SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2022] SC EDIN 34

EDI-B1059-21

JUDGEMENT OF SHERIFF JOHN K MUNDY

in the cause

NORBORD EUROPE LIMITED

Pursuer

against

(FIRST) THE SCOTTISH MINISTERS AND, (SECOND) THE SCOTTISH ENVIRONMENT PROTECTION AGENCY

Defender

Pursuer: Mure QC, instructed by DAC Beachcroft LLP, Glasgow
Defender: McLean, Scottish Government Legal Directorate (First Defenders)
O'Carroll, Advocate, instructed by Pinsent Masons LLP

EDINBURGH, 20 October 2022

The sheriff, having resumed consideration of the cause, appoints a hearing on a date to be afterwards fixed to discuss further procedure in light of the conclusions of the court in relation to the scope of this appeal and the remedies available to the pursuer; and reserves all questions of expenses in the meantime.

NOTE

Introduction and background

[1] This is an appeal by way of summary application under Regulation 58 of the Pollution Prevention and Control (Scotland) Regulations 2012 ("the 2012 Regulations"). The regulations were made by the first defenders in exercise of the powers conferred by section 2

of, and schedule 1 to, the Pollution Prevention and Control Act 1999 and section 2(2) of the European Communities Act 1972.

[2] In this appeal, the pursuer seeks, in terms of crave 1, to quash the determination dated 27 October 2021 by the reporter appointed by the first defenders of an appeal against the decision of the second defender dated 2 April 2020 to refuse in part an application by the pursuer dated 19 July 2019 to vary an existing PPC permit. The pursuer also seeks other orders, including, in terms of crave 2, a declarator that the proposed use of a type of particleboard satisfies the conditions of Article 5(1) of the Waste Framework Directive (Directive 2008/98/EC) ("the WFD") so that it is a by-product [of a production process] and not waste, and, in terms of crave 3, directions to be given to the second defender to grant the pursuer's application to vary the existing PPC permit.

[3] The matter called before me for a diet of debate on (1) the scope of the appeal under the regulations, including in particular whether it is an appeal by way of review or is an open appeal and (2) the remedies available to the pursuer in the event that it is successful in the appeal.

[4] By way of background, the pursuer manufactures medium density fibreboard (MDF) and particleboard (PB) at its facility at Station Road, Cowie, Stirlingshire. By an application dated 19 July 2019, the pursuer applied to the second defender for a variation of an existing permit under Regulation 46 of the 2012 Regulations. The permit in question regulates certain installations and activities carried out by the pursuer at the site. One part of the installation regulated by the permit is the generation of steam, electricity and heat carried out using combustion plant at the site, including a Heat Energy Plant in which various fuel sources are presently combusted. By Notice of Partial Refusal addressed to the pursuer dated 2 April 2020, with an appended schedule, the second defender intimated its partial

refusal of that application, and in particular its refusal to vary the permit so as to authorise the burning as a fuel in the Heat Energy Plant, along with other fuels, of PB WESP Crumb, a material produced in the wet electro-static precipitators which the pursuer is required to use at the production line that manufactures particleboards. On 2 October 2020, the pursuer appealed to the first defenders against the partial refusal of its application and that in terms of Regulation 58 of the 2012 Regulations. On 3 November 2020, in exercise of powers conferred by section 114 of the Environment Act 1995, the first defenders appointed Stephen Hall, as a reporter, to determine the appeal. The appeal procedure mainly comprised a series of written submissions, followed by a remote hearing held on 31 August 2021.

[5] Paragraph 4 of Schedule 8 to the 2012 Regulations afford an appellant and the second defender an opportunity of appearing before the reporter being heard. On 21 September 2021, at the reporter's request, the pursuer and the second defender lodged a short written Joint Submission on the conditions that each proposed be appended to the varied permit in the event that the reporter granted the appeal. On 27 October 2021, the reporter issued his Appeal Decision Notice in which he dismissed the appeal and affirmed the decision of the second defender to partially refuse the application to vary the permit.

[6] The pursuer's appeal to the first defenders turned on whether the second defender had been correct in determining that the PB WESP Crumb produced at the pursuer's plant proposed to be used as a fuel source at the Heat Energy Plant does not meet the four conditions necessary for it to be classified as a by-product in terms of Article 5 of the WFD. Article 5(1) provides:

> "Member States shall take appropriate measures to ensure that a substance or object resulting from a production process the primary aim of which is not

> the production of that substance or object is considered not to be waste, but to be a bi-product if the following conditions are met:
> (a) further use of the substance or object is certain;
> (b) the substance or object can be used directly without any further processing other than normal industrial practice;
> (c) the substance or object is produced as an integral part of the production process; and
> (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts".

[7] The main issue in the appeal was whether the WESP Crumb should be regarded as waste or as a by-product of the particleboard production process.

[8] The existing permit does not allow WESP Crumb to be burnt at Cowie. This is instead sent by road to a waste incineration facility in Southampton. The proposed variation would allow WESP Crumb to be blended with the various other fuel types and burnt in the onsite combustion plant. It is estimated that around 1300 tonnes of WESP Crumb per year are generated from the particleboard manufacturing process. If the WESP Crumb is to be considered as a waste product (other than biomass) then it may only be burnt in a waste incineration or co-incineration plant (as opposed to the combustion plant that currently exists on site). If however the WESP Crumb is to be considered as a bi-product of the particleboard manufacturing process then a variation to the existing permit could potentially allow it to be burnt on site.

[9] Finally, in relation to background, it should be noted that the application to vary the PPC permit was in relation to two matters, one of which does not concern us. That other aspect was granted. The aspect that was refused was the authorisation sought to burn WESP Crumb as a fuel type on site. In refusing that part of the application the second defender determined that none of the four conditions set out in Article 5 of the WFD were met. In the course of the appeal to the first defenders, the second defender conceded that in

the case of the PB WESP Crumb conditions (a) and (c) were in fact met and in his decision, the reporter agreed that those conditions were met. However, the reporter held that condition (b) was not satisfied. That is the condition that a substance or object can be used directly without any further processing other than normal industrial practice. As a result of that conclusion the reporter, consequentially, was unable to be satisfied that condition (d) was met i.e. that further use is lawful. The principle focus of the appeal therefore was whether condition (b) of Article 5 could be satisfied and that accordingly whether the PB WESP Crumb could be used directly without any further processing other than normal industrial practice.

[10] That issue gives rise to a series of important disputed facts, which are set out in pleadings in Articles 10-21 of condescendence and the answers thereto. Determination of the issue also requires to consider the proper interpretation and application of the WFD and the case law decided under that Directive.

[11] It is noteworthy that for the purposes of the appeal to the first defenders, evidence was tendered in the form of affidavits accompanied by a significant number of documents including technical statements.

[12] The debate in this appeal was fixed on the motion of the first defenders, the pursuer's motion for a three-day proof before answer having been refused *in hoc statu*. As indicated, although there is no particular plea-in-law directed to the issue, the debate related to the scope of the appeal and the remedies available.

[13] At the debate the pursuer was represented by Mr Mure QC, the first defenders by Mr McLean, solicitor and the second defender by Mr O'Carroll, advocate.

[14] Before turning to the submissions, I think it would be useful to set out the relevant statutory provisions, and also mention the pleadings on the issue of the scope of the appeal, for context.

The 2012 Regulations

Appeals to the Scottish Ministers and to the sheriff

58.—(1) A person—

(a) who has been refused a permit after an application under regulation 13,

(b) who has been refused the variation of a permit after an application under regulation 46,

(c) who is aggrieved by the conditions attached to a permit granted to that person…

…may appeal against the decision of SEPA to the Scottish Ministers.

(2) A person—

(a) who is served with a variation notice (other than in respect of an application for variation),

(b) a revocation notice,

(c) an enforcement notice,

(d) a suspension notice, or a

(e) closure notice under regulation 18(1) of the Landfill Regulations,

may appeal against the notice to the Scottish Ministers…

(4) On determining an appeal against a decision of SEPA under paragraph (1), the Scottish Ministers may—

(a) affirm the decision,

(b) where the decision was a refusal to grant a permit or to vary the conditions of a permit, direct SEPA to grant the permit or to vary the conditions of the permit,

(c) where the decision was as to the conditions attached to a permit, quash all or any of the conditions of the permit,

(d) where the decision was a refusal to effect the transfer or accept the surrender of a permit, direct SEPA to effect the transfer or accept the surrender,

and the Scottish Ministers may give directions as to the conditions to be attached to the permit where they exercise a power in sub-paragraph (b) or (c).

(5) On determining an appeal against a notice under paragraph (2), the Scottish Ministers may—

(a) quash or affirm the notice,

(b) if affirming it, may do so either in its original form or with such modifications as they think fit.

(6) An appeal may be taken to the sheriff against a determination by the Scottish Ministers under paragraphs (4) and (5) by—

(a) SEPA, or

(b) any person referred to in paragraphs (1) or (2) who is affected by the determination.

(7) The appeal referred to in paragraph (6) must be made by summary application within 21 days from the date of the decision of the Scottish Ministers.

(8) In disposing of an appeal taken under paragraph (6), the sheriff may take any step open to the Scottish Ministers under paragraphs (4) and (5)…

(14) Schedule 8 has effect.

Paragraph 7 of Schedule 8 provides, *inter alia:*

> Where a determination of the Scottish Ministers is quashed on appeal, the Scottish Ministers—
>
> (a) must send to the persons notified of their determination under paragraph 6, a statement of the matters with respect to which further representations are invited for the purposes of further consideration of the appeal,
>
> (b) must afford to those persons the opportunity of making, within 28 days of the date of the statement, written representations in respect of those matters, and
>
> (c) may, as they think fit, cause a hearing to be held or reopened and, if they do so, paragraphs 4(2) to (10) apply to the hearing or the reopened hearing as they apply to a hearing held under paragraph 4(1),

The pleadings on the scope of the Appeal

[15] On the scope of the appeal issue is joined between the parties in Article 1 and Answer 1 of Condescendence. In summary, it is averred on behalf of the first defenders that in this case the court is determining an appeal against an administrative decision made by the first defenders. Under those circumstances, the court can only uphold the pursuer's appeal if the first defenders decision is unreasonable or on consideration of the merits it is plainly wrong. Reference is made to *Coastal Regeneration Alliance Ltd* v *Scottish Ministers* [2016] SC EDIN 60 and *Holmehill Ltd* v *Scottish Ministers* 2006 SLT (Sh Ct) 79. In response, the pursuer avers that the first defenders characterisation of the court's jurisdiction in the appeal is mistaken. The authorities cited by the first defenders concerned ministerial decisions exercising a discretionary power referred on Ministers by the Land Reform (Scotland) Act 2003 in relation to applications made to them concerning the public

interest. The pursuer avers that the reporter in this case was exercising an appellate jurisdiction and required to hear parties and to decide points of law arising in a suit or *lis* between the pursuer and the second defender. The pursuer avers that Regulation 58 of the 2012 Regulations permits both the reporter and this court not only to quash the second defender's decision but to direct the second defender to grant the application. The pursuer avers that the 2012 Regulations do not restrict the grounds upon which this court's appellate jurisdiction proceeds. Neither the second defender as the original decision maker nor the reporter, nor the first defenders have institutional competence in relation to the legal questions raised by this appeal. It is therefore averred on behalf of the pursuer that this appeal is an open appeal in which the court may make a fresh decision on the merits based on the evidence and submissions before it. In response to that, the first defenders aver that the authorities referred to, had a wider application. While it was accepted that the reporter was required to hear parties and decide points of law in a suit or *lis* between the pursuer and the second defender that did not alter the scope of this appeal in which the court is reviewing a decision taken by the first defenders. In the pleadings, reference is made to Regulation 58(4) of the 2012 Regulations, which provided that the court can "… direct SEPA to grant the permit or to vary the conditions of the permit" but does not refer to quashing a decision. Regulation 58(6) was silent on the scope of the statutory appeal and therefore that must be determined as a matter of inference for the purposes and terms of the enactment in question. In the present appeal, the inference to be drawn is that the enactment provides for an appeal by way of review. Both the first defenders and second defender have been identified by Parliament as having institutional competence in relation to the legal questions in this appeal. It is further averred in answer 1 that if the court were to determine that the scope of this appeal is an open appeal, then the court ought to exercise a degree of deference

to the opinion of the original decision maker in relation to the issue under appeal (*Walker* v *Secretary of State for Transport* 2010 SLT (Sh Ct) 215). In its pleadings, the second defender simply refers to the first defenders averments on the scope of the appeal, which I take to mean that it does not demur.

Submissions

[16] On behalf of the first defenders, Mr McLean submitted that a clear inference could be drawn from the purposes and terms of the 2012 Regulations that an appeal of this nature was an appeal by way of review. That approach was proportionate given that if the appeal was by way of a re-hearing, as the pursuer contended, then it would be the third occasion in which evidence would be considered in support of the pursuer's application to vary the permit. An appeal by way of a re-hearing was therefore not consistent with good administration because to require evidence to be produced again before this court would result in unnecessary duplication of time and expense. I was therefore invited by Mr McLean to find that the scope of an appeal under Regulation 58 of the 2012 Regulations was by way of review and therefore to be determined by the principles set out in *Wordie Property Company Ltd* v *Secretary of State for Scotland* 1984 SLT 345. It was further submitted that the pursuer's craves to quash the determination, and in the alternative to directing the second defender to grant the variations sought, to remit back to the first defenders, were incompetent and should not be permitted to proceed to a substantive hearing. It was submitted that a further substantive hearing should be fixed in order to determine the appeal in accordance with the foregoing. Alternatively, if the court were to find that the scope of the appeal was by way of a re-hearing rather than review, it was submitted that the

court should exercise a degree of deference to the opinion of the first defenders in relation to the issues under consideration in the present appeal.

[17] Mr McLean pointed to the pleadings in Article 1 of Condescendence and Answer 1, which set out the position of the parties on this issue. He referred to *Macphail on Sheriff Court Practice* (4th Edition) at paragraph 27.42 to the effect that where the enactment is silent on the scope of a statutory appeal, unless the matter has been resolved by case law, determining whether the particularly statutory appeal is by way of a re-hearing or is limited to a review of the decision is to be determined as a matter of inference from the purposes and terms of the enactment in question. Relevant factors include the extent of the powers conferred on the sheriff on disposing of the appeal, such as the power to quash the decision and substitute a new decision, which may point to a re-hearing; if the appeal requires the sheriff to make a factual determination on the particular issue, this may also point to an appeal by way of a re-hearing; if the appeal is against the exercise of a statutory discretion, this may point to the appeal being limited to a review of the decision; if the appeal is made by enactment applying throughout Great Britain, then the scope of the appeal in the equivalent court in England and Wales may have persuasive force in determining the scope of the appeal in Scotland.

[18] Mr McLean referred to the terms of the statutory provision in question namely Regulation 58 of the 2012 Regulations. The equivalent provision in England and Wales was to be found in Regulation 31 of the Environmental Permitting (England and Wales) Regulations 2016 from which there is no right of appeal, any challenge requiring to be made by judicial review. It was explained that the scope of an appeal under Regulation 58 had not been resolved by case law and therefore the scope required to be determined as a matter of inference. However, guidance could be taken from other authorities and he referred to

Holmehill Ltd v *Scottish Ministers sup cit*; in which case the sheriff had cited with approval the following:

Stepney Burgh Council v *Joffe* [1949] 1KB 599, per Lord Goddard CJ at page 603;

Wordie Property Company Ltd v *Secretary of State for Scotland sup cit*;

Associated Provincial Picture Houses Ltd v *Wednesbury Corporation* [1948] 1KB 223.

[19] He also referred to: *Coastal Regeneration Alliance Ltd* v *Scottish Ministers sup cit*; *Valente* v *Fife Council* 2020 SC DUN 38; *Walker* v *Secretary of State for Transport sup cit*; *Carvana* v *Glasgow Corportation* 1976 SLT (Sh Ct) 3; *Rodenhurst* v *Chief Constable, Grampian Police* 1992 SC1 and certain authorities referred to therein. In support of the argument that the appeal was by way of review the first defenders relied on following:

1. There was no binding authority on the sheriff that indicates the appeal is by way of a rehearing;

2. There is no power to quash the first defenders decision or to substitute a new decision;

3. SEPA [the second defender] is the statutory body with authority and expertise in relation to environmental matters. The first defenders were performing an appellate function in relation to a challenge to SEPA's decision to refuse to vary the pursuer's permit. The first defenders discharged that function through the office of Directorate of Planning and Environmental Appeals, which has specialist expertise in hearing environmental appeals. Parliament has entrusted those roles to SEPA and the court should be slow to interfere with decisions of specialist bodies entrusted with decision making powers under the statute;

4. The reporter in determining the appeal was performing a quasi-judicial function to the extent that there was a *lis* between the parties, that had been determined by the

reporter and the question for the sheriff was whether the reporter's decision was correct;

5. There would be little practical purpose in providing for an appeal on the merits to the first defenders and then to allow an open appeal to the sheriff on the same basis;

6. In *Holmehill*, all relevant facts had to be produced before the sheriff as there had been no prior evidential hearing;

7. Adopting the approach suggested by the pursuer would be disproportionate. *Holmehill* was ultimately decided on *Wednesbury* grounds, which were accepted by the parties as applying;

8. Regulation 58 of the 2012 Regulations provides an equivalent discretion to the sheriff to the discretion given in other cases such as *Holmehill*, *Walker* and *Carvana* where the court determined the scope of the appeal was by way of review;

9. In *Walker* the sheriff considered that *Rodenhurst* (which decided that the sheriff was acting in a judicial rather than an administrative capacity) was not a barrier to him determining his appeal by way of review;

10. Determining an appeal under Regulation 58 of the 2012 Regulations is an appeal by way of review would be consistent with the approach in England and Wales under Regulation 31 of the 2016 Regulations there where a challenge to an Inspectors decision must be brought by judicial review.

[20] As to remedy it was submitted that this was a straightforward matter of statutory interpretation. On a proper analysis of the statutory provisions it was submitted that Regulation 58(8) provided that the sheriff may only take the same steps as the first defenders disposing of an appeal and as a consequence, in this particular appeal, there is no power to

quash the decision of the first defenders or to remit back to them in an appeal of this nature. Accordingly, the pursuer's first crave and crave 3(iii) was incompetent.

[21] On behalf of the second defender, Mr O'Carroll, by in large, aligned himself with the position of Mr McLean. In relation to the scope of the appeal, he acknowledged that the statutory provision was silent and he also referred to the authors of *Macphail on Sheriff Court Practice* (4th Edition) at paragraph 27.42. He submitted that in the absence of any case law determining the scope of the present statutory appeal that must be inferred from the purposes in terms of the 2012 Regulations and other underlying statutory provisions. In this case, the purpose of the legislation is borne of the public interest in avoiding pollution and the protection of the environment as a whole. To this end, the primary statutory body with authority in expertise to adjudicate on such technical matters is the second defender and thereafter the first defenders through the office of the Directorate of Planning and Environment Appeals, all prior to appeal by way of summary application to this court. There is no provision for quashing the second defenders decision in relation to the present application. There was therefore no provision which permits the sheriff to substitute a new decision. He or she may either affirm the second defenders decision or direct the second defender to vary the conditions of the permit. In the latter event, the provisions of Schedule 8 at paragraph 7 would come into play in determining the final terms of the permit conditions so varied. The absence of any power to quash pointed to the appeal being restricted to one of review rather than a re-hearing of the evidence leading to that decision.

[22] It was submitted that it is inappropriate for evidence to be led. He explained that where a summary application is to proceed by way of review the sheriff's function is broadly equivalent to that of the Court of Session on a petition for a judicial review. In that context, it would be unusual and not normally necessary for evidence to be led. On the basis

of the well-known judicial review principles as in *Wordie Property Company Ltd* v *Secretary of State for Scotland sup cit* and other case law it was suggested that the questions open to the sheriff are:

1. Did the Reporter make a material error of law in reaching his decision?

2. Did the Reporter take an immaterial consideration into account in reaching his conclusions?

3. Did the Reporter fail to take into account relevant material considerations in reaching his conclusions?

4. Did the Reporter's decision lack any proper basis on fact in order to support it?

5. Did the Reporter act in a way, which was *Wednesbury* unreasonable?

[23] Those questions may be answered by reading the reporter's determination dated 27 October 2021 by reference to the material before him during the course of the inquiry leading to his decision. Such evidence included affidavits, and statements produced by experts, adduced by both the pursuer and the second defender. To require such evidence to be produced of new to this court would result in unnecessary duplication of time and expense.

[24] Counsel derived support for his approach in the case of *Holmehil*l v *Scottish Ministers sup cit*, the sheriff in that case citing with approval the dictum of Lord Goddard CJ in *Stepney Borough Council* v *Joffe sup cit*. Counsel also referred to the case of *Coastal Regeneration Alliance Ltd* v *Scottish Ministers sup cit*; *Valente* v *Fife Council sup cit* and *Fieldman* v *City of Edinburgh Council* 2020 SLT (Sh Ct) 2020. Reference was also made to the case of *Carvan*a v *Glasgow Corporation sup cit*, where Sheriff Macphail indicated that, while there was an unrestricted right of appeal to the sheriff in that case, the sheriff should not vary or reverse in the decision of the Magistrates Committee unless he was satisfied that the decision was

wrong and he should pay due regard to the competence of the Magistrates in arriving at their decision. That approach was approved in *Walker* v *Secretary of State for Transport sup cit*. Accordingly, if it was found that the scope of the appeal was by way of re-hearing rather than review, the court should exercise a degree of deference to the opinion of the original decision maker in relation to the issues under consideration in the present appeal.

[25] In relation to remedy counsel referred to the relevant statutory provision namely Regulation 58 of the 2012 Regulations where it appeared that the power of the first defenders (and therefore the sheriff on appeal) to quash was restricted to a variation notice under paragraph (2) or in respect of conditions attached to a permit under paragraph (4)(c). Neither of those actions on the part of the second defender were under consideration in respect of the present appeal. This appeal was in respect of a refusal of a variation of a permit under Regulation 46 in terms of Regulation 58(4)(b) as provided for in Regulation 58(1)(b). It followed that the scope of the court's jurisdiction in relation to remedy was restricted to the exercise of powers under Regulation 58(4)(a) and (b) in other words to affirm the second defenders decision to refuse variation or to direct the second defender to vary conditions of the permit.

[26] Schedule 8 paragraph 7 was referred to. That is the provision by which further representations may be made and a further hearing may be held where the determination of the first defenders is quashed on appeal. In the present case, if the court found that the reporter was incorrect in its decision in relation to condition (b) and was minded to direct the second defender to vary the conditions of the permit, the question of whether the conditions in Article 5 of WFD would be met, and the appropriate permit conditions, would require to be addressed new by the first defenders following representations on behalf of the second defender and the pursuer.

[27] While, as earlier indicated, there are averments relating to the scope of the appeal, there is no plea-in-law directed towards the issues at this debate. I think Mr O'Carroll on behalf of the second defender was content to make the arguments under the umbrella of the second defenders first plea-in-law to the relevancy and specification of the pursuer's averments. The first defenders also have such a plea.

[28] On behalf of the pursuer, Mr Mure submitted that this was an open appeal or re-hearing as opposed to a review and asked the court to appoint an evidential hearing to determine the appeal along with a pre-hearing diet.

[29] It was acknowledged that there was no single case authority that explained the scope and nature of an appeal under the 2012 Regulations and that the Regulations themselves do not make any express provision in that regard. As regards the principles or factors, which may be relevant in such a situation reference was made to *Macphail on Sheriff Court Practice sup cit* and *Jamieson's Summary Applications and Suspensions* (2000). He submitted that certain points may be gleaned. Some enactments clearly provided for an appeal by way of a re-hearing, for example *Alexander* v *Scottish Ministers* [2021] SC LOCH 7, an appeal against an administrative decision made under the Protection of Vulnerable Groups (Scotland) Act 2007. In other cases, the statute may stipulate appeal by way of review only. In some appeals by review the sheriff may in any event require to hear evidence, for example where the issues between the parties turned on questions of fact. However, as noted, the 2012 Regulations were silent on the scope of the appeal and therefore it became necessary to infer the scope of the appeal from the terms of the enactment itself.

[30] Mr Mure noted that the 2012 Regulations did not lay down any restrictions on the tests that were to be applied by the sheriff before he may interfere with the determination of the first defenders. The court ought therefore to be astute not to limit its jurisdiction were

Ministers and the legislature have not sought to do so. In *Rodenhurst* v *Chief Constable of Grampian sup cit* the Second Division of the Inner House discussed the importance of distinguishing between enactments prescribing a specific test for appeal and those that merely provide in general terms for a right of appeal.

[31] Mr Mure noted that the summary application procedure was suitable for an open appeal.

[32] Under reference to the statutory provisions, Mr Mure submitted that there was a very broad range of powers when disposing of an appeal under Regulation 58(4) and (8). The sheriff may affirm the decision. He may direct the second defender to grant the permit or to vary the conditions of the permit. He may quash all or any of the conditions of the permit. He may direct the second defender to affect the transfer or accept the surrender of a permit. He may give directions as to the conditions to be attached to the permit. These powers, it was submitted, clearly include the ancillary power to quash the determination of the Scottish Ministers. For example, Schedule 8 paragraph 7 to the Regulations applied where "a determination of the Scottish Ministers is quashed on appeal". In any event, it was submitted that the sheriff must have the implicit power to quash a Ministerial determination in order to open up the second defender's jurisdiction and to take any of the steps set out in Regulation 58(4). Similarly, the power to direct the second defender to grant a permit must implicitly include the power to direct the second defender to grant a variation. This was no more than the application of common sense to the interpretation of the enactment involving the rule that, unless the contrary intention appears, the legislature is presumed to intend that an enactment be read in light of a principle that the greater includes the lesser (*Bennion, Baillie and Norbury on Statutory Interpretation* (8th Edition) at section 9.3). In short, it was submitted the breadth of these powers mean that the sheriff may, in effect, make such orders

he thinks fit. The breadth of powers is appropriate where the appeal is simply expressed in unrestricted terms in Regulation 58(6) as "an appeal may be taken to the sheriff against a determination by the Scottish Ministers ".

[33] It was submitted that on a common sense construction, the breadth of these powers clearly encompass cases where the sheriff considered the matter *de novo* and substituted his own new decision for that reached by the first defenders. The provisions pointed towards the appeal being an open one in which the sheriff considers the merits and reaches his own conclusion. This analysis also fits with the type of issues that could arise in applications for permits of the variation permits. These issues include complex factual matters, technical evidence and issues of law. The extent of the powers and the fact that the sheriff might require to make a factual determination may point to the appeal being by way of re-hearing. Another consideration noted by *Macphail* at paragraph 27.42 is that if the appeal is against the exercise of a statutory discretion this may point to the appeal being limited to a review of the decision. That point, it was submitted, did not arise in the present case with the determination by the first defenders not being made in the exercise of a statutory discretion, but rather in the exercise of an appellate jurisdiction. Mr Mure provided further examples of appeals were the sheriff had regarded the enactments as providing for unrestricted rights of appeal involving a re-hearing and a fresh decision on the merits (*Carvana* v *Glasgow Corporation sup cit*; *Walker* v *Secretary of State for Transport sup cit*; *Manson* v *Midlothian Council* 2019 SCLR 723; and *Forbes* v *Fife Council* 2009 SLT (Sh Ct) 79). He acknowledged however that each case must depend on a careful interpretation of the enactment in question and the types of issues that are likely to arise from any given case.

[34] In relation to the authorities founded upon by the defenders and in particular *Coastal Regeneration Alliance Ltd* v *Scottish Ministers* and *Holmehill Ltd* v *Scottish Ministers sup cit*, it

was submitted that both cases were decided in the sheriff court as appeals under the provisions of the Land Reform (Scotland) Act 2003 and could be distinguished. Both appeals challenged decisions made by the Scottish Ministers directly under statutory provisions conferring upon them a discretion. Ministerial policy and guidance laid down principles to be considered when reaching ministerial decisions under the 2003 Act. By contrast, the present appeal concerned a *lis* or dispute between the pursuer and the second defender about the present and proposed facts at the plant on the proper application of the law to particular facts and circumstances. This case did not concern a discretionary power similar to that in the cases founded upon. At the initial stage of an application the second defenders powers are heavily circumscribed by the provisions of the 2012 Regulations including Schedule 7. On appeal to the first defenders the reporter required to receive evidence, hear from the parties and rule upon what the position in law is, acting in a *quasi*-judicial manner. In *Holmehill,* the pursuer simply accepted the application of the *Wednesbury* principle. Counsel respectively demurred from the approach adopted by the sheriff in *Coastal Regeneration Alliance Ltd* v *Scottish Ministers* that in the absence of guidance in the relevant statutory provision the court should adopt the *Wednesbury* approach. In any event, the context of that case was wholly different to the present case.

[35] In relation to the submission that if the court is to determine that this is an open appeal and the sheriff should "exercise a degree of deference to the Reporter in relation to the issue under appeal" then citing *Walker* v *Secretary of State for Transport sup cit*, it was submitted that deference is only likely to be appropriate if the appeal is against the decision maker's exercise of discretion. The second defenders decision and the first defenders determination were not made in the exercise of any discretion referred by statute. The extent of any deference would depend on the quality of reasons given in the decision, the

nature of the issues in the case and the whole circumstances. As for "institutional competence", there was nothing special in the status of either the second defender or the first defenders. This appeal was distinguishable from those involving appeals from decisions by elected authorities exercising statutory discretion relating to their expertise and locality such as in *Carvana* v *Glasgow Corporation sup cit* or *Holmehill Ltd* and *Coastal Regeneration* or from expert regulators such as the Traffic Commissioner (*Walker* v *Secretary of State for Transport sup cit*).

[36] In relation to the first defenders' position, that there is no power to remit back to them for a fresh determination of permanent conditions, this was not in accord with the position of the second defender. While the reporter received details of written submissions on the matter, the reporter made no determination in respect of the permit conditions. This was because he had already concluded that condition (b) of Article 5 was not established. There was no question of the first defenders being asked to make a "fresh" determination on the permit conditions. The sheriff clearly has the power to direct the second defender to vary the conditions of a permit so that they are appropriate for the permit as granted or varied following the appeal. Accordingly, the sheriff has all the necessary powers to resolve matters raised by this appeal including the terms of any fresh permit conditions. Counsel observed that paragraph 7 of Schedule 8 to the 2012 Regulations was perhaps more apt to deal with cases where the decision of the first defenders had been quashed *simpliciter* and that was not the pursuer's preferred route in disposing of the appeal. However, I took it from what he said that a remit was open if the court was not able to resolve the terms of any varied conditions.

[37] Accordingly, counsel submitted that the court should proceed on the basis that it is an open appeal involving a re-hearing where the sheriff may hear evidence and determine the merits himself in a *de novo* decision.

Discussion

[38] The issues of the scope of the court's jurisdiction in an appeal under the statutory provision and the remedies available to the pursuer are to some extent inter-related.

[39] In relation to the scope of the appeal where, as here, the statutory provision is silent, it is sufficient in my view to derive guidance from *Macphail on Sheriff Court Practice (4th Edition) at paragraph 27.42* where the authors state:

> "Many enactments are silent on the scope of the statutory appeal. Unless the matter has been resolved by case law determining whether the particular statutory appeal is by way of a re-hearing or is limited to a review of the decision, the scope of the appeal must be determined as a matter of inference from the purposes and terms of the enactment in question. There are various ways in which this might be done. First, the extent of any powers conferred on the sheriff on disposing the appeal such as the power to quash the decision and substitute a new decision, may point to the appeal being by way of a re-hearing, although this is not necessarily conclusive of the question. The absence of such powers may point to the appeal being limited to a review of the original decision. Secondly, if the appeal requires the sheriff to make a factual determination on a particular issue, this may also point to the appeal being by way of a re-hearing. Thirdly, if the appeal is against the exercise of a statutory discretion, this may point to the appeal being limited to a review of the decision. If the appeal is made under an enactment applying throughout Great Britain, the scope of the appeal in the equivalent court in England and Wales may have persuasive force in determining the scope of the appeal in Scotland".

[40] The original decision by the second defender to partially refuse the variation of a permit was one made under Regulation 46 of the 2012 Regulations. In terms of Regulation 58(1)(b) a person who has been refused the variation of a permit under Regulation 46 may appeal against the decision of the second defender to the first defenders. Regulation 58 deals with appeals to the Scottish Ministers and the sheriff.

[41] It may be seen from the provisions of that regulation that this is an appeal under Regulation 58(1)(b) by a person who has been refused the variation of a permit following an application under Regulation 46. It is not an application by a person who has been refused a permit under Regulation 58(1)(a) or who is aggrieved by the conditions attached to a permit under Regulation 58(1)(c). Nor is it an appeal under Regulation 58(2) by a person who *inter alia* is served with a variation notice. On determining an appeal against the decision of the second defender under Regulation 58(1), Regulation 58(4) contains the powers of the first defender (and therefore the powers of the court where an appeal is taken to the sheriff). The first defenders may (a) affirm the decision, (b) where the decision was a refusal to grant a permit or to vary the conditions of a permit, direct SEPA (the second defender) to grant the permit or to vary the conditions of the permit, (c) where the decision was as to the conditions attached to a permit, quash all or any of the conditions of the permit, (d) where the decision was a refusal to affect the transfer or accept the surrender of a permit, direct SEPA [the second defender] to affect the transfer or accept the surrender. It is further provided that the first defenders may give directions as to the conditions to be attached to the permit where they exercise a power under (b) or (c). An appeal to the sheriff may be taken by virtue of Regulation 58(6) and the provision as to the powers of the sheriff is contained in Regulation 58(8) which provides that the sheriff may take any step open to the first defenders under *inter alia* paragraph (4). Regulation 58(14) simply provides that Schedule 8 has effect.

[42] In the present case, we are dealing with refusal to vary the conditions of a permit under Regulation 58(4)(b). In that situation, a specific power given to the court is to "direct SEPA" [the second defender] to vary the conditions of the permit and further may give directions as to the conditions to be attached to the permit. There is no express power in

that situation to quash as is specifically conferred for example in relation to a variation notice under Regulation 58(2) and (5) and also in relation to conditions of a permit under Regulation 58(4)(c) which I take it to refer to an appeal under Regulation 58(1)(c).

[43] The provisions of paragraph 7 of Schedule 8 to the regulations have already been noted. That provision applies to a "determination" of the first defenders, which is "quashed on appeal" and provides for further actions on the part of the first defenders, including affording persons the opportunity of making representations and potentially a hearing - in other words a remit back to them. That is of course relevant to remedy but it is also relevant to the scope of the appeal. I'll come back to that.

[44] The Regulations were made under the Pollution, Prevention and Control Act 1999 after consultation with SEPA [the second defender] and various other bodies. As noted Article 5(1) of the WFD is relevant in relation to the consideration of what is regarded as waste and what is regarded as a by-product in a production process. The equivalent provisions in England and Wales are the Environmental Permitting (England and Wales) Regulations 2016 also made under the 1999 Act. Regulation 31 of the 2016 Regulations provide for an appeal from the Regulator to an appropriate authority (Secretary of State). There is no provision for a further appeal to a court.

[45] Clearly, there is no case law that has been found which determines the scope of the present statutory appeal. We must therefore consider what the scope is as a matter of inference from the purposes and terms of the 2012 Regulations.

[46] It can be said in general terms that the purpose of the legislation is borne of the public interest in avoiding pollution and the protection of the environment as a whole. Clearly, the primary statutory body with authority to adjudicate on such matters is the second defender in the first instance and thereafter the first defenders through the Planning

and Environmental Appeals Division, all prior to an appeal to this court. I agree with the suggestion that the court should be slow to interfere with the decisions of specialist bodies entrusted with decision-making powers under statute. However, with all due respect to the reporter, I am not persuaded that he would come into that category. Such a reporter will deal with a broad range of matters, much as a court does. I will return to the question of "institutional competence" later. A consideration of the purpose of the legislation and how it is enforced does not take us very far. It is necessary to consider the terms of the statutory provisions.

[47] Firstly, in relation to the extent of the court's powers in disposing of the appeal, these have already been noted. It seems to me that the provisions are tolerably clear. There is no expressed power to "quash" the decision or any part of it in a case where there is a refusal to vary the conditions of a permit. By contrast, that term is employed where a person is aggrieved with the imposition of conditions, when the court may "quash" all or any of the conditions of the permit. Further, the sheriff may quash (or affirm) a variation notice. The term is not used in relation to the "decision" on these matters, but is employed, perhaps conveniently, as a way of expressing that certain consequences of a decision, for example conditions, are being set aside. Used in that way, the term might not easily be employed in relation to a refusal to vary a condition of a permit. On the other hand, the term is used in paragraph 7 of Schedule 8 in relation to a "determination" of the Scottish Ministers. This would appear to acknowledge a power to quash a "decision" and there is no discrimination between the various situations in which this may arise. It may be, as counsel for the pursuer suggested, that the provisions, which afford the opportunity for parties to make representations to the Scottish Ministers, are intended to deal with the situation where a decision is quashed *simpliciter* and where the court is not in a position, for whatever reason,

to resolve all matters, for example in relation to the conditions of any permit. Be that as it may, it is clear that decisions made on appeal under Regulation 58 may be quashed. It seems to me therefore, adopting a common sense approach, that the regulation carries with it a broad range of powers and that it is within the power of the court, at least implicitly, to quash a decision of the first defenders, including a decision to refuse to vary a condition of a permit. Accordingly, I do not place a great deal of store by the absence of the express power to "quash" in respect of a refusal to vary a permit condition. It would, in my view, be odd if the nature and scope of appeals under Regulation 58 were fundamentally different by the use or not of the word "quash" within the regulation. In any event, as indicated by the authors of *Macphail* in the passage quoted, the absence of such a specific power is not necessarily conclusive of the question. On the whole, however, a consideration of the court's powers on appeal would point towards to an open appeal, rather than review.

[48] As to whether this appeal requires the sheriff to make a factual determination on a particular issue, which may point to the appeal being by way of a re-hearing, there is little doubt that there are facts at issue between the parties, as is evident from the lengthy pleadings in this case. The principal issue of the appeal may properly be regarded as an issue of mixed fact and law, and in particular whether the WESP Crumb should be regarded as waste or as a bi-product of the particleboard production process having regard to the requirements of Article 5 of the WFD. It seems to me that this may well require the court to make an enquiry into the facts, requiring evidence, to resolve the issue. Further, there is the question of permit conditions in the event that the court is minded to allow the appeal. Submissions were lodged with the reporter in that regard, but he did not deal with that aspect in view of his conclusions on the primary issue. There may be scope for evidence in relation to the conditions in the absence of agreement. Of course, whether or not any given

case proceeds by way of a re-hearing or a review, it may be necessary to hear evidence. However, the potential for a factual enquiry in this case points to an open appeal, rather than an appeal by way of review.

[49] It is not disputed that the first defenders, by means of the reporter, enquired into the facts of the matter and came to a decision on the principal issue. In these circumstances, it could not be said with any force that the decision of the reporter involved the exercise of a discretion. In other words, this is not an appeal against the exercise of a statutory discretion. That would point away from the process in this court being by way of review.

[50] There is of course the fact that the appeal provisions in the 2016 Regulations applying to England and Wales do not provide for an appeal to a court. It was said that such a decision could therefore only be challenged by way of judicial review employing *Wednesbury* principles. That may be so and one would infer that, in England and Wales, Parliament did not intend that there be a fresh enquiry into the facts. However, we are here dealing with Regulations made by Scottish Ministers with a different appeal system and I think the court has to be extremely cautious in drawing any analogy.

[51] As regards the authorities that were referred to in submissions in relation to the scope of the appeal, it is quite clear that they were decided having regard to the statutory provisions that applied in those cases and each having their own context. I have difficulty in deriving assistance in those circumstances.

Conclusions on scope of Appeal

[52] It seems to me therefore, that a consideration of the factors relevant to the issue points firmly to the conclusion that this appeal should proceed as an open appeal or rehearing.

[53] As regards the question of "institutional competence", briefly mentioned earlier, I am not persuaded that the reporter in a case such as this is in a position of such expertise that the court could only interfere where error was shown in the *Wednesbury* sense. The reporter was a fact finder as well as decision maker. The fact that there may be further enquiry into the facts in this appeal is not something which is unusual in a statutory appeal process.

[54] In relation to the submission that if the court were to determine that this is an open appeal then the sheriff should exercise a degree of deference to the reporter in relation to the issue under appeal, I agree with the submission on behalf of the pursuer that deference is only likely to be appropriate if the appeal is against the decision maker's exercise of discretion. In general, of course, respect has to be given to the body appealed against. However, whether, and the extent to which, any deference would be appropriate would depend *inter alia* on the quality of the reasoning, the nature of the issues in the case and the whole circumstances. At this stage, I make no further observations on that issue.

Remedy

[55] In the event that the appeal is successful, certain specified powers are conferred by Regulation 58(4) and have been noted. The court may direct the second defender [SEPA] to vary the conditions of the permit and directions may be given as to the conditions to be attached to the permit. This power seems to be reflected in what is sought by the pursuer in crave 3 of the summary application which is in the following terms.

> "To direct the Scottish Environment Protection Agency to grant in full the application by the pursuer dated 19 July 2019, to vary the existing PBC permit… subject to such conditions as are either (i) agreed between the pursuer and the

> Scottish Environment Protection Agency, (ii) set out by the pursuer in the joint submission to the Reporter dated 21 September 2021 or (iii) otherwise determined by the Scottish Ministers following upon further procedure as provided for by paragraph 7 of Schedule 8 to the Pollution Prevention and Control (Scotland) Regulations 2012…"

[56] It seems to me that the terms of the crave are unobjectionable. It may be that the court will not require to remit back to the first defenders, as is sought in part (iii) of the crave, having power to deal with matters in the appeal, but, given the wide powers available to the court, including the powers in paragraph 7 of Schedule 8 to the 2012 Regulations, I am of the view that it is competent.

[57] It will be appreciated from my earlier conclusions, that I consider crave 1, which seeks to quash the decision of the first defenders, to be competent.

Further procedure

[58] In light of my conclusions on the two issues, I have appointed a hearing on a date to be fixed in order that further procedure can be addressed and I have reserved the question of expenses in the meantime.