

Trump offshore windfarm challenge – the end of the road?

Trump International Golf Club Scotland Ltd & The Trump Organisation LLC v Scottish Ministers [2015] CSIH 46.

At an earlier stage of this case in March last year, the action was dismissed by Lord Docherty in the Outer House of the Court of Session. That decision was appealed to the Inner House which has again dismissed it. The central question arose as to whether it was competent to grant planning permission for the production of electricity to an entity which is not at the same time also the holder of a licence in terms of the Electricity Act 1989.

The competency point arises from the wording of paragraph 3 of Schedule 9 to the 1989 Act which requires a licence holder (that is, an operator authorised by the State to produce electricity) to have regard to the environmental impacts of their proposal. The argument was that in granting permission to construct a windfarm to the applicants, Aberdeen Offshore Wind Farm Limited, who were not licence holders, the Scottish Ministers had exceeded their powers since the operators would not be obliged to comply with the environmental safeguards as set out in that provision. Lady Clark had upheld the substance of that objection in 2013 in the separate case of *Sustainable Shetland v Scottish Ministers* 2013 SLT 1173. However, Lord Docherty, when faced with arguments along the same lines in the *Trump* case which followed in 2014, he emphatically rejected it. He concluded that, on an ordinary reading of the Act, it contained no restriction on the grant of construction consent to only those persons who also held operating licences under the 1989 Act.

The *Sustainable Shetland* case went on to be heard in the Supreme Court in London. However, the competency point had already been conceded at the Inner House stage prior to it going there and the appeal was dismissed on other grounds relating to the Birds Directive (2015 SLT 95). The point was therefore left open to be argued again before the Inner House on appeal. The Court commenced by narrating that the Inner House had noted with approval that the competency point had already been dropped by concession in the *Sustainable Shetland* case prior to the rest of the case being argued there.

It then went on to reject the argument once again, describing it as “fallacious.” It did not accept that a non-licence holder could escape the duty to mitigate the impact of its proposal under paragraph 3 of Schedule 9 to the Act. It held that there is no escape from that duty because sooner or later every successful applicant for planning permission will require to either comply with the requirements of that provision or else obtain an exemption from it. It cannot

generate electricity otherwise. In addition, there is ample evidence that many planning consents have been applied for without the requirement to be a licence holder and this practice is supported by policy guidance produced by Ofgem.

Other arguments which were canvassed before Lord Docherty were also relied upon in the appeal, including alleged bias. It was submitted that the developer benefited from substantial financial assistance from public sources and had considerable official support. The most colourful indicator was a reported remark allegedly made by Alex Salmond in August 2012: When asked if the wind farm in question would ever be built, he is alleged to have replied "Absolutely" before remarking that he would not have his energy policy "dictated by Mr. Trump." The Court noted that "It is difficult to take that remark, if it was made, as a considered statement of the Scottish Ministers' intentions, especially as the decision was one that would be made by the Minister for Energy in light of detailed technical advice." It went on to state that despite numerous other indicators cited in support of the allegation of bias, there was nothing to point to the conclusion that the decision to grant planning permission was pre-determined or that the Ministers showed a bias in favour of the development.

Accordingly, it would appear that the competency point, first raised out of the blue in 2013, has now run its full course. It is of course still possible that an appeal might be made to the Supreme Court. However, in light of the rejection of the principal argument in relation to the competency point on three occasions in relation to two separate cases, that might be thought highly unlikely. But you never know.

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