OUTER HOUSE, COURT OF SESSION

[2018] CSOH 27

P495/17

OPINION OF LORD WOOLMAN

In the Petition of

WILLIAM GRANT & SONS DISTILLERS LIMITED

Petitioner

for

Judicial Review of a decision by The Moray Council dated 6 March 2017

Respondent

Petitioner: Findlay QC, Dunlop; Davidson Chalmers LLP
Respondent: Wilson QC; Harper Macleod LLP

Interested Party: Mure QC; CMS Cameron McKenna Nabarro Olswang LLP

27 March 2018

Introduction

[1] On 22 December 2011 the Scottish Ministers granted permission for the construction of a large wind farm on the Glenfiddich estate near Dufftown in Banffshire. They attached a lengthy string of conditions. One required development to commence within 5 years. The Moray Council ('the Council') was responsible for ensuring that all the conditions were purified.

[2] The original developer was Dorenell Limited (UK). It transferred its rights under the planning permission, which are now held by Dorenell Windfarm Limited, backed by EDF Energy Renewables. I shall refer to them collectively as 'Dorenell'.

[3] This was a large capital project involving the expenditure of tens of millions of pounds. Unsurprisingly, it took time to make preparations. Dorenell only began works at Glenfiddich in August 2016. They were designed to provide access to the proposed location of the turbines by upgrading a road junction and existing forestry track ('the access works').

[4] William Grant and Sons Distillers Limited ('WGS') owns the Glenfiddich distillery and visitor centre. It has been an implacable opponent of the wind farm, which it considers would have a detrimental impact on the Speyside landscape. That in turn would adversely affect local tourism. Other objectors to the planning application raised concerns about the environment and the preservation of wildlife.

[5] After the grant of the permission, WGS monitored the progress of the works. It believed that commencement did not take place within 5 years. It did not, however, raise proceedings to challenge any decision taken on or before 22 December 2016. Instead, it seeks to review a decision taken by the Council on 6 March 2017 holding that certain planning conditions had been purified.

[6] Miss Wilson QC for the Council said that it had entered the process to assist the court as its decision is under challenge. Because of the expense involved, it had pondered long and hard before doing so. The Scottish Ministers chose not to enter appearance.

Two legislative regimes

[7] Wind farms are subject to two sets of controls. They are contained in the Electricity Act 1989 and the Town and Country Planning (Scotland) Act 1997 (respectively 'the

1989 Act' and 'the 1997 Act'). Dorenell applied to the Scottish Ministers for permission under both statutes.

[8] Three provisions are relevant to these proceedings. First, wind farms can only be constructed, extended or operated in accordance with the terms of the consent given by the Scottish Ministers: 1989 Act, section 1. Secondly, applications for consent must describe the land on which it is proposed to construct, extend or operate the wind farm in writing under reference to a map: 1989 Act, paragraph 1 of schedule 8. Thirdly, development begins on the earliest date on which any material operation is carried out: 1997 Act, section 27. That includes laying out or constructing a road.

Environmental Statement

[9] Before making its initial application, Dorenell issued an environmental statement. It described the scope of the development, both during construction and over its proposed operating life of 25 years. The description included the land-use requirements. In particular, Chapter 7 'General Project Description' sets out the necessary access works. That is evident from the text (paragraphs 7.26 and 7.46-7.54 and table 7.1) and the plans (figures 7.1, 7.8 and 7.9a).

[10] Dorenell published the environmental statement on its project website. Later, the Council also published it on its website, together with all relevant materials and planning decisions. As the environmental statement in effect embodied the proposal, it became the key document for all parties interested in the development.

Decision Letter

[11] Because of the nature and number of objections, a local inquiry was held. Public hearings took place in Dufftown in the autumn of 2010. The reporter recommended that the development should proceed. In the decision letter of 22 December 2011, the Scottish Ministers stated that they "accept the reporter's findings, agree with his reasoning and conclusions and adopt them for the purposes of their own decision". They added that it was their policy to allow a 5 year timescale in respect of wind farms with a capacity of over 50MW. They would therefore make a direction to that effect under section 58 of the 1997 Act.

[12] The critical parts of the decision letter are as follows.

> "The Scottish Ministers … have decided-
>
> a. subject to the conditions set out in Part 1 of Annex 2, to **grant consent** under section 36 of the [1989] Act, for the construction of the Dorenell Wind Power Electricity Generating Station … (as described in Annex 1); and
>
> b. subject to the conditions set out in Part 2 of Annex 2, to issue a direction that **planning permission be deemed to be granted** in respect of the Development described in Annex 1.
>
> Scottish Ministers direct that section 58 (1) of the [1997 Act] is not to apply as respects that planning permission but that the permission is to lapse on the expiration of a period of five years from the date of this direction, if there has not been Commencement of the Development within that period."

[13] The full description given in Annex 1 states:

> "The Development shall have a maximum capacity of 177MW and shall comprise a wind-powered electricity generating station at Dorenell Hill, near Dufftown in the Moray Council area including:
>
> i. Not more than 59 turbines, each with a total height to blade tip of 126 m;
> ii. 5.3 km of existing site roads upgraded with a running width of 5 m;
> iii. 34.8 km of new site roads constructed with a running width of 5 m;
> iv. An on-site borrow pit;

v. A temporary construction compound containing site offices, welfare facilities and storage for plant and materials;
vi. On site concrete batching plant contained within the temporary construction compound;
vii. One on-site sub-station compound including the control building and transformers; and
viii. Two permanent wind farm monitoring masts (free standing lattice, up to 85 m tall)

All as specified in the Application and Environmental Statement; and references in this consent and deemed planning permission to 'the Development' shall be construed accordingly."

[14] Annex 2 to the decision letter divides the conditions attached to the permission into two groups.

a. Part 1 relates to the 1989 Act. The consent was to last for 25 years after final commissioning (paragraph 1). If the development did not commence within 5 years from the date of the decision letter, the developer had to reinstate the ground within 6 months (paragraph 2).

b. Part 2 relates to the deemed planning permission. The development had to be carried out in accordance with the approved plans and "all the details contained in the Environmental Statement" (paragraph 7). Prior to commencement, the developer had to submit a traffic management plan showing details of the road junction and heavy traffic routes to and from the site (paragraph 24). These routes had to be undertaken in accordance with the approved plan and "completed prior to any timber extraction from, or delivery of materials to, the site."

[15] The lexicon defines three key terms:

Commencement of the Development means "carrying out a material operation" as defined in section 27(4) of the 1997 Act.

the Development means "the Dorenell wind-powered electricity generating station near Dufftown … as described in Annex 1"

the Site is "the area outlined in red on figure 1 attached". Figure 1 shows an area encircled by a red line. The access track from the main road is outside that area.

[16] WGS unsuccessfully challenged the decision by way of a petition for judicial review: *William Grant & Sons Distillers Ltd* v *Scottish Ministers* [2012] CSOH 98.

Events after the Grant of Permission

[17] The 2011 permission allowed a maximum number of 59 turbines. In December 2014, Dorenell applied to add 10 turbines. That resulted in a further local inquiry ('the second inquiry'). No final decision on this application has yet been taken. WGS raised the question of commencement at the second inquiry. Dorenell submitted that it was outside the scope of their jurisdiction and that WGS should make any challenge by way of judicial review.

[18] After EDF took over as the developer, it wrote to Neal MacPherson, the Council's principal planning officer on 2 February 2016. It said that it was responsible for ensuring that the conditions were purified. It acknowledged that the development "must be commenced prior to 22 December 2016".

[19] On 15 August 2016, Dorenell served a notice on the Council under section 27A of the 1997 Act. It stated that it would commence enabling works at the end of that month. On 12 and 13 October 2016, the Council confirmed that the development had validly commenced and that the works could continue. Mr MacPherson added that "the commencement of development notification was fine" referring to the letter of 15 August.

[20] By then R J McLeod, contractor, was carrying out a significant programme of works outside the red line area on the instructions of Dorenell. It involved the upgrading of the A941 road and existing Forestry Commission track and the construction of a new site entrance.

[21] On 19 December EDF served a further section 27A notice "to clarify and remove any doubt that development has commenced". It did so without prejudice to its previous notice.

On 21 December, the Council re-affirmed that development had commenced in terms of the decision letter. It added:

> "on the basis of the majority of suspensive conditions already purified and the current progress on the last remaining outstanding conditions we are satisfied that development may continue on site. Officers do not consider at this point in time that it would be expedient to instigate any formal enforcement action in respect of the outstanding suspensive conditions yet to be discharged upon the basis of the previous and on-going commitment in your letter dated 15 August 2016 to fully purify conditions necessary to be in place prior to the construction of the principal wind farm development beyond the access through the forestry."

[22] Dorenell sent that second section 27A notice, because it learned that WGS had received advice querying the legal status of the access works. In an opinion dated 12 September 2016, Mr Findlay QC stated:

> "18. If works on site have commenced, they may be unlawful and the Council should be considering enforcement action.
>
> 19. Ultimately it may be possible to obtain a ruling from the Court of Session that any works that could have commenced development […] were unlawful and that the permission has expired but the format and context of such ruling would need further consideration."

[23] After WGS passed on that advice, Dorenell not only sought the security of the Council's letter. It also carried out further works on 22 December 2016. R J McLeod began the process of widening and upgrading the track within the red line area by using an excavator to dig up 60 metres of the track within the red line area. The works are vouched by a bundle of affidavits and photographs from: (i) Peter Hetherington, civil works package manager; (ii) John Penman, head of construction and project director; (iii) Andrew Russell, construction project manager; (iv) Thomas Murray, site agent; and (v) Ruaraidh Taylor, sub-contractor.

[24] On 31 January and again on 6 March 2017, the Council issued letters stating that the outstanding planning conditions had been purified. They related to management plans for fisheries, habitat and health and safety. That is the decision under challenge. WGS contends that the permission lapsed on 22 December 2016 and that everything done after that date is therefore invalid.

Issues

[25] Three questions arise in the present proceedings: (1) Were the Scottish Ministers entitled to impose a 5 year time limit? (2) If so, did Dorenell comply with it? (3) Has WGS brought the present application within three months, as required for judicial review?

(1) Was the commencement provision invalid?

[26] The Scottish Ministers purported to impose a time-limit of 5 years. It did so, however, after disapplying section 58, which is the relevant provision of the 1997 Act. Mr Findlay argued that the Scottish Ministers had either a general power to do so, or it should be implied. I see no basis to read extra powers into a statute carefully framed by Parliament. Nor is it necessary to imply a term, as the permission can work well without it.

[27] Next, Mr Findlay maintained that the developer's failure to challenge the validity of the condition at the outset precludes it from doing so now. I reject that argument. It would be absurd for a developer to seek to quash a condition that caused it no prejudice. That does not, however, deprive it of the right to rely on vires as a shield: *Boddington* v *British Transport Police* [1999] 2 AC 143, 157H-158D.

[28] Finally, Mr Findlay contended that, if the condition is *ultra vires*, then the whole permission is invalid. The condition is not, however, so fundamental as to be one "which

determines the scope and nature of a development and which, if invalid, would in turn invalidate the consent": *Trump International Golf Club Scotland Ltd* v *Scottish Ministers* [2016] 1 WLR 85 per Lord Hodge at paragraph 26. Accordingly, if it had been necessary to do so, I would have treated the condition as *pro non scripto*. But I prefer to rest my decision on the other two issues.

(2) Did development commence within 5 years?

[29] WGS submits that Dorenell did not commence the development. The access works are not part of "the Development", because they lie outside the red line area and Annex 1 does not refer to them. The works undertaken on 22 December are *de minimis* and did no more than break the ground, according to Kevin Martin, a consultant engineer, whose affidavit WGS has lodged.

[30] What constitutes commencement? That involves construing the time-limit condition. In *Trump* Lord Hodge stated:

> "When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference … or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent." (at paragraph 34).

[31] Lord Gill emphasised the need to avoid applying an unrealistic textual analysis to decision letters: *Moray Council* v *Scottish Ministers* 2006 SC 691, at paragraphs 28-31.

[32] I hold that 'the Site' does not define the scope of the development. That is therefore not the correct line of inquiry. The Scottish Ministers gave consent to 'the Development'. That necessitates reference to the environmental statement. Annex 1 expressly refers to it as forming part of the description. The bullet points are not an exhaustive list, because they are preceded by the word "including". Further, Annex 2 states that the Development had to be carried out "strictly in accordance with the approved plans and all details contained in the Environmental Statement".

[33] The environmental statement recognises that the access works had to take place first. That is evident, for example, from the whole thrust of chapter 7, and it squares with common sense. Unless and until the access works were carried out, construction traffic could not reach the turbine location. Accordingly, I hold that Dorenell did validly commence the development in August 2016.

[34] The question is put beyond doubt by the works undertaken within the red line area on 22 December 2016. Although queried by Mr Martin, I am satisfied that they relevantly commenced the development. The test is when a material operation "begins to be carried out". Very little needs to be done to satisfy that requirement: *Napier Coates* v *Bristol City Council* [2012] EWHC 4398 (Admin) at paragraphs 45 and 50, citing Eveleigh LJ in *Malvern Hills DC* v *Secretary of State for the Environment* [1982] 1 EGLR 175 and 178. It is evident from the photographs that the works were not *de minimis*.

[35] I do not attach importance to Dorenell's failure to rely on these works at the second inquiry. The question of commencement was outside its jurisdiction.

[36] There is one final point in this section. I refused a motion made at the bar by Mr Findlay to delete an apparent concession (added by adjustment) that the 2011 permission included land outside the red line area. In the view I have taken, it has had no bearing on the decision. I choose not to base my decision on a pleading point.

(3) Did WGS bring the present application within time?

[37] Proceedings for judicial review must be brought within three months of the date on which the grounds of challenge first arose: section 27A(1) of the Court of Session Act 1988. That is subject to an equitable exception that does not apply here.

[38] WGS served the petition on 8 June 2017. It submits that the Council decision made a series of alternative and independent decisions to discharge conditions. The potential to challenge an earlier decision does not prevent WGS from challenging the one made by the Council on 6 March: *R (Hammerton)* v *London Underground Ltd* [2002] EWHC 2307 (Admin) at paragraph 197; *R (Burkett)* v *Hammersmith and Fulham LBC* [2002] 1 WLR 1593 at paragraphs 49-51.

[39] Looking at the chronology, WGS must have contemplated proceedings on receipt of senior counsel's opinion in September 2016. Litigation became an option when the Council approved commencement the following month. The grounds of challenge clearly arose at midnight on 22 December 2016. Matters crystallised then. Accordingly, WGS should have raised this action within three months of that date.

[40] In any event, I would have refused to exercise my discretion to grant relief. WGS has not given a good reason for the delay in raising proceedings: *R (on the application of Hammerton)* v *London Underground Ltd* [2003] JPL 984, per Ouseley J at paragraph 197. To quash the decision would undermine "the needs of good public administration": *Bahamas*

Hotel Maintenance & Allied Workers v *Bahamas Hotel Catering & Allied Workers* [2011] UKPC 4 per Lord Walker at paragraph 40. It would cause serious prejudice to the developer and third party contractors. Over £100 million has been spent to date on the development.

Conclusion

[41] I uphold the decision taken by the Council on 6 March 2017 and refuse the orders sought in the petition.