EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 2
XA59/18

Lord Drummond Young

NOTE

delivered by LORD DRUMMOND YOUNG

in the Appeal to the Court of Session

under

Section 239 of the Town and Country Planning (Scotland) Act 1997

by

BRIAN ALFRED TAYLOR

Appellant

against

THE SCOTTISH MINISTERS

Respondent

In relation to

A decision of the Planning and Environmental Appeals division date 18 June 2018

Appellant: Party
Respondent: Sutherland; Scottish Government Legal Directorate

13 September 2018

Background

[1] The appellant trades under the name Grampian Soil Surveys. In 2017 he was appointed an adviser to an individual, John Ross, resident in Tarves, Aberdeenshire, and a company, PTM Plant Limited, based in Oldmeldrum, Aberdeenshire, in connection with proposed works to be carried out at Haddo Quarry, Tarves. Mr Ross was the proprietor of the quarry, and PTM Plant acted as contractor in relation to works at the quarry. The appellant was appointed as agent for both of those parties, and in particular gave advice about the planning aspects of the proposed works. Those works involved the extraction of minerals from the quarry.

[2] By letter dated 6 February 2017 Aberdeenshire Council, the local planning authority, wrote to Mr Ross to state that information provided to the Council alleged that there had been unauthorized mineral extraction and exportation of minerals from Haddo Quarry. The letter referred to substantial stockpiles of quarried and extracted material, and the existence of heavy plant commensurate with extraction and quarrying operations. The letter further alleged that no extant planning approval allowed such activity to be carried out. For those reasons a planning contravention notice was attached to the letter, requiring information about the activities on the land.

[3] On 12 February 2017, the appellant replied to the letter, giving a history of activity on site and his dealings with the planning authority and SEPA and responding in detail to the questions that had been asked in the letter from Aberdeenshire Council. The basic contention advanced by the appellant was that the activities carried out did not require specific planning permission or fell within the expression "permitted development" in terms of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. The intention had been to make use of materials that had already been extracted to repair

roadways on the site and for spreading across the site, although it was indicated that the latter might leave a rather steep profile. The appellant's letter concluded by stating that it was undecided whether to continue with the former idea of simple placement of materials over the existing landform or whether it was practicable and economically viable to reprofile the landform and to continue limited quarrying and treatment of materials for export, all in order to provide a gentler gradient more suited to forestry or agricultural operations.

[4] On 15 February 2017 the Planning Enforcement Officer of Aberdeenshire Council replied to indicate that no further enforcement action was required but that the letter would be passed on to the appropriate officials within the Council. Despite that, on 22 January 2018 Aberdeenshire Council served an enforcement notice on Mr Ross. This alleged that the processing of materials or minerals within Haddo Quarry amounted to a breach of planning control. The letter made no reference to the appellant's previous letter to the Council. On the same date the Council served a stop notice bearing the same reference on PTM Plant, by which PTM was ordered to cease the crushing, screening or processing of materials or minerals within Haddo Quarry. The enforcement notice and stop notice were accompanied by a letter of the same date to indicate that those notices related to an allegation that unauthorised processing of on-site material had taken place using a large screener. Such operations, it was stated, required planning permission in their own right; and no such planning permission had currently been obtained.

[5] On 20 February 2018 the appellant submitted a completed form issued by the Scottish Government Directorate for Planning and Environmental Appeals in order to appeal against the foregoing enforcement notice. He completed the form as agent for PTM Plant. In the form it was submitted that no breach of planning control had occurred. The appellant further submitted an appeal statement on behalf of PTM Plant and Mr Ross in

respect of the alleged breach of planning control. In this document he gave details of the history of the site and dealings with the local planning authority. Grounds of appeal were set out which made reference to the relevant provisions of the Town and Country Planning (General Remitted Development) (Scotland) Order 1992, in particular Schedule 1, Part 6, Class 18(1), and Part 7, Class 22, and also to the Scottish Government Circular 2/2015 – Consolidated Circular on Non-domestic Permitted Development Rights. The appeal was presented on the basis that the matters that appeared to the planning authority to constitute a breach of planning control either had not occurred or did not constitute a breach of planning control. The Planning Department of the Council had conceded that the removal of material currently stockpiled at Haddo Quarry did not amount to a breach of planning control, whereas the extraction of additional materials was not permitted by the existing planning consent.

[6] The appeal was referred to a reporter appointed by Scottish Ministers but was dismissed on 18 June 2018. The first ground of appeal had been that the matters stated in the notice had not occurred. The reporter held that the appellants had stated in their submissions that the processing of material, including crushing of rock and screening of a spoil heap, had occurred on site. On that basis that ground of appeal was rejected. The second ground of appeal was that, to the extent that the first ground did not apply, the works undertaken would be "development" but did not constitute a breach of planning control as they benefited from permitted development rights; in particular they were said to be undertaken to provide materials for the maintenance of an existing private access serving forestry plantations and agricultural fields owned by one of the appellants, Mr Ross. The reporter considered that the processing of materials and minerals constituted development,

and was not related to the provision of access to forestry plantations or agricultural fields. The site was an unrestored quarry and did not fit the definition of agricultural land.

[7] It had further been submitted that the landowner, Mr Ross, had entered into an agreement with PTM Plant to restore the site to forestry use. The reporter had carried out a site inspection but saw no evidence of partially restored areas that pointed towards eventual use for forestry. In the appeal no reference had been made to acts of woodland management. Consequently the reporter was unable to conclude that the works to the access were justified as reasonably necessary for forestry purposes. She accepted, in accordance with the appellant's submission, that the removal of stockpiled materials was permitted development, but held that the "removal" of materials did not permit the processing of such materials. Processing required planning permission, and acts of processing had taken place.

Appeal to the Court of Session

[8] The appellant has presented an appeal to the Court of Session against the decision of the reporter appointed by Scottish Ministers. Scottish Ministers are the respondents in that appeal. The grounds on which the appeal is presented are as follows:

1. The reporter had failed to identify and comment upon the principal important controversial issue in the appeal, namely whether "processing operations" utilizing SEPA-licensed mobile plant required an extant planning permission to be in place. Consequently the reporter had failed to disclose how that issue was resolved.
2. The reporter's decision to reject the first ground of appeal was incorrect. She had held that, having concluded that processing of materials had occurred,

she should reject that ground. The appellant submits that that is in direct conflict with the provisions of the Town and Country Planning (General Permitted Development) (Scotland) Order 2011 ("the GPDO") and the Waste Management Licensing Regulations 2011.

3. The reporter had failed to take cognizance of Class 19 of the GPDO.

4. Under her decision notice the reporter had placed restrictions on the repair of private roadways that went beyond the provisions of the GPDO or the resultant published guidance in Annex F of Circular 2/2015.

5. The reporter's conclusion that the processing of the minerals or materials did not benefit from permitted development rights conflicted with provisions of the GPDO.

[9] On the foregoing basis, the appellant poses three questions of law for the opinion of the court:

1. Do "processing operations" utilizing a SEPA licensed mobile plant require an extant planning permission to be in place?

2. Do the provisions of the Town and Country Planning (General Permitted Development) (Scotland) Order 2011 preclude the processing of newly extracted materials or previously extracted "waste materials" to separate out distinct fractions for usage in specified road or drainage repairs permitted under Classes 18, 19 and 22 of the GPDO?

3. Do the provisions of Schedule 1, Class 22 of the Town and Country Planning (General Permitted Development) (Scotland) Order 2011 impose any restriction on when existing private ways can undergo repair?

Objection to competency by Scottish Ministers

[10] Scottish Ministers have objected to the competency of the appeal presented by the appellant on the following grounds:

1. In terms of section 239(1) of the Town and Country Planning (Scotland) Act 1997 proceedings challenging the decision of a reporter may be brought by "any person aggrieved". The appellant acted as an agent of behalf of PTM Plant Ltd and Mr John Ross in the proceedings before the Reporter.
2. A person aggrieved must be able to point to something of the nature of a personal interest in the matter to which the decision, act or omission in question relates, and he must be able to point to some way in which the decision, act or omission has adversely affected that interest. Reference is made to *Macaulay* v *Morrison*, [2018] CSIH 50, at paragraph 38. Acting as an agent the appellant did not participate in the proceedings for his personal interest. Based on the information currently held by the respondent the appellant did not appear to qualify as a person aggrieved. Accordingly, the appeal was incompetent and should be refused.

A note of objection to the competency of the appeal was lodged by Scottish Ministers under Rule of Court 41.5.

[11] In summary, Scottish Ministers' contention is that because the appellant had only acted as an agent for Mr Ross and PTM Plant in the appeal that was decided by the reporter, it was not competent for him now to appeal against the reporter's decision to the Court. The enforcement notice had been served by Aberdeenshire Council on Mr Ross as landowner of Haddo Quarry, and the stop notice was served on PTM Plant Ltd. PTM Plant had been described as having an arrangement with Mr Ross to remove sand and gravel and to carry

out works at Haddo Quarry. In the DPEA appeal form the appellant had confirmed that he was acting as an agent on behalf of PTM Plant, and written representations were made by the appellant purporting to act on behalf of both PTM Plant and Mr Ross. The appellant had accordingly made an error in raising proceedings in his own name; proceedings should have been brought in the name of either Mr Ross or PTM Plant.

[12] Furthermore, it was submitted on behalf of Scottish Ministers that the appellant was not a "person aggrieved" in terms of section 239(1) of the Town and Country Planning (Scotland) Act 1997. That expression had been considered in *Macaulay* v *Morrison*, *supra*, where the court had observed (at paragraph [36]):

> "... for a person to be 'aggrieved it is not enough that he is unhappy about something; he must have an identifiable cause for his unhappiness and it must have adversely affected him in some way".

In *Walton* v *Scottish Ministers*, 2013 SC (UKSC) 67, it had been held that a person might be aggrieved where he took part in a decision-making process and a decision was improperly made which was contrary to the decision that he had advocated. That, however, required qualification: a person aggrieved must be able to point to something in the nature of a personal interest in the matter to which the decision, act or omission in question relates, and must be able to point to some way in which the decision, act or omission has adversely affected that interest: *Macaulay*, at paragraph [38]. In the present case, the enforcement notice was served on Mr Ross and sent to PTM Plant. Acting as agent the appellant did not make representations to Scottish Ministers or participate in the decision-making process for his personal interest.

[13] In reply, the appellant accepts that he acted as an agent for Mr Ross and PTM Plant in the proceedings before the reporter, but submits that he qualifies as a "person aggrieved". The test for challenge to an enforcement notice was the existence of an "objective grievance",

which was described in *Macaulay*, at paragraph [26], as "on something other than a fanciful or speculative grievance". Interests in the present appeal extended beyond those of the appellant's clients, and the appellant could claim to have an interest even though he had operated as an agent. Furthermore, he submitted that, in terms of the test adopted in *Walton* at paragraph [94], maintenance of the rule of law in respect of public administration was an important factor. The appellant stated that he was more interested in that than in advancing his own pecuniary interests. Nevertheless, even as an agent he had an interest in the outcome of the appeal. In acting as a consultant for a range of clients, he was entitled to ask that the proper interpretation of the law should be considered. In the present case, in his capacity as agent, he had been told at first that what Mr Ross and PTM Plant had done at Haddo Quarry was acceptable. Some work had been carried out, and then he and his clients had been served with an enforcement notice. If that were correct, the result would be to reduce his fees, and on that basis alone he would have an interest. Nevertheless, he contended that an agent such as himself, acting for a client on the basis of particular planning expertise, should be treated as a person aggrieved.

Status of the appellant

[14] In my opinion the appellant has a sufficiently arguable case that he is a "person aggrieved" for the purposes of the planning appeals legislation. Consequently I have refused the note of objection and found the appeal to be competent. The proceedings in *Walton* v *Scottish Ministers*, *supra*, were brought by an objector to a road scheme whose primary ground of objection was the impact it would have on the natural environment in an area of land outside Aberdeen. That was held to be sufficient to give him standing to challenge the decision of Scottish Ministers in relation to the road scheme. The meaning of

the expression "person aggrieved" is considered at some length by Lord Reed in paragraphs [83] et seq, with extensive reference to earlier authorities. The conclusions reached suggest that the expression should be given a wide meaning. For example, at paragraph [86] it is stated

> "It is apparent from these authorities that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made".

In relation to the appellant in that case, it was stated at paragraph [88]

> "In the present case, Mr Walton made representations to the Ministers in accordance with the procedures laid down in the 1984 Act. He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the [western peripheral route]. Although that is some distance from the Fastlink [the road under challenge], the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for development which is bound to have a significant impact on the natural environment".

At paragraph [94], it is stated:

> "In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it".

Statements to similar effect are found in the opinion of Lord Carnwath at paragraphs [111]-[112] and Lord Hope at paragraphs [152]-[154].

[15] The foregoing statements make it clear that there is no need for any direct pecuniary interest to be an "aggrieved person" for the purpose of challenging a planning decision. It is enough to have a bona fide interest in the outcome of the decision, whether through indirect effects (as with the impact on traffic on the Fastlink) or through an active interest in the environment, for example by taking part in local environmental organisations. Furthermore, *Walton* emphasizes the importance of the rule of law in public law decisions. It is one of a number of recent cases (including the recent decision in *Wightman* v *Secretary of State for Exiting the European Union*, [2018] CSIH 62) that place stress on the proposition that government must in a civilised society be conducted in accordance with the law, and a major function of public law remedies is to achieve that result. Procedural niceties should not stand in the way of due observance of the rule of law, and enforcing the rule of law is a vital function of the courts.

[16] In the present case, the appellant was involved in the planning procedures that resulted in the enforcement notice and stop notice served by Aberdeenshire Council, as an agent for the proprietor of Haddo Quarry and the company that was carrying out operations there. Furthermore, an adverse outcome in the planning appeal would, he submitted, have an adverse impact on the fees that he could charge. Clearly I am not in a position to adjudicate on that issue. Nevertheless, his status as an agent does tend to demonstrate that he had a pecuniary interest in the outcome of the planning processes. That would give him an interest to sue in the traditional private law sense of that expression. In addition, he submitted that his planning consultancy work was dependent on his being able to express reasonably accurate opinions on the application of the law to particular cases. That depended on the proper application of the rules of planning law, which gave him a specific

professional interest to ensure that planning procedures were conducted in accordance with the law.

[17] In my opinion the foregoing factors give the appellant a clear interest to present this appeal, at least for the purposes of the note of objection lodged by Scottish Ministers. As an agent involved in the planning procedures, he may well have a financial interest in the outcome of the appeal. As someone involved actively in planning processes, he cannot be considered a mere busybody; he is rather a person with a proper interest in ensuring that the rules of planning law are properly applied. Furthermore his consultancy work gives him a clear interest in ensuring that the rules of planning law are properly defined. All of these are matters that may be raised in the present case.

Conclusion

[18] For the foregoing reasons, I have refused the note of objection for Scottish Ministers and found the appeal to be competent. I should observe that it has become commonplace for public bodies, whether the Scottish Government or local authorities, to raise preliminary objections at an early stage to appeals to the Court of Session by private individuals on the basis of standing or other factors. I do not doubt that in some cases such a course is entirely justified. Nevertheless, it is important that excessive use of preliminary objections should not be used to prevent the court from hearing substantive argument in cases that may have an important bearing on questions of public law, questions relating both to what the law is and to how it should be applied in a particular case. I would reiterate the renewed emphasis on the importance of the rule of law in public law decisions, and the fundamental principle that all forms of government, by any public body, must be conducted in accordance with the

law. For that reason I would caution against the excessive use of preliminary objections to cut down appellate litigation.