SHERIFF APPEAL COURT

[2022] SAC (Civ) 13
ABE-B418-20

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the application for permission to appeal to the Court of Session in terms of section 113 of the Courts Reform (Scotland) Act 2014

in appeal by

FRANK A SMART & SON LIMITED

Pursuer and Applicant

against

ABERDEENSHIRE COUNCIL

Defender and Respondent

Appellant: Gratwick, solicitor-advocate; Addleshaw Goddard LLP
Respondent: Campbell QC; Aberdeenshire Council Legal Department

28 March 2022

[1] The pursuer and applicant (hereinafter "the applicant") seeks permission to appeal to the Court of Session against the decision of this court of 14 January 2022 [2022 SAC (Civ) 005[1]], refusing the applicant's appeal and adhering to the interlocutor of the sheriff, who, had repelled the applicant's preliminary pleas and allowed a proof.

[1] 2022-sac-(civ)-005.pdf (scotcourts.gov.uk)

[2] The first issue for the court to determine is whether the present application is competent. It is not.

[3] An appeal may be taken to the Court of Session against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings (see section 113(1) of the Courts Reform (Scotland) Act 2014 – hereinafter "the 2014 Act"). The decision of this court was not a final judgment. A final judgment is one which, by itself, or taken along with previous decisions, disposes of the subject matter of proceedings, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for (see section 136(1) of the 2014 Act).

[4] Properly construed, neither the decision of the sheriff nor the decision of this court were final judgments. The circumstances of *Malcolm* v *McIntyre* (1877) 5 R 22, relied upon by the applicant, are readily distinguishable and do not assist the applicant. The application is incompetent.

[5] Habitually, where this court has concluded that an application for permission to appeal is incompetent, it has, nevertheless, expressed a view on whether the proposed appeal meets the test set out in section 113(2) of the 2014 Act. In the present case, for the reasons set out below, we have concluded that the test is not met. It is therefore unnecessary for us to consider whether we would have exercised the discretion vested in us by section 113(2).

[6] Despite being ordered to do so, the applicant elected not to lodge written submissions on the merits and rested on the terms of the application itself. The application identifies three grounds. First, an important point of principle or practice is said to arise because of the necessity of obtaining definitive guidance from the Court of Session as to the proper legal test or tests against which the validity and lawfulness of a statutory abatement

notice ought to be measured. Second, it is submitted that developers of and investors in renewable energy wind turbines would benefit from guidance from the Court of Session as to what requires to be specified in a statutory abatement notice as a legal nuisance entitling a local authority to demand a change in operation or cessation of use of those turbines. Third, it is submitted that the applicant has invested a considerable sum of money in obtaining planning consent for and developing the two wind turbines which are the subject matter of the notice. Those turbines cannot be moved to another location. Planning permission was granted for the turbines, and they are operating lawfully within the terms of that consent. Seeking to 'defend' the lawful operation of those turbines at proof, against the threat of criminal sanctions, will be costly and time consuming. The applicant (and turbine operators more generally) would benefit from guidance from the Court of Session as to the degree of specification required in a notice and/or the pleadings of the legal nuisance complained of before statutory enforcement action ought to be allowed, particularly bearing in mind the alternative remedies available to an aggrieved party at common law.

[7] The solicitor-advocate for the applicant confirmed that permission to appeal was only sought in terms of section 113(2)(a) of the 2014 Act, namely, that the proposed appeal would raise an important point of principle or practice. An important point of principle or practice is one which has not yet been established. It does not include a question of whether an established principle or practice has been correctly applied (see *Politakis* v *Spencely* 2018 SC 184 per Lord President (Carloway) at para. 21; following *Uphill* v *BRB (Residuary) Ltd* [2005] 1 WLR 2070 at para. 18); or disagreement with the conclusions of the Sheriff Appeal Court and the sheriff. In the present appeal, this court was referred to and relied upon the *dicta* of the Inner House in *Community Windpower Ltd* v *East Ayrshire Council* 2018 SCLR 339 (see paragraph [29] of the opinion of the court). The court also followed the Court of Appeal

decision in *Budd* v *Colchester Borough Council* [1999] Env LR 739 (see paragraph [34] of the opinion of the court) where the alleged nuisance was "dog barking". There, in considering the Environmental Protection Act 1990, the court found it was sufficient "for the local authority to require the appellant himself to abate the nuisance in a manner which is the least inconvenient or expensive and the most acceptable to him." In reality, the applicant disagrees with this court's interpretation of the notice in issue. The purpose of a second appeal is not to provide guidance to applicants or those in a similar position. Section 113(2) of the 2014 Act is clear in its terms. In our view, the present application fails to identify an important point of principle or practice. Had it been necessary for us to do so, we would have refused the application on its merits.

[8] The application will be refused as incompetent. The applicant will be found liable to the respondent in the expenses occasioned by it and we shall sanction the employment of senior counsel for the application procedure before this court.