Scottish Civil Law Reports/1988/JAMES ANTHONY WALFORD Pursuer against CROWN ESTATE COMMISSIONERS C. DAVID Defenders - 1988 S.C.L.R. 113

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JAMES ANTHONY WALFORD Pursuer against CROWN ESTATE COMMISSIONERS C. DAVID Defenders

Court of Session, Outer House

Lord Clyde

27 November 1987

River, loch and sea—Sea—Rights of navigation—Salmon cages interfering with rights—Interdict

Crown proceedings—Ultra vires actings of Crown Estate Commissioners—Whether grant of lease challengeable by third party—Crown Estate Act 1961 (c. 55), s. 1(5)

Section 1(5) of the Crown Estate Act 1961 provides as follows:

> 'The validity of transactions entered into by the Commissioners shall not be called in question on any suggestion of their not having acted in accordance with the provisions of this Act regulating the exercise of their powers, or of their having otherwise acted in excess of their authority, nor shall any person dealing with the Commissioners be concerned to inquire as to the extent of their authority or the observance of any restrictions on the exercise of their powers.'

The pursuer owned a farm on the island of Scalpay. The first defenders entered into a lease with the second defender whereby the second defender leased part of the seabed between Scalpay and Skye for the purpose of salmon farming. The pursuer sought a declarator that the salmon farm and the cages associated with it would be a material interference with the public right of navigation between the islands, that the lease entered into was null and of no effect, and for interdict against the mooring of cages for the rearing of salmon in the area referred to in the lease or elsewhere in the navigable waters between Skye and Scalpay. The first and second defenders tabled general pleas to the relevancy of the pursuer's averments. The defenders argued that the terms of s. 1(5) of the Crown Estate Act 1961 precluded any challenge by the pursuer of the lease. The pursuer argued that the section should be construed as only affecting persons contracting with the Commissioners. Further and in particular that the terms of the lease did not give the second defender any right to interfere with navigation.

Held (1) that the terms of the section, in its ordinary meaning, resulted in the exclusion of any question of the first defenders having exceeded their authority; and

(2) that on a reading of the terms of the lease the first defenders had not authorised any interference with navigation and there was no basis for the declarator sought; but quoad ultra a proof before answer allowed on other conclusions.

Cases referred to:

Crown Estate Commissioners v Fairlie Yacht Slip Ltd, 1979 S.C. 156

Fleming v Gemmill, 1908 S.C. 340

Lord Advocate v Wemyss (1899) 2F. (H.L.) 1

Orr Ewing & Co. v Colquhoun's Trustees (1877) 4R. (H.L.) 116.

The circumstances so far as relevant are set out in the Lord Ordinary's opinion which was issued on 27th November 1987 when the pleas-in-law to relevancy tabled by the

defenders were sustained to the extent of excluding from probation the second conclusion of the record.

Lord Clyde.

This action has come before me on procedure roll on general pleas to the relevancy tabled by each of the first- and second-named defenders. The pursuer farms in partnership on the island of Scalpay. The first defenders are the Crown Estate Commissioners. The second defender is a tenant of the first defenders under a lease dated 6th and 17th March 1968 whereby the first defenders let to him a part of the seabed at south-east Scalpay delineated on a plan annexed to the lease. Purpose 2 of the lease states that the subjects are let for the purpose of anchoring equipment for the rearing and cultivation of Atlantic salmon and for no other purpose. In the action the pursuer seeks, first, a declarator that a salmon farm consisting of cages moored to the sea-bed in the area marked on the plan would be a material interference with the public right of navigation between the islands of Scalpay and Skye. Secondly, he seeks a declarator that the lease, described in the conclusion as a pretended lease, is null and void and of no effect. Thirdly, he seeks interdict

in the following terms:

> 'For interdict of the second-named defender or anyone on his behalf from mooring cages for the rearing of salmon or other fishes in the area specified in the first conclusion or elsewhere in the navigable waters between the islands of Skye and Scalpay to the prejudice of the public right of navigation therein. . . .'

Parties were at one on the general principle of law applicable to the present case. It was agreed under reference to the case of *Crown Estates Commissioners v Fairlie Yacht Slip Ltd* that in order to be unlawful the Crown grant must be likely to constitute a material interference with the public right of navigation. As the Lord President [Emslie] observed in that case (p. 178):

> 'The true view appears to me to be that the right of navigation is not to be regarded as a right to sail in every square inch of the surface of the sea or to use for casting anchor every square inch of the sea-bed. The public right is undoubtedly wide but it should not be regarded as having been infringed save in circumstances in which what is done by or with the consent of the Crown constitutes or is likely to constitute a material interference with its exercise by members of the public exercising their right reasonably.'

In that case the court considered an obiter dictum by Lord Watson in *Lord Advocate v Wemyss* at p. 8 to the effect that the Crown could not lawfully convey any right which might by possibility interfere with the uses of navigation and held that the test was not one of mere possibility but one of a probability of material interference. An example of the principle applied to the building of piers of a bridge in a public navigable river can be found in *Orr Ewing & Co. v Colquhoun's Trustees* to which counsel for the second defender referred. It was against that common understanding of the law that both sides presented their arguments before me.

The arguments presented by counsel for the first defenders were directed at the second conclusion of the summons. The first point which he put forward, a point which was adopted by counsel for the second defender, was that section 1(5) of the Crown Estate Act 1961 shut out any challenge by the pursuer of the lease. [His Lordship then quoted the terms of the subsection as set out above and continued:]

Counsel pointed out that at the start of condescendence 7 the pursuer simply avers that the first defenders 'have no title or authority to grant leases of the sea-bed which materially interfered with the public right of navigation'. The plea-in-law for the pursuer relative to the second conclusion is the second plea-in-law and is in the following terms:

> 'The first defenders not being entitled to authorise a material interference with the public right of navigation decree of declarator should be pronounced as second concluded for.'

1988 S.C.L.R. 113 at 115

Counsel for the first defenders submitted that there could be no question about the first defenders' title to grant a lease such as was here in issue and that any question of their having exceeded their authority in the present case was excluded by the statutory provision.

It has not been averred and it was not argued that the present lease was fundamentally null so that the first defenders could never have had authority to grant it. There may be a question whether section 1(5) of the Act of 1961 would cover a case of a fundamental nullity. But such a construction of the section was not put

forward as applicable to the present case. Accordingly, I refrain from expressing a view on that matter and I proceed on the basis that the present is a case of an alleged acting in excess of authority. The reply presented by counsel for the pursuer was to the effect that section 1(5) should be construed as affecting only persons contracting with the Commissioners. He submitted that the construction proposed by the [first] defenders' counsel would confer an immunity beyond what the words would carry. He referred to section 2(1) of the Trusts (Scotland) Act 1961 which expressly provides that neither the party with whom the trustees make a transaction nor any other person may challenge it on the ground that it was at variance with the terms or purposes of the trust. He also referred to section 35 of the Companies Act 1985 which deems a transaction entered into with a company by someone in good faith to be within the capacity of the company and the powers of the directors. As I understood the argument it implied that section 1(5) would be effective in relation to the present case as between the first and second defenders but was not open to either of them as against the pursuer. On this approach the matter is one of the construction of the terms of the particular provision, in this case section 1(5). There is no obvious reason and none was suggested for limiting the meaning of the phrase 'having otherwise acted in excess of their authority' so as to exclude the allegation made in the present case. So far as the contention put forward by counsel for the pursuer is concerned, the provision in the latter part of the subsection, which expressly relates to any person dealing with the Commissioners, suggests to me that the former part is intended to be of quite general application. I see no good reason for not following the ordinary meaning of the words and so finding here a valid objection to the pursuer's second conclusion. It may be that the point is one of competency but no objection was taken to its presentation under a plea of relevancy and accordingly it is under that head that I would hold the second conclusion to be bad.

The second argument presented by counsel for the first defenders dealt more directly with the terms of the particular lease granted in the present case. That lease was agreed by a joint minute to be No. 9 of Process and I was invited to look at that production. The second plea-in-law for the pursuer implies that the invalidity claimed in the second declarator arises because the lease authorises a material interference with the public right of navigation. The pursuer avers in condescendence 2 that in terms of the lease the second defender is entitled to moor cages to the sea-bed in the area specified. He avers that cages would float on the surface and gives dimensions of the area and of the cages. In condescendence 6 he avers that 'the said proposed fish farm authorised by said lease would constitute a material hazard and in any event inconvenience to the navigation of the waters between and around the islands of Skye and Scalpay'. Consideration of the lease, however, reveals that the first defenders have not authorised any interference with the public right of navigation. On the contrary they have in clause three (*b*) expressly accepted and reserved from the lease full and free right for inter alia 'all members of the public to exercise all rights to which they may be entitled and all privileges which they may enjoy from and over the subjects of let and without prejudice to the foregoing generality such rights of navigation and fishing as exist'. Further, in clause six, the tenant expressly undertakes inter alia 'not in any way to hinder or obstruct the due exercise and enjoyment of any rights or privilege hereby excepted and reserved'. By clause eight the tenant is obliged to obtain the consent of the Department of Trade under section 34 of the Coast Protection Act 1949. By clause nine it is provided that the tenant shall have no claim against Her

Majesty or the [first] defenders or their respective successors in respect of any loss or damage sustained by the tenant as a result of the exercise by others of the public rights reserved, including navigation. By clause thirteen the lease may be irritated by the first defenders in the event inter alia of the tenant breaching any provision of it. It is evident from this that the lease does not authorise any material interference with the public right of navigation and there is no basis for the declarator sought. Counsel for the pursuer maintained that in the whole circumstances averred the lease necessarily inferred a material interference with navigation because of the particular position of the proposed cages and the particular needs and problems of navigation in the area. He argued under reference to Rankine on Leases (p. 712 et seq) and *Fleming v Gemmill* (especially pp. 348 to 349) that it was proper to have called the landlord as a defender in the present action since the interests of both landlord and tenant were affected. His case was that any salmon farm at the site in question would necessarily constitute a material interference with navigation. The terms of the lease were of no materiality. Whether there is or is not a material interference with navigation seems to me to be a matter of fact for inquiry. If the pursuer is correct then it may be that the effect of the lease is to confer on the

tenant a right which he cannot exercise consistently with the terms of the lease or the interests of the public. But the challenge made in the second conclusion is a challenge to the validity of the lease on the ground that the lease authorised a material interference with navigation. That it clearly did not do.

Counsel for the first defenders presented a third argument related to section 34(1) of the Coast Protection Act 1949. That section provides that subject to certain excepted cases no person shall without the consent of the Minister of Transport inter alia construct any works on, under or over any part of the sea-shore lying below high water mark of ordinary spring-tides. 'Sea-shore' means the bed and shores of the sea (section 49(1)). Section 43(3) provides that if the Minister of Transport considers that an operation will or is likely to result in obstruction or danger to navigation, he shall either refuse his consent or grant consent subject to conditions. The second defender avers that the Secretary of State for Transport has consented under section 34 to him placing salmon cages at Scalpay subject to certain conditions. The pursuer's pleadings on this are somewhat unclear. In condescendence 2 it is not known and not admitted what, if any, purported approval has been given by the Secretary of State for Transport. But in condescendence 6 the pursuer avers:

> 'The Coast Protection Act 1949 and the consent of the Secretary of State are referred to for their terms beyond which no admission is made and under explanation that no consultation was afforded to the pursuer or other inhabitants of Scalpay relative to said consent.'

However, it was not argued that even if the pursuer was admitting that the Secretary of State had consented, that would foreclose any question whether there was a material interference with navigation. I agree with the view expressed by Lord Morison in the opinion which he gave earlier in this case that the issue is not determined by any consent given under the Act of 1949. Counsel for the pursuer argued that if it was not being suggested that the Act determined the position then this third argument put forward by counsel for the first defenders was of no significance. But as I understand it, the matter was raised before me as a further indication that the lease did not authorise a material interference with public navigation. It is thus the existence of the obligation in clause eight of the lease which matters in this context rather than any actual consent. On that understanding of the point it is ancillary to but supportive of the first defenders' second argument.

In my judgment the arguments presented by counsel for the first defenders were sound and I shall accede to his motion to sustain his first plea-in-law so far as it relates to the second conclusion of the summons. The point which was raised might be thought to be one of fact but it was agreed that I should look at the lease and no point was taken regarding the propriety of dealing with the matter as one of relevancy. I

was not asked to make any order on the pursuer's second plea-in-law nor the first defenders' fourth plea, which is to the effect that as they had not authorised any interference with navigation they should be assoilzied from the second conclusion.

So far as the first conclusion was concerned counsel for the first defenders adopted in advance arguments to be presented by counsel for the second defender, but he also stated that if the second conclusion was disposed of then he would require to consider whether he should continue a defence simply on the first conclusion. Counsel for the pursuer argued that the second conclusion was only ancillary to the first conclusion. There may be room for argument about the consequences so far as the lease is concerned of a finding that no salmon farm can be carried on under it, but given the terms of the second plea-in-law I am unable to treat the second declarator as simply raising that consequential question. The second declarator appears to me to proceed upon the basis that the first defenders authorised a material interference with the public right of navigation. It is on that understanding that I hold it not to be supported by relevant averments. What the first defenders' attitude to an action proceeding only on the first and third conclusions may be must be [a] matter for them.

Counsel for the second defender adopted the argument under section 1(5) of the Crown Estate Act 1961, but he did not consider it appropriate to adopt the other arguments directed at the second conclusion. However, as I have already indicated, that is sufficient to enable him to succeed so far as that conclusion is concerned. He then proceeded to attack certain passages in the pursuer's pleadings as being not relevant or sufficiently specific to support a case of material interference with the public right of navigation. While there is some ground for criticism of the pursuer's pleadings, I am not persuaded that they are not sufficiently clear to enable the case to proceed to proof.

Counsel directed his attack principally at the averments in condescendence 6. He pointed to the phrase 'a material hazard and in any event inconvenience', to which I have already referred as not matching the requirement of a material interference. I am not prepared to hold that the particular language used here is fatal to the pursuer's case. The pursuer avers that the site of the fish farm 'either straddles or is immediately adjacent to the line of passage around the southern shores of Scalpay and the said traditional line of passage between Scalpay and Skye'. Counsel argued that the pursuer should specify precisely which of these alternatives applied. But the uncertainty of the precise position of the cages in relation to the area leased and a possible inexactitude of the line of the sea crossing from Scalpay to Skye to my mind entitles the pursuer to the degree of latitude expressed in his averment. The pursuer then avers 'attempts to navigate round the obstruction so caused could prove unsuccessful, dangerous and in any event inconvenient'. Counsel for the second defender argued that this was an echo of Lord Watson's discredited dictum and was lacking in clarity. But this sentence seems to me only illustrating the material hazard which is predicated as a consequence of the fish farm. While inconvenience will not by itself constitute a material interference with the public right, I am not prepared to affirm without proof that the material hazard averred by the pursuer may not do so.

Counsel for the second defender also challenged the terms of the third conclusion for interdict insofar as it sought to relate to the rearing of salmon or other fishes, not only in the area of the lease but elsewhere. He pointed out that the case was only concerned with the rearing of Atlantic salmon and while there were averments in condescendence 7 about a second area, there were no averments of an interference with rights of navigation elsewhere than in relation to the area under the lease with which the other conclusions were concerned. Counsel for the pursuer, however, disclaimed any intention to seek a specific interdict relating to any second site. The averments in condescendence 7 were added in relation to an argument connected with earlier applications for grant or recall of interim interdict and did not relate to the scope of the final interdict sought. He submitted that the proper style of interdict extended to the more general restraint sought in conclusion three. On the understanding that the pursuer's action is directed at the enterprise sought to be

carried on at the site leased to the second defender under the lease of 6th and 17th March 1986 I do not consider it necessary or desirable at this stage to rule on the terms of any final interdict in the case.

On the whole matter raised in this procedure roll hearing I shall sustain the first plea-in-law for each of the defenders so far only as concerns the second conclusion and I shall allow a proof before answer on the action so far as the other conclusions are concerned.

For the pursuer: *Bruce, Q.C., Scott*, instructed by *Brodies, W.S*.

For the first defenders: *Murray, Q.C*., instructed by *J. & F. Anderson, W.S.*

For the second defender: *Osborne, Q.C*., instructed by *Drummond & Co., W.S*., for *MacLeod & Co*., Solicitors, Inverness.