EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 17
XA55/19 and XA56/19

Lord Brodie
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD BRODIE

in the Appeals by

COMMUNITY WINDPOWER LIMITED

First Appellant

against

THE SCOTTISH MINISTERS

Respondents

and

EAST AYRSHIRE COUNCIL

Interested Party

and

FIM FOREST FUNDS GENERAL PARTNER LIMITED

Second Appellant

against

THE SCOTTISH MINISTERS

Respondents

and

EAST AYRSHIRE COUNCIL

Interested Party

First Appellant (Community Windpower): Wilson QC, A Sutherland; Balfour & Manson LLP
Second Appellant (FIM Forest Funds): Niall McLean (sol adv); Brodies LLP
Respondents: Crawford QC, Burnet; Scottish Government Legal Directorate
Interested Party: GA Dunlop; Ledingham Chalmers LLP

24 April 2020

Introduction

[1] These two appeals under section 239 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") arise out of a planning permission obtained by Community Windpower Limited ("the first appellant") for the construction and operation of a windfarm at Sneddon Law, U41 Hemphill to High Rushaw, Moscow, East Ayrshire KA3 6JJ ("the site"). The site is owned by FIM Forest Funds General Partner Limited as a general partner and trustee for and on behalf of FIM Sustainable Timber and Energy LP ("the second appellant") and was leased to Sneddon Law Community Wind Company Limited who along with its parent company, the first appellant, are the developer for the construction and development of the windfarm. The relevant planning authority is East Ayrshire Council ("the council"). The council appears in both appeals as an interested party. The respondents are the Scottish Ministers.

[2] The original permission obtained by the first appellant was granted subject to 47 conditions. An application to vary the permission so as to remove a number of the conditions ultimately resulted, following an appeal to the Scottish Ministers, in a new permission being granted on 24 October 2014. That permission was also made subject to a number of conditions including condition 36, the purpose of which was to protect the quantity and quality of private water supplies.

[3] On 28 October 2015, the first appellant applied to the council for a discharge of condition 36. That application was, however, refused by the council on 14 January 2016. An appeal against that refusal was lodged by the first appellant, and on 23 February 2017, the reporter appointed to deal with the matter, Mr Cunliffe, having had regard *inter alia* to a technical report, the Consolidated Water Risk Assessment dated 15 November 2016, granted the appeal and discharged condition 36. As a condition of the discharge of condition 36, Mr Cunliffe imposed certain supplemental conditions ("the SCs"). The reason given was "to ensure that satisfactory mitigation measures are in place before the start of the development". Mr Cunliffe was concerned to provide for the mitigation of the risk of contamination or disruption of the existing water supplies to neighbouring properties by reason of the construction of the wind farm and any consequent interference with naturally draining water. A particular degree of risk had been identified in relation to the existing supply to three properties: Tayburn, Muirburn and Alton Lodge. With a view to mitigating the risk in relation to these properties Mr Cunliffe imposed SC 1.1. With a view to mitigating the risk in relation to other properties at significant risk he imposed SC 1.2. Fulfilment of these SCs was a condition precedent for commencement of the development.

[4] On 3 July 2017, the first appellant provided the council with documentation which it considered demonstrated fulfilment of the requirements of SC 1. The council took a different view and wrote to the first appellant accordingly, indicating that it should cease work at the site immediately. It appears that the parties were then unable to agree a suitable way of resolving matters and the council served an enforcement notice on 9 August 2017 ("the Enforcement Notice"). The Enforcement Notice was due to take effect on 8 September 2017. It alleged a breach of planning control by commencement of site investigation works involving the drilling of proposed turbine locations prior to the fulfilment of SCs 1.1 and 1.2

(the Enforcement Notice contains the immaterial clerical error of referring to the current relevant condition as "Condition 36").

[5] Discussions continued between the parties following upon service of the Enforcement Notice, and the first appellant submitted further documentation on 4 September 2017. However, as a resolution had not been arrived at and the council had not indicated that it would withdraw the Enforcement Notice prior to its effective date, the first appellant lodged an appeal to the Scottish Ministers against the Enforcement Notice in terms of section 130 of the 1997 Act.

[6] There were two grounds to the first appellant's appeal to the Scottish Ministers, reflecting the respective terms of section 130(1)(c) and (f) of the 1997 Act:

(1) that the matters stated in the notice do not constitute a breach of planning control (section 130(1)(c)); and

(2) that the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control stated in the notice, or to remedy any injury to the amenity which has been caused by that breach (section 130(1)(f))

[7] Following upon the appointment of the reporter, Ms Craggs, and pre-examination procedure, an inquiry was held from 24 to 27 April 2018 and finalised on 10 May 2018. The reporter's decision on the appeal to the Scottish Ministers was issued in the form of the Appeal Decision Notice dated 12 April 2019 ("the Decision"). The Decision granted the appeal in certain respects, but upheld the Enforcement Notice in so far as it related to certain of the requirements of SCs 1.1 and 1.2. The appellants were accordingly held to be in breach of planning control because the development had commenced before all the suspensive conditions in SC 1.1 and SC 1.2 had been purified. It is with this finding that the appellants in their respective appeals to this court have taken issue. The first appellant has renewed its

submissions that the matters stated in the Enforcement Notice did not constitute a breach of planning control because the relevant conditions had in fact been fulfilled prior to the commencement of development and, moreover, that the steps required by the Enforcement Notice in order to amount to fulfilment of the SCs exceeded what was necessary to remedy any breach. Although the second appellant's appeal is not as extensive in its criticism of the Decision it makes the same principal points and the appeals largely follow the same lines of argument.

Relevant legislative provisions

[8] The Town and Country Planning (Scotland) Act 1997 provides, *inter alia*:

> "**123.— Expressions used in connection with enforcement.**
>
> (1) For the purposes of this Act—
>
> (a) carrying out development without the required planning permission, or
>
> (b) failing to comply with any condition or limitation subject to which planning permission has been granted…
>
> constitutes a breach of planning control.
>
> (2) For the purposes of this Act—
>
> (a) the issue of an enforcement notice
>
> …
>
> under this Part constitutes taking enforcement action.
>
> ...
>
> **127.— Issue of enforcement notice.**
>
> (1) The planning authority may issue a notice (in this Act referred to as an *"enforcement notice")* where it appears to them—
>
> (a) that there has been a breach of planning control, and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.
>
> (2) A copy of an enforcement notice shall be served—
>
> (a) on the owner and on the occupier of the land to which it relates, and

(b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.

…

128.— Contents and effect of notice.

(1) An enforcement notice shall state—

(a) the matters which appear to the planning authority to constitute the breach of planning control, and

(b) the paragraph of section 123(1) within which, in the opinion of the authority, the breach falls.

…

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are—

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach.

…

130.— Appeal against enforcement notice.

(1) A person on whom an enforcement notice is served or any other person having an interest in the land may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the Secretary of State against the notice on any of the following grounds—

…

(c) that those matters (if they occurred) do not constitute a breach of planning control;

…

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

…

132.— General provisions relating to determination of appeals.

(1) On the determination of an appeal under section 130, the Secretary of State shall give directions for giving effect to the determination, including, where appropriate, directions for quashing the enforcement notice.

(2) On such an appeal the Secretary of State may—

(a) correct any defect, error or misdescription in the enforcement notice, or

(b) vary the terms of the enforcement notice, if he is satisfied that the correction or variation will not cause injustice to the appellant or the planning authority.

…

239.— Proceedings for questioning the validity of other orders, decisions and directions.

(1) If any person—

…

(b) is aggrieved by any action on the part of the Secretary of State , or on the part of a planning authority, to which this section applies and wishes to question the validity of that action on the grounds—

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the Court of Session under this section.

...

(5) On any application under this section the Court of Session—

…

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by failure to comply with any of the relevant requirements in relation to it, may quash that order or action.

..."

The supplemental conditions

[9] In terms of Mr Cunliffe's decision of 23 February 2017 SC 1 provided as follows:

"Unless otherwise agreed in writing by the planning authority, the following shall be in place before development (including any intrusive ground investigation) begins:-

1.1 fully operational replacement water supplies for -

(a) those properties served by the Blackshill Spring (Muirside Farm, Hemphill Farm, Rushaw Farm, Dykescroft Farm, Dykestonend, Cowan's Law Trout Fishery),

(b) Alton Muirhouse Farm and Alton Lodge, and

(c) Muirburn and Tayburn.

In each case the replacement water supply shall either be from the public mains or be derived from a source shown to be at low or negligible risk of contamination or disruption, and which does not prejudice the quantity or quality of water delivered by other existing private water supplies, delivering sufficient quantity and quality of water for the relevant uses (as determined following consultation with the users), and details shall be provided of how the supply will be managed and maintained.

1.2 For other properties at significant risk (rated before mitigation as moderate or major in the Consolidated Water Risk Assessment), either:

(a) a facility for connection to the public water supply which is either already operational or is capable of being made so within 24 hours, or

(b) a holding tank at the property capable of holding at least 24 hours' supply of water which can be immediately connected into existing pipework to provide a pressurised supply for all domestic and/or commercial needs, together with

(c) a contract or contracts with emergency water suppliers to deliver water of suitable quality within 6 hours' notice to each holding tank and to replenish the supply at least once in every 48 hours until further notice, and

(d) access arrangements for each property to ensure that emergency water deliveries can be made without causing damage, and

(e) a scheme for each property, prepared in consultation with the owners/occupiers, describing in detail how an alternative long-term water supply can be provided in the event of prolonged contamination or disruption of the private water supply, such scheme to include all necessary permissions, licences, agreements and wayleaves to enable the scheme to be implemented at short notice if required, and

(f) for domestic properties, a supply of bottled water (already delivered to the property) sufficient to meet household needs for drinking, cooking and personal hygiene until the first delivery under (c) above takes place, together with arrangements to replace the bottled supply before its expiry date.

1.3 The full cost of implementing and maintaining the mitigation measures shall be met be the Operator throughout the lifetime of the planning permission.

1.4 The Operator shall supply the professional credentials of:

(a) the personnel employed to assess and upgrade existing treatment systems for private water supplies;

(b) the Environmental Clerk of Works; and

(c) the personnel employed to conduct water sampling and monitoring.

1.5 The Operator shall provide documentary evidence to the planning authority demonstrating that 1.1 -1.4 above have been fulfilled".

The Decision

Material findings by the reporter

The SC 1.1 properties; Muirburn, Tayburn and Alton Lodge

[10] The reporter found that the first appellant had not put a public water supply in place for the Muirburn, Tayburn and Alton Lodge properties. As an alternative, the first appellant had undertaken three boreholes in the area (Craigend, Cowan's Law and Alton Muirhead). The Craigend borehole was intended to supply water to the properties at Muirburn and Tayburn. The Alton Muirhead borehole was intended to supply water to Alton Lodge. The boreholes were drawing water which was flowing in the pipes which had been laid by the first appellant. The reporter found, however, that the pipes were not connected to the properties although lengths or coils of pipe which appeared to be sufficient to make the necessary connections had been brought to the verges adjacent to the respective properties.

[11] The reporter accordingly found that while the lack of a final connection to the properties had not been due to a failure or reluctance on the part of the first appellant, were the existing water supply to become contaminated or disrupted, there would not be a fully operational replacement water supply which could instantly be turned on at these properties. She recognised that the first appellant's ability to make such a final connection was dependent on the cooperation and consent of third parties, namely the property owners, but cooperation and consent had not been forthcoming (Decision paras 31 to 37 and 71).

[12] In relation to the supplies to Muirburn, Tayburn, and Alton Lodge, the reporter found that whereas water quality tests suggested that the boreholes were capable of providing water that was wholesome after treatment, there had been no evidence of the quality of water "at the point of use", in other words at the tap, because no test had been carried out there. Absent such a test, she found herself unable to conclude that the water was of sufficient quality (Decision paras 54 and 82).

[13] No details had been provided as to how the supply to Muirburn, Tayburn and Alton Lodge would be managed and maintained throughout the period of construction and use of the windfarm (Decision para 55).

[14] An additional difficulty in relation to Alton Lodge was that the Alton Muirhead borehole was situated on land which was part of Alton Muirhead Farm. The reporter was not satisfied that the appellant had control over the rights necessary to draw water from the borehole and then convey it through pipes to Alton Lodge (Decision para 74).

The SC 1.2 properties

Requirement (b)

[15] SC 1.2(b) required that holding tanks (Intermediate Bulk Containers or "IBCs") were to be installed at each property, capable of holding at least 24 hours' supply of water, which could be immediately connected into existing pipework at each property to provide a pressurised supply for all domestic and commercial needs.

[16] The reporter found that in some instances, IBCs had been delivered to properties but not installed. Others had not been delivered to the properties but were being stored near to the Craigend borehole. In respect of this latter category, the reporter accepted that this was

because either the property owner had not responded to correspondence from the first appellant or had refused to accept the installation and connection of the IBC.

[17] The reporter had information submitted by the first appellant in July 2017 that the IBCs could be installed within 6 hours. She did not accept that that meant that they could be "immediately connected" but in any event she was not convinced that all of the IBCs could be connected within 6 hours given that the number to be installed and the work required to install them was, at least to some extent, unknown (Decision paras 90 and 91).

[18] The reporter recognised that where IBCs had not been delivered, this was due to the fact that the owners of those properties had not given the necessary consent. Although she sympathised with the first appellant, who was being frustrated due to lack of cooperation from the third parties, she noted that as was the case with the SC 1.1 properties, the first appellant had an alternative option, namely that it could provide a connection to the public water supply. The third parties had been asked at the inquiry and had confirmed that this would be acceptable to them. This reflected their expressed preference at the time Mr Cunliffe had been considering the discharge of condition 36.

[19] It followed that the IBCs could not be immediately connected as required by the condition (Decision para 95)

Requirement (d)

[20] SC 1.2(d) required the provision of access arrangements for each property to ensure that emergency water deliveries could be made. On 3 July 2017, the first appellant had submitted documents setting out how access should be taken and any specific requirements for each of the properties concerned with a plan showing the location of the IBC and the

access route into and from the property. No details of access arrangements had been provided in respect of those properties to which an IBC had not been delivered.

[21] The reporter considered that because the IBCs had not been delivered and/or installed, there was "no certainty" that if consent was given they would be located on the positions shown in the plans submitted by the first appellant. The access arrangements provided were no more than a proposal and could not be finalised until the IBCs were *in situ*. On that basis, the reporter could not be certain that deliveries could be made without causing damage.

[22] Once again, the reporter recognised the difficulties facing the first appellant where proprietors did not consent to the installation of the IBCs, but as either no access arrangements had been provided or they were based on a theoretical location of an IBC which had not been installed, she could find only that there was, and continued to be, a breach of planning control in respect of this requirement (Decision para 104).

Requirement (e)

[23] SC 1.2(e) required the first appellant to provide a scheme for each property, prepared in consultation with owners and/or occupiers, setting out in detail how an alternative long-term water supply could be provided in the event of prolonged contamination or disruption of the private water supplies, including all necessary permissions, licences, agreements and wayleaves to enable the scheme to be implemented at short notice if required.

[24] The first appellant had submitted two schemes: the first on 3 July 2017; the second on 4 September 2017. The reporter considered that both fell short of what was required by SC 1.2(e). In relation to the first proposal, which envisaged a connection to the public mains, this was no more than an "in principle" scheme which might be capable of being delivered

but there was no certainty that it could be delivered at short notice. There had been no evidence of any consultation on the specific proposal nor that the scheme was acceptable to Scottish Water, and that Scottish Water would carry out the necessary connections. Further, there was no evidence of any contract with a suitable contractor being in place. No land rights or wayleaves had been provided for nor any agreement with the roads' authority enabling the works to be carried out. In relation to the second of the proposed schemes, this was similar to the first, but with some new information. Again, an alternative scheme whereby the properties were connected to the public mains was suggested, but a further alternative whereby the properties were supplied by the Craigend borehole was also suggested. There was again little evidence that any consultation had taken place, albeit the reporter made reference at para 112 of the Decision to a summary note of a meeting between the third parties and Business Stream (an arm of Scottish Water) where the timeframe for connection to the public mains appears to have been discussed (this had been lodged as a production in the inquiry as document AMG56b). But, the timeframe for connection was not, as the reporter put it, the issue. The issue with the second submission was, as with the first, the lack of detail provided and the lack of certainty that the scheme could be delivered. Reference was made to the evidence about discussions with Scottish Water, but there was, in the reporter's view, still no concrete proposal with all the necessary consents in place.

[25] Further, connection to the Craigend borehole was unlikely to be acceptable to third parties, and there was no evidence that the yield in volume of water would be sufficient if more properties were to be connected to it. There was still no evidence of a contract having been agreed with any suitable contractor, nor of any land rights or wayleaves, consents or other agreements which would be required to install the pipe and connections. The fact that there were now two proposals merely added to the uncertainty of the scheme. Accordingly,

there was an ongoing breach of planning control in respect of this requirement (Decision para 116).

Summary of respects in which the reporter found the SCs not to have been fulfilled (determination of the section 130(1)(c) ground of appeal)

[26] Accordingly, on the basis of her findings in fact, the reporter concluded that there had been a breach of planning control in that development had commenced before the following requirements of the SCs had been met:

i. In respect of Muirburn and Tayburn and Alton Lodge: there was not a "fully operational replacement water supply… either from the public mains or… derived from a source shown to be at low or negligible risk of contamination" in place as required by SC 1.1 (Decision paras 35, 37 and 71).

ii. In respect of Muirburn and Tayburn, and Alton Lodge: there was not shown to be "a replacement water supply… delivering sufficient quality of water for the relevant uses" as required by SC 1.1 (Decision paras 54 and 82).

iii. In respect of Muirburn and Tayburn, and Alton Lodge: no details had been provided as to how "the supply would be managed and maintained" throughout the construction and for the lifetime of the windfarm, as required by SC 1.1 (Decision para 55)

iv. In respect of Alton Lodge: there was not shown to be "a source to be at low or negligible risk of …disruption" as required by SC 1.1 (Decision para 74).

v. In respect of the SC 1.2 properties: there was neither "a facility for connection to the public water supply" nor "a holding tank at the property … which can be

immediately connected into existing pipework to provide a pressurised supply…" as required by SC 1.2(b) (Decision para 95).

vi. In respect of the SC 1.2 properties: there was neither "a facility for connection to the public water supply" nor were there shown to be "access arrangements for each property to ensure that emergency water deliveries can be made without causing damage" as required by SC 1.2(d) (Decision para 104).

vii. In respect of the SC 1.2 properties: there was neither "a facility for connection to the public water supply" nor "a scheme for each property, prepared in consultation with the owners/occupiers, describing in detail how an alternative long-term water supply can be provided in the event of prolonged contamination or disruption of the private water supply, such scheme to include all necessary permissions, licences, agreements and wayleaves to enable the scheme to be implemented at short notice if required" as required by SC 1.2(e) (Decision para 116).

viii. Documentary evidence had not been provided to the planning authority demonstrating that the foregoing requirements of SC 1.1 and SC 1.2 had been fulfilled, as required by SC 1.5.

The reporter's determination of the section 130(1)(f) ground of appeal

[27] In its appeal against the Enforcement Notice the first appellant also relied on the ground provided by section 130(1)(f), that the steps required by the notice to be taken exceeded what was necessary to remedy any breach of planning control.

[28] The Enforcement Notice had required the first appellant to take four steps by reason of its breach of planning control. The reporter affirmed step 1, subject only to replacing a

reference to the former condition 36 and substituting reference to SC 1.1 and SC 1.2. She amended steps 2 and 3. She deleted step 4. In summary the steps affirmed by the reporter subject to amendment were as follows:

i. Stop all works associated with the development with the exception of any works required to fulfil conditions 1.1 and 1.2

ii. Provide fully operational replacement water supplies to the SC 1.1 properties; and, in the event that the first appellant wishes to continue to pursue an alternative private water supply demonstrate that the Alton Muirhead borehole is from a source at low to negligible risk of disruption, and demonstrate the quality of water for the supplies of water to all properties at point of use.

iii. In relation to the SC 1.2 properties, provide either a facility for connection to the public water supply which is either already operational or is capable of being made so within 24 hours, or a holding tank at the property capable of holding at least 24 hours' supply of water which can be immediately connected into existing pipework to provide a pressurised supply for all domestic and/or commercial needs, together with access arrangements for each property to ensure that emergency water deliveries can be made without damage, and a scheme for each property, prepared in consultation with the owners/occupiers describing in detail how an alternative long-term water supply can be provided in the event of prolonged contamination or disruption of the private water supply, such scheme to include all necessary permissions, licences, agreements and wayleaves to enable the scheme to be implemented at short notice if required.

iv. Demonstrate, regardless of which option to fulfil the requirements in relation to the SC 1.2 properties is pursued, that the first appellant has the necessary

permissions, licences, agreements and wayleaves to enable the scheme to be delivered without delay.

The appeals to this court

[29] Each appellant appeals, in terms of section 239 of the 1997 Act, against the reporter's decision of 12 April 2019. The procedure is accordingly regulated by the provisions of part III of chapter 41 of the Rules of the Court of Session. RCS 41.25(1) provides that an appeal (in the sense of the initiating document) must be made in Form 41.25. RCS 41.25(2) makes certain requirements with which an appeal must comply. Among these requirements is that imposed by RCS 41.25(2)(e): the appeal shall "state in brief numbered propositions, the grounds of appeal".

[30] Brevity is not a feature of the first appellant's appeal. It extends to 26 pages before, over a further two pages, posing no less than 22 questions for the Court. It presents challenges to the reader seeking grounds of appeal stated in brief numbered propositions. What are described as grounds are set out in parts 3 to 10 of the document, organised under eight headings. At various points in the text there is to be found the proposition that the reporter erred in a particular respect which relates to the topic identified by the heading. The 22 questions are organised under six headings, again of the nature of topics, some the same as the topics in the grounds, some not. The second appellant's appeal, with its three identifiable grounds of appeal and two questions for the court, is a more accessible document.

[31] Among the benefits of brief and focused grounds of appeal is that they can provide a readily identifiable structure for the analysis of the issues. What the first appellant offers are its eight headings, as equivalents of grounds of appeal: (1) SC 1.1: Fully Operational

Replacement Water Supplies; (2) SC 1.1: Sufficient Quality of Water; (3) SC 1.2(b): Holding Tanks/IBCs; (4) SC 1.1 and SC 1.2(b): Unfairness; (5) SC 1.2(d): Access Arrangements; (6) SC 1.2(d): Access Arrangements: Additional Step for Compliance; (7) SC 1.2(e): Scheme for Alternative Long-Term Water Supply: Additional Step for Compliance; (8) SC 1.2(e): Scheme for Alternative Long-Term Water Supply. Of these (1), (2) and (8) overlap the second appellant's three grounds of appeal. We shall accordingly use the headings as reference points in the discussion which follows, taking that discussion to comprehend both appeals. We do not propose to address the 22 questions which would appear to repeat, in slightly different form, points made in the submissions.

Discussion and decisions

Overall context

[32] These appeals depend on the proper interpretation of the conditions which are suspensive of the planning permission for the development and how that interpretation falls to be applied to the facts as found by the reporter. The two appellants contend that on a proper interpretation as applied to the facts, the conditions have been purified and accordingly it was not a breach of planning control for the first appellant to commence work on the development. The reporter found to the contrary, in the eight respects summarised above. The respondents and the interested party say that the reporter was right to do so. The evidence heard by the reporter included the views of witnesses as to what the conditions meant and whether they had been met by the work done by the first appellant, but the issues of proper interpretation and whether there was a breach of planning control by reason of the conditions not having been purified are questions of law which were for the reporter to determine at first instance and for this court to consider on appeal.

[33] A certain amount is uncontroversial. The reporter's findings of primary fact are not challenged. Parties have lodged a joint statement of legal principles. It is not said by any party that the relevant conditions are unreasonable. The appellants have not sought to vary the conditions by making an application to develop land without compliance with conditions previously attached, as is provided for by section 42 of the 1997 Act. While a failure to comply with any condition or limitation subject to which planning permission has been granted constitutes a breach of planning control (1997 Act, section 123(1)(b)), it is a matter for the discretion of the planning authority as to whether it is expedient to issue an enforcement notice (*Tarn* v *Secretary of State for Scotland* 1997 GWD 9-394). However, the expediency of enforcement in a particular case is not a matter for the reporter on a section 130(1(c) appeal; the issue is simply whether the facts alleged in the enforcement notice and found by the reporter constitute a breach of planning control. No more is expediency a matter for this court.

[34] As we have already noted, the SCs were imposed by the previous reporter, Mr Cunliffe, in terms of his decision of 23 February 2017, in substitution for the original condition 36, in order to reduce the pollution risk consequent on the construction of the wind farm and, in particular to mitigate the risk of contamination or disruption of existing private water supplies to properties owned by third party proprietors. Thus, what this appeal is concerned with is the application of conditions which were put in place to ensure that provision was made for an alternative to the existing water supplies which would only need to be called upon in the event of the occurrence of pollution or disruption. Counsel for the interested party was able to supply the information that as part of the process of the appeal which was determined by Mr Cunliffe, all the parties, including the council, the first appellants and the third party objecting proprietors spent a day at Kilmarnock Football

Stadium discussing proposals which ultimately found expression in the SCs. As can be seen from Mr Cunliffe's decision at paras 20 and 21, he concluded that it would be prudent to provide replacement supplies for Alton Lodge, Tayburn and Muirburn (what we have referred to as the SC 1.1 properties). There does not appear to have been agreement as to how this should best be done. As can be seen from paras 20, 22 and 23 of Mr Cunliffe's decision, whereas the preference of the third party proprietors was for connection to the public water supply, the first appellant's preferred solution was to take the water from boreholes. This difference was left unresolved.

[35] Effecting a connection with the internal plumbing of a property and a water supply requires the consent of the proprietor. This is so where it is a private supply from, for example, a borehole. It is also so if it is a public supply, as counsel for the first appellant demonstrated by reference to the relevant provisions of the Water (Scotland) Act 1980. Scottish Water has a variety of duties and powers which include the laying of communication pipes and supply pipes forming part of a road but, as appears from paragraph 5 of schedule 3(II) of the 1980 Act, an owner or occupier of premises who desires to have a supply of water for his domestic purposes must lay the supply pipe at his own expense having first obtained, as respects any land not forming part of a road, the consent of the owners and occupiers.

[36] As was found by the reporter, the first appellant appears to have done what it can to make provision for an alternative supply of water to the SC 1.1 properties by its preferred method of taking the supply from a borehole. It has however been prevented from making a connection to the properties by the proprietors' refusal to give their consent. They have not cooperated with the first appellant in implementing its preferred method of meeting the

requirements of the condition. The proprietors however apparently adhere to their expression of willingness to take a supply from the public mains.

[37] There has been a similar lack of cooperation from SC 1.2 proprietors. The first appellant would appear to have done what it can to deliver and install IBCs but have been frustrated by lack of consent from SC 1.2 proprietors either to accept them onto their properties or allow their connection to the existing plumbing.

(1) SC 1.1: Fully Operational Replacement Water Supplies

[38] Read short, SC 1.1 required that

> "…, the following shall be in place before development (including any intrusive ground investigation) begins:-
>
> 1.1 fully operational replacement water supplies for
>
> [the SC 1.1 properties]
>
> In each case the replacement water supply shall either be from the public mains or be derived from a source shown to be at low or negligible risk of contamination or disruption, and which does not prejudice the quantity or quality of water delivered by other existing private water supplies, delivering sufficient quantity and quality of water for the relevant uses (as determined following consultation with the users), and details shall be provided of how the supply will be managed and maintained."

[39] In each case the reporter found the pipes to be installed up to the verge of the property but not connected to the property itself. She could not accept that that was "a fully operational replacement water supply" (Decision paras 35, 37 and 71).

Submissions

[40] Although elaborated as error by taking into account extraneous evidence and error by failing to have proper regard to material evidence, the first appellant's essential submission, which the second appellant adopted, was that the reporter had erred in law in her interpretation of SC 1.1. On a proper interpretation, it was not necessary that the

replacement water supplies be connected or capable of immediate connection to the properties. "Fully operational replacement water supply" was not defined in SC 1.1; the condition only required that replacement water supplies be "in place". For a supply to be "fully operational" it did not necessarily require a physical connection to the properties before commencement of development. The preposition "for" where it occurs immediately before the specification of the SC 1.1 properties does not impose a requirement of connection to the internal plumbing system of the properties. It is enough that a fully operational supply would be available for the properties in the event of pollution or disruption of the existing supplies. The reporter's interpretation left out of account the purpose of SCs 1.1, 1.2(b), 1.2(d) and 1.2(e), which was to provide against a contingency which may or may not arise at some point in the future. In contrast to SC 1.2(b), SC 1.1 imposed no timeframe within which a property must be connected.

[41] Properly interpreted SC 1.1 afforded the first appellant an option as to what would be the source of the replacement water supplies ("optionality"). A similar optionality was present in SC 1.2: compliance with SC 1.2(a) was one option; compliance with SC 1.2(b) to SC 1.2(f) was another. The reporter had effectively varied SC 1.1 by interpreting it in such a way that the element of optionality was removed from the first appellant, and instead was exercisable by the proprietors; by ignoring the optionality conferred on the first appellant, the reporter had imposed an additional requirement on the first appellant, which was to provide a replacement water supply from a source selected by the proprietor. That was notwithstanding the reporter's acknowledgement that the third parties should not have a right of veto or be able to stymie the scheme (Decision para 32). On the reporter's interpretation, one uncooperative proprietor could stymie the entire development. Regard

had to be had to common sense and the principle that conditions should be interpreted benevolently.

[42] In reply, the respondents submitted that as a matter of common sense, the reporter was entitled to conclude that a water supply that is not physically connected and/or capable of immediate connection was not "fully operational" or "in place"; such a system could not be used immediately. The reporter's decision was rational and reasonable. She had provided proper, adequate and intelligible reasons. The SC 1.1 proprietors were not exercising a veto. The reporter had heard evidence that they were willing to accept a supply from the public mains. The reporter was entitled to have regard to the importance of having a fully operational alternative water supply in place prior to the start of construction in order to mitigate the risk of interruption or contamination of the existing supply.

[43] The interested party emphasised the requirement to have an alternative supply in place before works commenced. The alternative supply had to be a reasonable equivalent to what was currently enjoyed; not a pipe to the verge of the road. The requirement for a fully operational replacement supply is not diluted by lack of cooperation on the part of the third party proprietors. The steps required in the Enforcement Notice as amended by the reporter went no further than the terms of SC 1.1.

Decision

[44] The parties' joint statement of legal principles agrees the following propositions as encapsulating the proper approach to the interpretation of planning conditions:

1. The interpretation of planning conditions is a matter of law. The Court should ask itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent

as a whole. This is an objective exercise in which the Court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. This may require looking at relevant documents related to the consent (*Trump International Golf Club Scotland Ltd* v *Scottish Ministers* [2015] UKSC 74; 2016 SC (UKSC) 25 at para [34]; cf. *Lambeth LBC* v *Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 WLR 4317 at para [19]).

2. Planning conditions should not be construed too narrowly or strictly, but in a benevolent manner that ensures that they are not unreasonable (*Carter Commercial Developments Limited* v *Secretary of State for the Environment* [2002] EWHC 1200 (Admin) at para [49]). Benevolence "means no more than that, as with any other legal document, incompetent drafting should not prevent the Court from giving the condition a sensible meaning if at all possible" (*Trump International Golf Club Scotland Ltd*, *supra*, at para [55]).

This statement of applicable principles appears to us to be entirely sound. We would draw attention to the paragraph from *Lambeth LBC* which is cited in the joint statement:

> "In summary, whatever the legal character of the document in question, the starting point - and usually the end point - is to find the natural and ordinary meaning of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

Again, that appears to us to be the right approach.

[45] Here, the natural and ordinary meaning of the words used in SC 1.1 leaves little room for ambiguity. The requirement is expressed in mandatory terms: "the following shall be in place". When used to refer to concrete objects "in place" does not mean in the vicinity or nearby or at hand, it means appropriately and precisely positioned in order to carry out

their function and ready to carry out their function. When used to refer to more intangible or complicated things such as systems or networks, of which a water supply is an example, "in place" similarly means so arranged or positioned or prepared as to achieve its purpose. What has to be "in place" are "fully operational replacement water supplies for [the specified SC 1.1 properties]". To be "fully operational" a water supply must be capable of supplying water "for" one of the specified properties. Moreover, a "replacement" water supply must be capable of providing an equivalent to what is being supplied by the existing supply and which it is intended to replace. This requires a connection with the internal pipework of the specified property.

[46] What we see to be the natural and ordinary meaning of the words used in SC 1.1 is consistent with the purpose of the condition: that a sufficient alternative water supply should be immediately available to all the potentially affected properties before anything is done by way of development which might compromise their existing water supplies. While in a sense the first appellant is entitled to say that the requirement for alternative sources of supply is to meet what are no more than the contingencies of pollution or interruption of the existing supply, a sufficient supply of wholesome water which is continuous is of self-evident importance to the amenity of domestic properties and, as appears from para 4 of Mr Cunliffe's decision of 23 February 2017 the requirements imposed by him were predicated on a precautionary approach.

[47] A recurrent theme in the first appellant's submissions in relation to the reporter's interpretation and application of both SC 1.1 and SC 1.2 was the significance of the lack of cooperation from the third party proprietors in implementing measures which were intended for their benefit. On the one hand, the first appellant had done what it could to put in place mitigation measures which conformed to the Supplementary Conditions whereas,

on the other, the third party proprietors had withheld their consent in an apparent attempt to frustrate a development which they had opposed from the outset. While counsel for the first appellant argued that the SCs gave the first appellant an option as to which of the alternative methods of providing water supplies should be implemented, she emphasised that what had occurred was not simply a case of the first appellant unilaterally imposing its preference on the reluctant proprietors. To understand what had happened that way, she explained, would be a misapprehension, as appeared from the summary of events contained in a note provided to the court. The first appellant had provided supplies to the SC 1.1 properties sourced from boreholes and had delivered IBCs for the use of the SC 1.2 properties because these were the only means of meeting the requirements of the Supplemental Conditions within the three years available to commence the development following the grant of planning permission on 24 October 2014. The alternative of connection to the public mains had not been available in the short-term because work was then being done to upgrade the public mains. Cost was not determinative; it was a question of purifying the suspensive condition within the available time by the only means which were then practicable.

[48] We have some sympathy with the position of the appellants. It is clear that in imposing the Supplemental Conditions in place of condition 36, Mr Cunliffe was concerned to secure the quality and the quantity of the water supplies available to the properties which might be affected by the development. It is equally clear that he considered that either of the alternatives identified in SC 1.1 and SC 1.2 would achieve that. He cannot have intended that a provision to mitigate the possible adverse effects of the development on the relevant properties should become a means whereby the proprietors could prevent the development proceeding. The reporter accepted that. It might therefore be thought reasonable that if the

first appellant has done everything in its power to make available to proprietors what Mr Cunliffe considered to be a technically sufficient solution to mitigate the risks, then the suspensive conditions should be held to have been purified. However, despite Mr Cunliffe being aware that the first appellant, on the one hand, and the proprietors, on the other, preferred different solutions, the SCs provide no mechanism for resolving these differences and, more importantly, the SCs are not framed in terms of requiring the first appellant to do something, for example to put an alternative water supply in place. The first appellant is not required to do anything. Rather, what SC 1.1 requires is that fully operational replacement water supplies "shall be in place". In other words, the condition requires a result or a state of affairs, as opposed to an action to achieve a result or state of affairs. That is by no means uncommon with planning conditions and a planning condition may well require a result that it is beyond the developer's powers to achieve, whether that is because it requires the cooperation of a third party which is not forthcoming, or for some other reason (cf *British Railways Board* v *Secretary of State for the Environment* [1994] JPL 32 at 38).

[49] We do not read SC 1.1 as conferring what the first appellant referred to as optionality, in other words the power of unilateral choice as to how fully operational replacement water supplies shall be put in place. However, notwithstanding the way in which the condition is framed and notwithstanding what we see to be the natural and ordinary meaning of the words used, as we have already accepted, the condition cannot have been intended to confer on each of the affected proprietors a power to veto the development. The first appellant pointed out that irrespective of the source of a water supply, whether a bore hole or the public mains, the owner and occupier of a property must give their consent to the making of the connection. This, it argued, indicated that the reporter's interpretation of the condition was erroneous in that if the SC 1.1 proprietors can

frustrate purification of the condition by refusing a connection to a borehole, they can equally frustrate purification of the condition by refusing a connection to the public mains and that (as we accept) cannot have been intended. The first appellant submitted that where water supplies had been brought to the boundary of the third party proprietors' properties and all that prevented final connection was the proprietors' refusal of consent the reporter should have found the requirement for fully operational replacement water supplies to have been met. That would have resolved what would otherwise be the absurdity of conferring on parties who had objected to the development the power to stop it.

[50] This submission on behalf of the first appellant is not without attraction but, in our opinion, it runs counter to the natural and ordinary meaning of the words used, which are to the effect that we have indicated. We do not consider that the reporter erred in her interpretation of the suspensive condition and we do not consider that she erred in deciding that the first appellant was in breach of planning control. While that is all we need say, we would add this. The condition is not said to be unreasonable. It requires a result to be achieved by one of two means, each of which is acceptable. It was imposed in the public interest but with identifiable private interests particularly in view. As must have been evident to Mr Cunliffe when he imposed the condition, achieving the result would require agreement among the various interests involved. That does not appear to be impossible. The first appellant is willing to provide a connection from the public mains, subject to that being practicable, as we would suppose it now to be. The reporter heard evidence that the proprietors were willing to accept connection to the public mains. Were, on the other hand, the proprietors or some of them to refuse consent to connection to the public mains, having also refused connection to a supply from a borehole which satisfied the requirements of SC 1.1, the planning authority might, in its discretion, decide not to take enforcement action

should the development be commenced with not all alternative supplies in place (notwithstanding what would, strictly, be a breach of planning control). The first appellant, moreover, would have the option of making an application under section 42 of the 1997 Act.

(2) SC 1.1: Sufficient Quality of Water

[51] The reporter found that in respect of the SC 1.1 properties there was not shown to be "a replacement water supply… delivering sufficient quality of water for the relevant uses" as required by SC 1.1 (Decision paras 54 and 82). She accepted the evidence that the boreholes were capable of providing a sufficient quality of water but there was no evidence of the quality at point of use, in other words at the tap. In the absence of evidence of quality at point of use the reporter held that she was unable to conclude that the water was of sufficient quality.

Submissions

[52] The first and second appellants submitted that the reporter had erred by misinterpreting SC 1.1 so as to include a requirement to provide results from samples taken from the taps within the properties. There was no basis for importing such a requirement. It was not supported by the wording of the condition as originally imposed; SC 1.1 did not require that water quality testing be carried out at point of supply. The reporter had effectively imposed a more onerous requirement than that required by the condition.

[53] It was the case that in terms of regulation 7(4)(c) of the Private Water Supplies (Scotland) Regulations 2006, the wholesomeness of water is to be tested at the point at which it emerges from the tap or taps that are normally used for human consumption purposes. However, the replacement water supplies to the three properties were not normally used for human consumption, and in terms of regulation 7(4) (d) wholesomeness may be tested at the

point which, in the reasonable opinion of the monitoring local authority, is representative of the quality of the water in question. Further, the reporter had been inconsistent in her application and reasoning in relation to SC 1.1. She had found that there had been no breach in relation to Alton Muirhouse Farm notwithstanding that the testing for that property had been carried out downstream of filtration equipment fitted at the borehole and not at the tap within the property. However and in any event, it was unreasonable for the reporter to require the first appellant to produce water quality test results from a point at the taps within the properties when she knew that such a requirement could not be fulfilled given the proprietors' lack of cooperation. By interpreting the condition in this way, the reporter had allowed third parties to prevent the implementation of a planning consent.

[54] Given the evidence of the lack of cooperation from the proprietors, step 2 in the steps to be taken specified in the Enforcement Notice was excessive where the proprietors had refused to consent to a connection and testing at the tap. It had been open to the reporter to find a solution, short of a complete remedy of the breach, that was acceptable in planning terms. Enforcement procedure was intended to be remedial rather than punitive; where there was an obvious alternative which would overcome the difficulties the reporter should have considered it (*Tapecrown Ltd* v *First Secretary of State* [2007] 2 P&C R 7 at paras 33 and 46).

[55] In reply, the respondents referred to the evidence of the council's expert hydrologist, Dr Ham, that the Craigend borehole was capable of delivering water that was wholesome after treatment but that water testing required to be at point of use because the supply could be contaminated or interfered with between the borehole and point of use or be affected by backflow. The first appellant had acknowledged a need for additional future mineral filtration. There was no actual evidence of water quality downstream of the existing

treatment system and no evidence of water quality within the properties at point of use (albeit by reason of there being no supply because the proprietors had not consented to a connection). The reporter had been entitled to decide as she had and in doing so have regard to the fact that the proprietors had expressed willingness to be connected to the public mains. *Esto* it was to be taken that fully operational water supplies were in place, which was denied, it had not been demonstrated that the replacement supplies were sufficient.

[56] The reporter had not been inconsistent in her approach. She did not require water quality testing at Alton Muirhouse Farm as a supply had been installed which had been providing water into the property prior to the inquiry.

Decision

[57] Once it is decided that the reporter was entitled to find that fully operational water supplies were not in place, the question as to whether their quality was sufficient might be thought to be academic at best. However, the appellants had to address the point and so shall we. We can do so quite shortly. Again, purification of the condition has been frustrated by the proprietors' refusal to consent to the connection of what the first appellants have provided. These are supplies sourced from a borehole and therefore they had to meet the test of "sufficient quality" (quantity was not an issue). The evidence heard by the reporter indicated that the supplies were or could be made sufficient. However she also heard that that water had not and could not be tested at point of use, in other words coming out of the tap within the properties (because the supplies had not been connected). The reporter did not rely on the 2006 Regulations. Rather, she found as a matter of primary fact that she had had no evidence of water quality at point of use and as a matter of planning

judgement, and as we would see it good sense, that the appropriate place to test for the quality is at the point where the water is delivered, in other words at the tap. The first appellant argued that it was unreasonable for the reporter to require test results from a point at the taps when she knew that such a requirement could not be fulfilled given the proprietors' lack of cooperation. We do not see that reasonableness comes into the matter. The condition imposed an objective requirement. The reporter found that it had not been met. We do not consider that in doing so she erred.

[58] It follows that in finding that the requirement in the Enforcement Notice that the first appellant stop all works until step 2 has been carried out and evidenced did not exceed what was necessary, the reporter did not err when she came to consider the first appellant's appeal under section 130(1)(f) of the 1997 Act. What the reporter required to be done was no more than the relevant condition required. That being so, it cannot be said that the steps which the Enforcement Notice, as amended by the reporter, required to be taken exceeded what was necessary to remedy the breach of planning control.

[59] Counsel for the first appellant relied on what had been said by Carnwath LJ as he then was in *Tapecrown Ltd* v *First Secretary of State* at para 33 for the proposition that when determining the appeal to her under section 130(1)(f) the reporter had "wide powers" to amend the Enforcement Notice so as to modify what the conditions might strictly require with a view to providing a more balanced or proportionate solution. We disagree. The reporter's powers do not extend beyond what is permitted by section 130(1)(f). What was said by Carnwath LJ was said in the context of the then current (English) legislation. At that time (as remains the case in England) section 174(2)(a) of the Town and Country Planning Act 1990 provided that an appeal could be brought against an enforcement notice on the ground that, in respect of any breach of planning control which may be constituted by the

matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged. That provision undoubtedly confers extensive power on an inspector in England, on allowing an appeal, to grant planning permission or discharge a condition. Before 2006 there was a provision in exactly the same terms in the Scottish Act of 1997: section 130(1)(a), but that paragraph was repealed with effect from 3 August 2009 by the Planning etc. (Scotland) Act 2006, section 59(2). Since then a reporter in Scotland no longer has the sort of jurisdiction that Carnwath LJ was discussing in *Tapecrown* and accordingly what he said has no application to the present case.

(3) SC 1.2 (b): Holding Tanks/IBCs

[60] In respect of the properties to which SC 1.2 applied, as with the properties to which SC 1.1 applied, the relevant condition imposed alternative requirements: either (a) a facility for connection to the public water supply which is either already operational or is capable of being made so within 24 hours; or (b) a holding tank at the property capable of holding at least 24 hours' supply of water which can be immediately connected into existing pipework to provide a pressurised supply for all domestic and/or commercial needs. In the event of the holding tank option being adopted, other requirements had to be met, as specified in paragraphs (c) to (f).

[61] The first appellant did not adopt alternative (a). That being the case, as the reporter put it, the first appellant required to demonstrate that it had met the requirements of paragraphs (b) together with (c) to (f).

[62] The reporter found that water holding tanks or IBCs with adequate storage capacity had either been delivered to the SC 1.2 properties or had been stored in a container close to the Craigend borehole. Where the IBCs had been delivered to the properties no work had

been carried out to enable them to be connected. The reporter accepted that in respect of the properties where the IBCs had not been delivered this was due to the proprietors not having given the necessary consent. Nevertheless, she concluded, in respect of all the SC 1.2 properties, that there was not "a holding tank at the property … which can be immediately connected into existing pipework to provide a pressurised supply…" and therefore in this respect the suspensive condition had not been purified and therefore commencement of development had breached planning control (Decision para 95).

Submissions

[63] The first appellant submitted that the reporter had erred in law by misinterpreting SC 1.2(b) so as to include the requirement that the holding tanks or IBCs should be capable of being immediately connected into the existing pipework. The evidence of Mr Roland Hunt for the first appellant and of Mr Tom Dickie for the council had been that what the first appellant had done would satisfy the condition.

[64] The reporter had ignored or left out of account the detailed submissions from the first appellant on the issue in so far as it related to capability of being made operational within 24 hours and further, had not provided any reasoning to explain the basis upon which she apparently rejected those submissions. Her interpretation permitted no delay in connection to the existing pipework but, properly interpreted, no such requirement was imposed by SC 1.2(b). SC 1.2(b) had to be read in the context of SC 1.2 as a whole. SC 1.2(c) allowed 6 hours for the delivery of a water supply of suitable quality and SC 1.2(a) allowed 24 hours for connection to the public mains. The reporter had construed the condition too narrowly and had imported into SC 1.2(b) a requirement which was inconsistent with the condition when read as whole.

[65] The reporter's interpretation was unreasonable given the refusal of the proprietors to cooperate. That was material to whether or not the narrow interpretation of the SC was consistent with the purpose of the SC or whether it amounted to a new requirement, since it would allow third parties to prevent implementation of the planning permission. The reporter ought to have placed weight on, and taken account of, the evidence of Mr Dickie but instead found it to be irrelevant, favouring her own interpretation. Further, she had failed to give adequate reasons for doing so, to the substantial prejudice of first appellant.

[66] Moreover, the reporter had been required to consider whether the steps specified in the Enforcement Notice were excessive to remedy the breach. The evidence of non-cooperation by the proprietors and the evidence of Messrs Hunt and Dickie was material to that question. The reporter had failed to take that evidence into account.

[67] The reporter's approach was inconsistent. In relation to whether there had been a breach of SC 1.1, she had differentiated between the properties affected and the extent of cooperation from the relevant proprietors, but in relation to SC 1.2 she had failed to do so.

[68] The reporter had reached a conclusion which was not open to her and failed to set out a relevant basis for doing. There was evidence that the IBCs could be connected within 6 hours and no contradictory evidence was presented. Notwithstanding that, the reporter stated she was not convinced they could all be connected within that period.

[69] In response the respondents submitted, in a line of argument which was followed by the interested party, that the reporter was entitled to conclude that, properly interpreted, connection within 6 hours did not meet the immediacy requirement. The reporter was entitled to have regard to the terms of the decision of Mr Cunliffe and interpret the requirement as she did (Decision at para 90). In his decision Mr Cunliffe had also regarded

the first appellant's proposal of establishing a connection within 6 hours as being unsatisfactory. At para 24 of his decision he stated that:

> "The [first] appellant's proposal is to appoint (a) contractor... (to) establish a connection within 6 hours... I do not consider that satisfactory. The infrastructure should be in place at the outset, so that the contractor, once mobilised, only has to deliver the water...".

[70] The evidence provided by the council's enforcement officer, Mr Dickie, relied on by the first appellant was given in the context of the discretion afforded to the council whether or not to take enforcement action. The reporter was entitled to reach her own conclusion in relation to the interpretation of SC 1.2(b). She had provided proper, adequate and intelligible reasons for her decision. *Esto* connection within 6 hours satisfied the "immediacy" requirement in SC 1.2(b) (which was denied), the reporter was entitled to exercise her professional judgement and address whether the IBCs could be connected within 6 hours. In doing so, taking account of the evidence and her own site observations, she was entitled to conclude that not all of the IBCs could be connected within 6 hours (Decision at para 91).

[71] The interested party emphasised that on no reasonable view could the reporter be said to have erred because she had not applied the time-scales of 24 hours in SC 1.2(a) or 6 hours in SC 1.2(c) in coming to her interpretation of "immediately" in SC 1.2(b). These were different provisions. The first appellant's complaint about the proprietors' refusal to cooperate ignored the alternative option of supply from the public mains.

Decision

[72] The reporter was the fact-finder here. She had to have regard to the evidence, as informed by her site inspection, but she was not obliged to accept every statement of

opinion or aspiration simply because it was not contradicted by something said by another witness. As we have already observed, the meaning of the Supplementary Conditions is a question of law which was for the reporter, at first instance, to determine as such. The reporter was prepared to listen to the views of witnesses as to what was the proper interpretation of SC 1.2 but she was bound to reject these views if they differed from her interpretation based on the natural and ordinary meaning of the words used, read in context and in the light of common sense.

[73] Again, SC 1.2 requires a result or state of affairs, not simply the first appellant's best effort to achieve that result or state of affairs. As we have already observed, these are not conditions which require the first appellant to do anything. That it has tried its best but failed by reason of the actions of others is nothing to the point. That the parties for whose benefit the mitigation is conceived have failed to cooperate in its implementation cannot alter the meaning of the Supplementary Condition which is intended to provide for that mitigation. SC 1.2 does not confer "optionality" on the first appellant any more than SC 1.1 does.

[74] In our opinion the reporter did not err in her interpretation of the suspensive condition. A holding tank had to be "at the property" and it had to be capable of being "immediately connected". The reporter recognised that "immediately" takes its precise meaning from context. Part of that context is the more or less continuous need for a water supply, but the reporter accepted that time would be required for a water contractor to be mobilised, but "once mobilised" the state of affairs should be such that the contractor "has only to deliver the water to fill the tank and enable immediate connection to be made" (Decision para 90). We agree with the reporter. Accordingly, given her findings of primary fact, we do not consider that she erred in deciding that the first appellant was in breach of

planning control by reason of the commencement of development before purification of SC 1.2(b).

(4) SC 1.1 and SC 1.2(b): Unfairness

Submissions

[75] It was submitted on behalf of the first appellant that the approach of the reporter to the question of whether there was an ongoing breach of SCs 1.1 and 1.2(b) had been unfair. At the inquiry, she had asked third party proprietors whether they would accept a connection from the public mains, to which they responded that they would. The reporter had not disclosed her reasons for posing that question. The first appellant had understood that she had done so in order to determine whether the proprietors were in effect exercising a right of veto. It was now clear that the reporter's purpose had been to support her own interpretation of SCs 1.1 and 1.2, which removed the element of optionality.

[76] The reporter ought to have disclosed why she was asking the question so as to afford the first appellant the opportunity to lead evidence and to make submissions on the reporter's approach towards what the first appellant submitted was the optionality afforded to the first appellants under the SCs. That she afforded them no such opportunity had resulted in unfairness and serious prejudice to the first appellant.

[77] On behalf of the respondents, it was submitted that reporter was entitled to address the issue of whether third party proprietors would be agreeable to a public mains connection. The first appellant had argued that lack of consent was justification for non-compliance with SC 1.1 and SC 1.2(b). The issue of consent required to be determined and was relevant to whether the conditions could be fulfilled. The reporter's questions were properly asked to ascertain factual matters relevant to the issue of consent.

[78] There is no obligation incumbent upon a reporter to explain why he or she is asking a particular question or to indicate at the time of asking the issues to which she may think it has relevance, nor to indicate at the time what consideration she is giving to it. In any event a reporter is entitled to rely on evidence given to reach conclusions after further consideration following the conclusion of an inquiry hearing. It is a matter for the reporter whether she thinks she requires more information before exercising her judgment. The first appellant was given a reasonable opportunity to lead evidence and to make the submissions it chose to relative to the conditions, its compliance with the requirements and the Enforcement Notice. There was no obligation on the reporter to disclose her thinking or her reasons for asking a question. The issue of consent to a public mains supply was not a new matter. The procedure was fair and no prejudice has been occasioned to the first appellant.

[79] Counsel for the interested party drew attention to the fact that no objection had been taken to the reporter asking the question and that the third parties' preference for a public supply had been clear from the terms of their precognitions and statements of case to the inquiry. That preference had been previously noted by Mr Cunliffe.

Decision

[80] We do not see there to have been anything unfair in the reporter asking the question that she did or in her having regard to the answer. The relevancy of the willingness of the proprietors to accept connection from the public main may have been open to debate, but the matter was in issue and cannot have come as a surprise to the first appellant which was in a position to respond by cross-examination or, if necessary, by the leading of further evidence if it saw itself to be in some way prejudiced by an unpredictable turn of events. There is no obligation for a reporter to explain the purpose of every question that she asks.

In proceedings such as an appeal conducted by a reporter, parties, at least if professionally represented, are taken to be able to anticipate the potential significance of lines of evidence and lines of argument. We can see no reason for the first appellant being in some way misled or induced not to make the fullest of submissions which it considered to be necessary.

[81] We fail to discern any prejudice as arising from the asking of the question. Had it not been asked, and no one else had asked it, the reporter would have been in the position of having heard no evidence to suggest that the proprietors would refuse connection to the public main and therefore she would not have been entitled to conclude that they would refuse. The reporter would therefore have had to proceed on the basis that that option was open, which is what she did in any event.

[82] We do not accept that there was any unfairness in the reporter's question and we accordingly do not accept that there is any basis for quashing the reporter's decision on this ground.

(5) SC 1.2(d): Access Arrangements

[83] SC 1.2(d) required that there be access arrangements for each property to ensure that emergency water deliveries could be made to the IBCs without causing damage. SC 1.5 required this to be documented. Because there were cases where IBCs had not been delivered and/or not installed, while there were plans in existence showing the proposed locations of the IBCs, there was, in the reporter's view, no certainty that they would necessarily be located in these positions. The reporter considered that the access arrangements were therefore no more than proposals; they could not be finalised until the IBCs were in position. The reporter again recognised the difficulties faced by the first

appellant where the proprietors had not consented to the installation of IBCs but, in the absence of better information, concluded that this element within the Supplementary Conditions had not been purified and therefore there had been a breach of planning control (Decision para 104).

Submissions

[84] The first appellant submitted that the reporter had erred in law by misinterpreting SC 1.2(d), by failing to have proper regard to material evidence *et separatim* by applying the incorrect standard of proof by requiring "certainty". The Enforcement Notice had not alleged a breach of SC 1.2(d). In any event, as certain proprietors had refused to cooperate, access arrangements for their properties could only ever be provisional. Nevertheless, the first appellants had established feasible locations for the IBCs, assessed whether access could be taken without causing damage, used swept path analysis (computerised vehicle movement simulation) and submitted detailed reports which had been provided to the reporter. In the circumstances, where cooperation had been refused by the third party proprietors, there could be no breach of planning control. To find otherwise would be to allow the third parties to prevent implementation of the planning permission. In any event it was highly unlikely that the proprietors would have chosen locations other than those shown in the plans.

[85] Further, the reporter had left material evidence out of account. She had ignored inquiry document AMG56b, the minutes of the meeting between the third-party opposition group and Business Stream (the arm of Scottish Water which would be responsible for the delivery of water to the IBCs), which demonstrated that Business Stream was content with

the sufficiency of the information supplied. She had also ignored the closing submissions of the first appellant reminding her that the council had not alleged a breach of SC 1.2(d).

[86] The respondents submitted that the reporter was entitled to construe SC 1.2(d) in the manner that she did and was entitled to find that the requirements of the condition had not been met. That the access arrangements were not in accordance with SC 1.2(d) was alleged as a breach in part 3 of the Enforcement Notice. Given the terms of SC 1.5 the reporter was required to consider the issue of the adequacy of the documentary evidence provided in relation to access arrangements. The reporter had taken into account the Business Stream agreement. The access arrangements and assessments in that agreement related to theoretical locations of the IBCs. Section 3.3 of the agreement required the first appellant to provide Business Stream with locations of all IBCs and to ensure that there was suitable access for tankers to these locations. The reporter was entitled to conclude that the documents were not sufficient to "ensure" that deliveries could be made without causing damage on the basis that the location of the IBCs was unknown. The reporter interpreted and applied the requirement to "ensure" in SC 1.2(d) correctly and reasonably. It is a high test. In the circumstances the reporter was entitled to conclude that the test was not met when there was uncertainty as to the location of the IBCs. She was entitled to specify the step that would be required to rectify the failing. The access arrangements as presented at the inquiry were provisional and theoretical. The reporter was entitled to conclude that there was a breach of planning control. The weight to be attached to document AMG 56b and the submissions made to her was a matter for the reporter. The reporter required to consider the main determining issues. She did not require to make reference to every document or submission that was produced to or considered by her.

[87] The interested party acknowledged that the Enforcement Notice had not specifically required further documentation in relation to access arrangements as a step to be taken. However, that did not prevent the reporter from taking a different view from the council as to what SC 1.2(d) and SC 1.5 required and, in exercise of her powers under section 132 of the 1997 Act, varying the Enforcement Notice accordingly. There was evidence before the reporter which justified her reaching the view that the access arrangements which had been made were no more than initial proposals. First, the locations of the IBCs had yet to be determined by the third party proprietors whose entitlement it was to do so. Second, the first appellant had lodged a service agreement dated 17 August 2017 which required the first appellant to provide Scottish Water with the locations of the IBCs in order for Scottish Water to assess whether there was suitable access for its tankers. The locations had yet to be provided. The assessment had yet to be made. Accordingly, as at the lodging of the appeal to the reporter, the documentation of access arrangements had yet to be confirmed and consequently the reporter was entitled to conclude that it had not been demonstrated that deliveries could be made without causing damage. The reporter had applied her professional judgement and concluded that "in principle" arrangements did not meet the SC. The reporter had properly identified that it could not be known that damage would not be caused without knowing the location of the IBCs.

Decision

[88] While it is true that the Enforcement Notice did not specify the evidencing of access arrangements as required by SC 1.2(d) as a step to be taken to remedy the breach of planning control, it is included with the other elements within SC 1.1 and SC 1.2 as a reason why a breach has been alleged. It was a matter for the reporter to consider. She noted that

in terms of the SCs access arrangements for each property were required to ensure that emergency water supplies could be delivered. While there were plans, these proceeded on assumptions as to where the IBCs would be located and the access routes to them. There were IBCs yet to be located. Arrangements could therefore be no more than proposals. Finalised arrangements had not been made. The Supplementary Condition had not been met.

[89] We see no error in the reporter's reasoning. Indeed, her conclusion appears to us to be self-evident. This heading does not provide a good ground of appeal.

(6) SC 1.2(d): Access Arrangements: Additional Step for Compliance

Submissions

[90] The first appellant submitted that the reporter had erred in law by imposing an additional step in the Enforcement Notice as amended relating to SC 1.2(d). In any event her approach to the question of the additional step was unfair.

[91] It was accepted that in terms of section 132(2) of the 1997 Act, a reporter may vary the terms of an Enforcement Notice to impose an additional step for compliance if he or she is satisfied that the correction or variation will not cause injustice to the first appellant or the planning authority. However, in the present case the reporter had varied part 5 of the Enforcement Notice to include an additional step for compliance, namely that the first appellant's supply and evidence "access arrangements for each property to ensure that emergency water deliveries can be made without causing damage" in relation to the SC 1.2 properties. For the reasons advanced under the previous heading, this variation caused injustice to the first appellants. The reporter had failed to have regard to the material evidence. Further she had failed to address the test for the imposition of the additional step

and in so doing she had erred in law. This failure disclosed inconsistencies in the approach of the reporter throughout her decision. She had considered the question of injustice to the parties before varying the Enforcement Notice to delete the requirement to comply with condition 36, but she had made no reference to that test before imposing the additional step relating to access arrangements.

[92] There had been no issue between the first appellant and the council over the sufficiency of access arrangements. The reporter had not disclosed her concerns regarding this issue to the first appellant as she ought to have done. The first appellant ought to have been given an opportunity to address any such concerns. The reporter's failure to afford them such an opportunity resulted in unfairness and had caused serious prejudice to the first appellant.

[93] In response, the respondents submitted that the reporter was entitled to impose the requirement that she did. She was aware of the test and considered the issue of injustice before varying the Enforcement Notice and deleting the requirement for compliance with condition 36, as she made clear (paragraphs 23 and 124). She did not require to repeat the legal test elsewhere in the Decision. The first appellant does not specify the injustice caused to it. Properly understood, the variation to the Enforcement Notice made by the reporter did not constitute an "additional step". The "additional step" was no more than a verbatim repetition of what is required under SC 1.2(d). The first appellant has to do no more than what is required under SC 1.2(d). This is not a "new matter". There is no prejudice or injustice to the Appellant involved in repeating the requirement of SC 1.2(d).

[94] The interested party acknowledged that the Enforcement Notice had not required further documentation in relation to access arrangements. However, that did not prevent the reporter from taking a different view as to what SC 1.2(d) and SC 1.5 required and, in

exercise of her powers under section 132 of the 1997 Act, varying the Enforcement Notice accordingly. No injustice could be said to arise from the first appellant being required to do no more than what was required by the Supplementary Conditions.

Decision

[95] While the reporter can be regarded as having imposed an additional step over and above what was required by the Enforcement Notice to remedy the breach of control, as the respondents submitted the additional step was no more than a verbatim repetition of what is required by SC 1.2(d). The reporter was entitled to reaffirm the requirement in the amended Enforcement Notice. There was no unfairness in her doing so.

(7) SC 1.2(e): Scheme for Alternative Long-Term Water Supply: Additional Step for Compliance

[96] The question raised by this heading of the first appellant's grounds of appeal was whether the reporter had erred in law by failing to quash the Enforcement Notice as a nullity due to it having failed to comply with the terms of section 128 of the 1997 Act.

Submissions

[97] The first appellant submitted that part 5 of the Enforcement Notice ought to have mirrored the terms of part 3 insofar as the steps which require to be taken ought to correspond to the matters which appear to the authority to constitute the breach of planning control. It is not open to an authority to specify steps to be taken which are not related to the alleged breaches of planning control.

[98] Part 3 of the Enforcement Notice alleged a breach of the requirement of SC 1.2(e) and part 5 required the appellant to supply and evidence a scheme in the terms described in

SC 1.2(e), but went further by including additional wording which related to an alleged breach to supply evidence. No such breach had been alleged in part 3 of the Enforcement Notice.

[99] Further, the steps to be taken as a result of the additional wording did not reflect the wording of SC 1.2(e). It contained requirements that were not requirements of SC 1.2(e). The council had in effect used part 5 of the Enforcement Notice to specify a breach of planning control that ought to have been specified in Part 3. This effectively amounted to the imposition of an additional requirement.

[100] The Enforcement Notice was accordingly a nullity and ought to have been quashed by the reporter.

[101] The respondents and the interested party denied that the Enforcement Notice had been a nullity. While the steps which a planning authority require to be taken must relate to the alleged breach of planning control, they do not require to "mirror" what are alleged as breaches. Section 128(1)(a) of the 1997 Act requires an enforcement notice to state "the matters which appear to the planning authority to constitute the breach of planning control… ". Section 128(3) requires an enforcement notice to "…specify the steps which the authority require to be taken". These are requirements which serve different purposes. The authority is entitled to specify the steps that are required to remedy the breach as it considers appropriate.

[102] The steps relate to an alleged breach to supply evidence, in the context where there is a requirement to provide documentary evidence in accordance with SC 1.5. Although SC 1.2(e) does not specify the exact documentary evidence to be provided in accordance with SC 1.5, SC 1.2(e) requires descriptions in detail of "how" and "can" the long-term supply be provided. One possible solution was a connection to the public mains. The first

appellant proposed a connection to the public mains supply. There was a lack of detail and a lack of certainty that such a connection could be provided at short notice, as is required under SC 1.2(e). If the first appellant proposed a long-term alternative supply by connecting to the public mains it would require permission and confirmation from Scottish Water. That is a further specification of a step required under SC 1.2(e). It is not an additional requirement. The council was entitled to seek the detail of any such agreement to demonstrate whether the scheme could be implemented at short notice in accordance with SC 1.2(e). The reporter correctly held that the steps in the notice were adequately specified.

Decision

[103] It is true that part 3 of the Enforcement Notice ("the breach of planning control alleged") alleges breach by commencing works without first meeting the requirements of SC 1.1 and SC 1.2 but does not include reference to the requirement for documentary evidence imposed by SC 1.5, whereas in part 5 ("what you are required to do") step 3 requires that the various matters required by SC 1.1 to SC 1.4, including a scheme for alternative long-term water supply, should be "supplied and evidenced". That does not, however, invalidate the Enforcement Notice. Section 128(1)(a) of the 1997 Act provides that an enforcement notice shall state the matters which appear to the planning authority to constitute the breach of planning control. A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are. Further and separately, section 128(3) and (4) provide that an enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, the relevant purposes. Those purposes are remedying the breach or remedying any injury to amenity which has been caused by the

breach. There is no necessity that the specification of steps to be taken, as provided for by section 128(3) and (4), should "mirror" or repeat point by point, the statement of matters which appear to the planning authority to constitute a breach, as provided for by section 128(1)(a). It may. It may not.

(8) SC 1.2(e): Scheme for Alternative Long-Term Water Supply

[104] SC 1.2(e) provided that there should be a scheme for each of the relevant properties, prepared in consultation with the owners/occupiers, describing in detail how an alternative long-term water supply could be provided in the event of prolonged contamination or disruption of the private water supply. Such a scheme should include all necessary permissions, licences, agreements and wayleaves to enable the scheme to be implemented at short notice if required.

[105] The reporter considered this requirement and whether it had been implemented at paras 105 to 116 of the Decision. She noted that a document had been prepared for each property detailing a proposed scheme for connection to the public mains from a branch off the mains running along the A719. Later an alternative scheme had been proposed connected to the Craigends borehole. However, for the reasons which she gave, the reporter considered that these proposals were uncertain and no more than "in principle". What was available fell short of the condition which was, in the reporter's view, very explicit.

Submissions

[106] The first appellant submitted that the reporter had erred in law by requiring more than an in principle scheme given that unless and until prolonged contamination and/or disruption occurred, the first appellant could not know when the scheme would need to be implemented and for how many properties. The reporter had: (i) misinterpreted SC 1.2(e) to

such a degree that no reasonable reporter could have reached the same interpretation; and (ii) failed to have regard to the material evidence when determining whether the first appellant had complied with SC 1.2(e).

[107] It was sufficient for compliance with SC 1.2(e) that an in principle scheme be provided. The various requirements which the reporter considered were imposed by SC 1.2(e) were impossible (and unnecessary) requirements at the stage of complying with the SCs. The reporter had conflated the requirements of SC 1.2(e) with those of SC 1.2(a) and (b), which required a scheme capable of immediate implementation. She had construed SC 1.2(e) too narrowly. Such an interpretation would allow for the third party proprietors to prevent implementation of the planning permission because it would require the first appellant to secure wayleaves over land.

[108] In addition, the reporter had failed to take account of the un-contradicted evidence that Scottish Water had all the necessary powers to implement either proposal to the extent of bringing a supply to the boundary of the third party proprietors' properties. She had failed to set out a relevant basis for rejecting that evidence and accordingly had reached a conclusion which was not open to her.

[109] The reporter had also to consider, under reference to section 130(1)(f), whether the steps specified in the notice were excessive and in so doing she ought to have had regard to the evidence of the proprietors' non-cooperation and the evidence of the powers of Scottish Water, but she had failed to do so.

[110] On behalf of the respondents, it was submitted that while it was accepted that the scheme would only need to be implemented in the event of prolonged contamination or disruption of the private water supply, the requirements of SC 1.2(e) would be next to pointless if they did not require some level of investigation of the feasibility of any

alternative long-term supply. The reporter had found that there was no evidence of any contract being in place with a suitable contractor, nor any evidence that necessary wayleaves and agreements were in place. SC 1.2(e) required details and not the submission of an in principle arrangement. It required the scheme to be capable of being implemented "at short notice if required". The reporter was accordingly entitled to require documentation to demonstrate that the terms of SC 1.2 had been complied with. The reporter identified her reasons for finding that the documents submitted did not meet the requirements of SC 1.5. SC 1.2(e) required *inter alia* "details" of any wayleaves. It required the proposed scheme to be prepared in consultation with the third party landowners. The reporter was entitled to conclude that the detail required by SC 1.2 (e) had not been provided in the documentary submissions made under SC 1.5. The reporter was entitled to insist on there being documents demonstrating the detail of how an alternative long-term scheme would be delivered. The reporter had not erred in deciding as she had.

Decision

[111] We do not consider the reporter to have erred in her interpretation of SC 1.2(e), nor in the application of that interpretation to the facts as she found them to be.

[112] We understand and accept, as the reporter understood and accepted, that the purpose of SC 1.2(e) is to provide for a contingent event: the prolonged contamination or disruption of the water supply to one or more of the SC 1.2 properties. What is required by the condition is only a scheme, as opposed to something more tangible. However, to comply with the condition, the scheme must be "in consultation with the owners/occupiers"; it must describe "in detail" how an alternative long-term supply can be provided; and it must include "all necessary permissions, licences, agreements and wayleaves to enable the

scheme to be implemented at short notice". The reporter was entitled to consider that this required something more than a scheme in principle. She found that what had been put forward did not meet SC 1.2. She noted that, in the event of the alternative supply being provided from the mains, the points of connection to the properties would only be identified closer to the time of installation. There was no evidence of there having been consultation on the specific mains supply proposal or that the scheme would be acceptable to Scottish Water. There was no evidence of a contract being put in place with a suitable contractor. No land rights or wayleaves had been provided nor any agreement with the roads authority. A further proposal had been made, for the water supply to be sourced from the Craigend borehole rather than connection to the public mains. Again, details of the connection point were to be provided nearer the time of connection and again there was little evidence of there having been consultation. The reporter doubted whether connection to the Craigend borehole would be acceptable to the third party proprietors. There was, in any event, no evidence that its yield would be sufficient if more properties were connected to it. As with the proposal to connect to the public mains, there was no evidence of any contract being in place with a contractor for the work in connection with a borehole connection. That there were two proposals which had been put forward meant that there was even less certainty as to what the scheme would be.

[113] We have noted the first appellant's submission that the reporter had ignored un-contradicted evidence that Scottish Water had all the necessary powers to bring supplies to the boundaries of the third party properties. Assuming that Scottish Water does have all necessary powers, there remained matters which the reporter found had not been finalised and which she was entitled to conclude required to be finalised before a SC 1.2(e) compliant scheme could be considered to be in place. There was no material error.

Conclusion

[114] We have considered each of the material attacks made by the appellants on the Decision. We have found none of them to be well-founded. We shall refuse the appeals.