 conditional on compliance with the contents of the Procedure Notice, I can ensure that the work on the wind farm site does not begin until the required mitigation is in place… All conditions, both of the planning permission itself and of the discharge of conditions under it, will be enforceable by the planning authority."

In paragraphs 33 and 34 he set out his conclusion:

> "*Conclusion*
>
> 33. I consider that a great deal of progress has been made since the original WRA was rejected by the council in January 2016… I acknowledge the concerns of those who depend on private water supplies, and in discharging the condition I have significantly strengthened the mitigation measures to ensure that these will reduce risks to a level I consider acceptable. I also acknowledge that these measures will have cost and potential delay implications for the appellant, but it is necessary to strike a reasonable balance between the appellant's interests and those of local residents and businesses who could be affected.
>
> 34. Overall, I consider that the Consolidated Water Risk Assessment, as supplemented by the appellant's response to the 20 January Procedure Notice and subject to the conditions I am imposing, meets the requirements of Condition 36…".

The reporter imposed four conditions which were appended to the decision letter. Condition 1 provided that, unless otherwise agreed by the respondent, five things should be in place before development began. For present purposes it is sufficient to note that the first (1.1) was fully operational water supplies for certain specified properties; the second (1.2) was other specified mitigation measures for certain other properties at significant risk; the third (1.3) was that the full cost of implementing and maintaining the mitigation measures should be met by the Operator throughout the lifetime of the planning permission; and the fourth (1.4) was that the Operator should supply the professional credentials of certain persons.

The Enforcement Notice and the Stop Notice

[7] On 9 August 2017 the respondent served an Enforcement Notice on the petitioner in terms of s 127 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") in respect of an alleged breach of planning control. The breaches alleged were set out in paragraph 3:

> "1. Commencement of works specifically excluded by Condition 36 of planning consent 13/0198/PP, namely intrusive site investigation works involving the drilling of proposed turbine locations, prior to demonstration of fulfilment of this condition."

Paragraph 3.2 narrated separately (beginning "And in any event") as a breach commencement of the site investigations works involving the drilling of proposed turbine locations prior to certain specified mitigation. The measures specified repeated the contents of conditions 1.1, 1.2 and 1.3 of Mr Cunliffe's decision of 24 October 2014.

[8] At the same time as the respondent served the Enforcement Notice it also served a Stop Notice in terms of s 140 of the 1997 Act. Section 140 provides:

> **"140.— Stop notices.**
> (1) Where the planning authority consider it expedient that any relevant activity should cease before the expiry of the compliance period in respect of an enforcement notice, they may, when they serve the copy of the enforcement notice or afterwards, serve a notice (in this Act referred to as a *'stop notice'*) prohibiting the carrying out of that activity on the land to which the enforcement notice relates, or any part of that land specified in the stop notice.
> (2) In this section, *'relevant activity'* means any activity specified in the enforcement notice as an activity which the planning authority require to cease and any activity carried out as part of that activity or associated with that activity.
> …
> (7) A stop notice shall specify the date when it is to come into effect, and that date—
> (a) must not be earlier than 3 days after the date when the notice is served, unless the planning authority consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice…"

In terms of the Stop Notice the respondent prohibited the carrying out of "the unauthorised activity specified in Schedule 2 to this Notice with effect from 9 August 2017". Schedule 2 narrated:

> "Site investigation works have been undertaken on site, at or adjacent to the turbine locations identified in planning consent 13/0198/PP prior to the discharge of negative suspensive conditions attached to the said consent. It is believed that this works (sic) has been undertaken in preparation for commencement of more intrusive engineering works at the site. Stop all works associated with the windfarm development including intrusive ground investigation works with immediate effect with the exception of any works required to fulfil the requirements of Condition 36 of Planning Permission 13/0198/PP."

In an Appendix to the Notice headed "Reasons for the immediate effect of the Stop Notice" the Notice stated:

> "The works described in Schedule 2 in the attached notice have the potential to cause environmental harm by way of contamination and pollution of existing private water supplies as identified by the MacArthur Green Technical Report on Private Water Supplies; Consolidated Risk Assessment dated 15 November 2016 and … Michael Cunliffe's Decision Notice relating to the discharge of Condition 36 of 13/0198/PP. No acceptable mitigation measures have been demonstrated for the site as being in place as required by Condition 36. It is therefore considered expedient that this Stop Notice takes immediate effect."

The Petition for Judicial Review

[9] The petitioner has exercised its statutory right (in terms of s 130 of the 1997 Act) to appeal against the Enforcement Notice. There is no right of appeal against a Stop Notice. It is in those circumstances that the petitioner seeks judicial review of the decision to issue the Stop Notice. The substantive remedies sought (article 4 of the petition) are (i) declarator that the decision to serve the Stop Notice was unlawful in that it involved the respondent acting irrationally by issuing a notice which is (1) based on a planning condition which is no longer extant; (2) void for want of adequate specification; and (3) contradictory *et separatim* irrelevant; (ii) reduction of the decision to issue the Stop Notice; (iii) suspension of the Notice; (iv) interdict of the respondent from enforcing the Notice. On 20 September 2017 the respondent appeared at a hearing of the petitioner's motion for interim orders. The respondent opposed a motion for interim relief. Following the hearing it lodged answers to the petition. At a By Order on 27 September 2017 the court granted permission for the petition to proceed, fixed a substantive first hearing to take place on 5 and 6 October 2017, and made certain other case management orders.

First Hearing

[10] The matter came before me on 5 October 2017 for the substantive first hearing. In the normal course a first hearing is a full substantive hearing. Neither party suggested that the court was not in a position to proceed to a full hearing and determine the petition on the basis of the material before it. In those circumstances the issue was not whether a case could be made for the grant of interim remedies. The issue was whether the petitioner had made out its case that in the exercise of the court's supervisory jurisdiction it should grant one or more of the final remedies sought.

[11] The essence of the petitioner's case is (i) that the respondent's decision to serve the Stop Notice was irrational; (ii) that the notice is a nullity. Both aspects have at their core the contention that both the decision and the Notice are fatally flawed because they proceeded upon the basis that condition 36 of the planning consent remained extant at the time of the decision and the Notice.

[12] Senior counsel for the petitioner submitted that on a proper construction of the reporter's decision of 23 Feb 2017 there was no doubt that condition 36 had been discharged. He accepted that the further conditions imposed by the reporter qualified the planning permission. The consequence was that the reference to condition 36 in the Stop Notice was inept. In those circumstances the description of unauthorised activity in Schedule 2 did not make it sufficiently clear to the petitioner what it was that was prohibited. The description contained no express reference to any of the conditions imposed on 23 February 2017. Breach of a Stop Notice could have penal consequences. Accordingly, Stop Notices had to be construed strictly (*East Riding County Council* v *Park Estate (Bridlington)* [1957] AC 223, at pages 233, 236; *Francis* v *Yiewsley* [1958] 1 QB 478, at pages 490-491). The lack of specification here, combined with the reference to a discharged condition, had the consequences that the

Notice was contradictory and that there was uncertainty as to what was prohibited. As a result, the Notice was a nullity. In those circumstances the respondent's decision to serve it was irrational. Further, the decision was also irrational because as at the date of service the petitioner had gone as far as it reasonably could to satisfy conditions 1.1 to 1.5. In that regard the Mr Steele placed reliance on a number of affidavits from representatives of the petitioner and from the petitioner's advisers, and on related documents. He submitted that on the basis of that material the court should hold that it had been irrational for the respondent to proceed on the basis that the conditions had not been satisfied. He further submitted that in the whole circumstances it had also been irrational for the respondent to determine that the Stop Notice should have immediate effect.

[13] Senior counsel for the respondent submitted that, on a proper construction of Mr Cunliffe's decision, condition 36 had not been discharged on 23 February 2017. Rather, discharge of the condition was subject to fulfilment of the four conditions which the reporter had imposed. It followed that condition 36 was extant on the date of the Stop Notice. Even if that were not the case, the Notice was not a nullity. The unauthorised activity was sufficiently specified in Schedule 2. The words used had to be interpreted sensibly. No-one was in any doubt that the negative suspensive conditions referred to were conditions 1.1 to 1.5. Schedule 2 was not inherently contradictory. Matters of planning judgement were matters for the respondent. At the time of service of the Stop Notice the respondent's officers had been entitled to conclude that the conditions had not been satisfied. There was a proper basis for that view, as the affidavits of Mr Dickie and Mr Mitchell and the related productions showed. While that may not have been a view which the petitioner or its advisers shared, the respondent's view was one it was entitled to hold. The same observations applied to the respondent's belief that the Stop Notice should have immediate

effect. It was not part of the supervisory jurisdiction to review the merits of the decision challenged. The petition should be dismissed.

[14] In the note of argument for the respondent (No 16 of process), which senior counsel adopted, reference was made to the following authorities: *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759, at page 780H; *Cartledge* v *Scottish Ministers (No. 2)* 2011 SC 602, at paragraph 44; *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] 1 AC 374, at page 410G-H; *The RSPB* v *Scottish Ministers* [2017] CSIH 31, at paragraph 204; *British Railways Board* v *Secretary of State for the Environment* [1994] JPL 35, at page 38; *Telford & Wrekin Council* v *Secretary of State for the Communities and Local Government* [2013] EWHC 79 (Admin), at paragraph 33(8); *West Oxfordshire DC* v *Secretary of State for the Environment & Others* (1988) 56 P&CR 434, at page 449; *Ormston* v *Horsham Rural DC* (1966) 17 P&CR 131, at pages 140-141; *Bristol Stadium Ltd* v *Brown* [1980] JPL 107, at page 108; *R* v *Pettigrove & Roberts* (1991) 62 P&CR 355, at pages 364-365; *Central Regional Council* v *Clackmannan District Council* 1983 SLT 666, at page 668. In the course of submissions reference was also made to *Trump International Golf Club Scotland Ltd* v *Scottish Ministers* 2016 SC (UKSC) 25, but I was not taken to the report.

Decision and Reasons

[15] Condition 36 was a suspensive condition providing that before development commenced a WRA in connection with private water supplies had to be submitted to the planning authority for its written approval in consultation with SEPA. The petitioner sought to do that. It applied to the respondent in terms of s 59 of the 1997 Act for approval of a WRA it had prepared and for discharge of the condition, but the respondent did not grant approval. The petitioner appealed to the Scottish Ministers. The reporter was not

satisfied with the petitioner's WRA. He issued two Procedure Notices proposing amendments to the mitigation measures proposed. Ultimately, he issued his decision on 23 February 2017. On a proper construction of that decision I am satisfied that he approved the final version of the petitioner's proposals, but only as qualified by the four conditions which he listed at the end of the decision letter. In my opinion it was that qualified package containing the WRA with the four conditions which he approved and treated as satisfying condition 36. It was on the basis that the WRA incorporated those conditions that he allowed the appeal and discharged condition 36. The consequence, in my view, is that condition 36 was indeed discharged on the date of the decision, but that the planning permission became subject to the terms of the approved WRA including the four conditions which the reporter had insisted upon. Condition 1 contained five conditions which had to be satisfied before development began. The discharge of condition 36 was not postponed or suspended pending purification of the four conditions which the reporter imposed.

[16] The reporter's decision of 23 February 2017 provides part of the context in which the Enforcement Notice and the Stop Notice were issued.

[17] The Enforcement Notice is under appeal, and whether the respondent may enforce it will be determined in those proceedings. For my part, I incline to the view that the informed reader would understand the reference in paragraph 3.1 of the Notice to "works specifically excluded by Condition 36" and the description which follows those words as being a reference to works specifically excluded by the WRA which was approved in terms of condition 36 (including, of course, the conditions which the reporter imposed on 23 February 2017). In any case, although conditions 1.1, 1.2 and 1.3 are not mentioned specifically in paragraph 3.2, the contents of those conditions are substantially incorporated in that paragraph. The informed reader would be in no doubt that paragraph 3.2 specifies

breach of the planning consent by the commencement of site investigations prior to the suspensive conditions in conditions 1.1, 1.2 and 1.3 of the reporter's decision having been fulfilled.

[18] I come then to the Stop Notice. I am not persuaded that any of the criticisms levelled against it, or against the decision to issue it, are well founded.

[19] In my opinion the Stop Notice requires to be read sensibly having regard to the knowledge which an informed reader would have. In my view Schedule 2 specifies with sufficient clarity the unauthorised activity. There is no dubiety as to the negative suspensive conditions referred to - they are the conditions imposed in condition 1 of the reporter's decision of 23 February 2017. I do not think that the reference to condition 36 in the exception renders the notice a nullity. On the contrary, construing the exception from the prohibition sensibly, having regard to the history of the approval of the WRA with conditions, the informed reader would understand that what is excepted are works required to fulfil the requirements of the WRA including the conditions. I am not persuaded that there is insufficient clarity as to the activity which is prohibited as being unauthorised. Nor am I convinced that the Notice is inherently contradictory. It follows that I am not persuaded that the Stop Notice is a nullity.

[20] In my opinion the respondent's decision to issue the Stop Notice was not irrational. It is clear on the material before me that the decision was based upon the respondent's view that conditions 1.1 to 1.4 had not been complied with at the date of service of the Notice. While that appears to be a view which the petitioner and its advisers disagree with, I am satisfied that it was a view which the relevant officers of the respondent held and were entitled to hold. Putting the matter another way, I am content both that they did indeed consider it expedient that the relevant activity should cease (s 140(1)) and that there was a

proper basis for them holding that view. Similarly, I am satisfied that the respondent was entitled to reach the view that there were special reasons for specifying that the Notice should have immediate effect (s 140(7)(a)). The petitioner's submissions relating to these matters appear to me to be a thinly veiled attempt to engage upon a merits review, rather than a legitimate challenge to the legality of the decision.

[22] Finally, some of the material relied upon by the petitioner seemed designed to address the merits of whether conditions 1.1 to 1.4 had been satisfied at a date after the date of the Stop Notice - a matter disputed by the respondent. That issue is not a matter upon which the court may properly adjudicate in these judicial review proceedings.

[23] For the foregoing reasons, the petitioner has failed to establish that the court should grant any of the remedies which it seeks.

Disposal

[24] On 6 October 2017 I sustained the respondent's second, third, fourth and fifth pleas-in-law, repelled the petitioner's first, second and third pleas-in-law, and dismissed the petition. I found the petitioner liable to the respondent in the expenses of the petition.