



Access to Environmental Justice Campaign Update

Supreme Court Ruling & Campaign Next Steps

November 2011

In June this year, Friends of the Earth Scotland became the first Scottish NGO (and the first environmental NGO in the UK) to intervene in a case at the UK Supreme Court. The case related to insurance claims by victims of asbestos exposure who suffer from pleural plaques – scarring of the lungs – an apparently asymptomatic condition. In *AXA General Insurance Ltd v Lord Advocate*¹, the insurers were challenging the validity of a 2009 Act of the Scottish Parliament that ensures individuals can sue for damages if they contract the condition.

An interesting case, but what has it got to do with Friends of the Earth Scotland, you might ask?

AXA were challenging the ‘title and interest’ of a number of individuals with pleural plaques to argue against the case. ‘Title and interest’ is the Scots law test of standing, or the right to have your case heard by the court. It is also a major hurdle for individuals, communities and NGOs who want to challenge poor decision-making or breaches of environmental law by public authorities.

Effectively, ‘title and interest’ makes it almost impossible to take a public interest case to court – which environmental cases tend to be – unless you can demonstrate a clear private interest, such as property. And even then, it’s not straightforward.

The issue has come to the fore in a number of recent high-profile environmental cases. In October

“The highly restrictive title and interest requirements forced concerned individuals and communities to jump through hoops in a perverse effort to demonstrate some kind of private interest in order to take public interest cases. The Axa ruling means that individuals, communities and NGOs can go to court in the public interest and be upfront about doing so without fear of being tripped up by an historical technicality.”

William Walton, Road Sense campaigner and environmental law lecturer.

this year, Marco McGinty lost his legal challenge against the proposed coal-fired power station at Hunterston on ‘title and interest’. In Road Sense’s case against the proposed Aberdeen Bypass, the campaign group was forced to drop out of the action leaving it’s Chair as sole petitioner because Scottish Ministers confirmed that they would challenge the campaign group’s standing. Despite her home being under threat from Trump’s golf course development, Mrs Forbes was found by the court not to have ‘title and interest’ to sue Donald Trump and Aberdeenshire Council.

Thanks to the hard work of Frances McCartney, Solicitor, and Simon Collins QC – who worked *pro*

bono to draft our intervention – Supreme Court judges Lord Reed and Lord Hope expressed the opinion that ‘title and interest’ had “no place” in public interest litigation.

The ruling was damning about the negative effect that years of judge-made law has had on the development of public law in Scotland.

While it still needs to be tested in the Scottish Courts, the fact is that the Supreme Court ruling has essentially changed the face of environmental and public law in Scotland.

¹ *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)* [2011] UKSC 46. Full judgment available at: <http://www.supremecourt.gov.uk/decided-cases/index.html>

Campaign next steps

While the Axa ruling is a huge campaign success, there is still a long way to go to make access to environmental justice a reality for communities and campaigning organisations in Scotland.

We are campaigning for full implementation of the Aarhus Convention – an international treaty that Scotland is legally obliged to meet – which demands broad and affordable access to justice in environmental matters, including review of the merit of cases. Better access to justice should result in improved decision-making by public authorities who know that their decisions can be challenged if they don't consult and engage with communities, and generally, make decisions that are good for people and the environment.

Our next big challenge is to reduce the cost of taking cases to court, which can often amount to tens of thousands of pounds, making justice completely unaffordable for many communities.

Legal Aid regulations as they currently stand mean that people can't get financial help for a legal problem if the case impacts on other people who could be expected to help pay for the case too. Environmental cases by their very nature tend to impact on more than one individual, meaning that it is almost impossible to secure legal aid for an environmental dispute.

Without Legal Aid, people have to raise enough money to pay not only their own legal costs, but the other side's too, should they lose their case. This can add up to enormous sums, such as the £80,000 that Marco McGinty had to raise to challenge the Scottish Government over the proposed coal-fired power station at Hunterston.



The reality in Scotland is that this high cost of litigation (combined until recently with the restrictive 'title and interest' test) means that going to court to challenge environmentally damaging decisions or acts has become a luxury that effectively only the very time and money rich can afford.

Even if people do overcome all of these hurdles and make it to court, unfortunately, the merits of the case are very unlikely to be discussed, as the key mechanism for challenging poor decision making by public authorities – Judicial Review – is limited to examining whether decision makers have followed processes correctly, not whether they have substantively made a good decision.

What we are calling for

We are calling on the Scottish Government and Courts to implement legal reforms ensuring that:

- the process of challenging breaches of environmental law or poor decision-making is free or inexpensive, so that people and communities aren't put off by the threat of huge costs
- the merit, or substance of decisions can be examined by the courts, not just whether 'due process' has been followed
- public legal education is improved, and the courts made more user-friendly, so people learn to recognise problems and injustices which may have a legal solution, and aren't put off by an archaic system

Find out more

You can download our 'Tipping the Scales' report at www.foe-scotland.org.uk/tippingthescales or for more information contact Mary Church at mchurch@foe-scotland.org.uk

You might be wondering why you haven't heard more about this in the news. As James Wolffe QC pointed out in a special seminar held by Axiom Advocates on the issues raised by our intervention, the media chose to focus on the fact that the Court's decision upheld Scots law on compensation for asbestos victims, but the "real headline" should have been "*Supreme Court removes barrier to public litigation*".