SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 36
A39/17

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

WILLIAM MacBEAN

Pursuer and Reclaimer

against

SCOTTISH WATER

Defender and Respondent

Pursuer and Reclaimer: Smith QC, Young; T C Young, LLP
Defender and Respondent: McBrearty QC, Pugh; BLM

7 July 2021

Introduction

[1] A waste water treatment plant ("WWTP"), operated by the respondent, sits down an embankment from the reclaimer's property, discharging into the River Spey. Since 2015 the reclaimer made complaints to the respondent about noxious fumes in his garden, which sometimes reached his house. The reclaimer raised an action for declarator of nuisance, together with interdict and damages.

[2] The Lord Ordinary heard proof over several separate occasions, commencing in November 2018. At the close of the second hearing, in January 2019, at the parties' joint invitation, the Lord Ordinary pronounced declarator that the plant caused a nuisance to the reclaimer. He did not grant interdict, it being agreed that the respondent should have a further opportunity to remedy matters.

[3] During 2019 the respondent carried out remedial works, instructed the carrying out of smell assessments, and set up a dedicated complaints helpline. It believed that it had cured the odour problem. The reclaimer disagreed, asserting that the nuisance continued. As a result, the proof recommenced in March 2020, to ascertain whether the problem had been resolved, the reclaimer seeking further declarator of continuing nuisance.

[4] The Lord Ordinary declined to pronounce such further declarator, having determined that, following the remedial works, the plant did not create a continuing nuisance to the reclaimer. The reclaimer challenges the Lord Ordinary's findings in fact, in summary on the basis that he did not take advantage of seeing and hearing the witnesses before him; and that he went plainly wrong in that he did not provide an adequately reasoned judgment. In addition, the reclaimer challenges (i) the form of disposal, the grounds of appeal asserting that the decree should have been one of dismissal rather than absolvitor; and (ii) the decision in relation to expenses.

Background

[5] The reclaimer purchased Tomboyach House in 1988, as his residence and the centre of his various business operations. The WWTP sits down an embankment 17m from the house and discharges into the River Spey. Sewage works for Boat of Garten, which did not

cause the reclaimer any problems, had originally been located a further 50m away from the house.

[6] In 2010 the respondent applied for planning permission to construct a new WWTP. The application contained a misrepresentation, namely that the new works "will not create any odours and will therefore not impact on any sensitive receptors", a statement which the respondent conceded should never have been made, since all sewage works give rise to some odours. In granting permission the planning authority imposed as a condition the requirement of an odour management plan. The plan has been revised several times since. The original plan is said to contain two errors: (i) that Tomboyach was 70m, rather 17m, away from the WWTP; and (ii) that there were "no significant odour-generating locations at the site".

[7] The WWTP began operating in 2015. Two main treatment processes take place within four septic tanks. The first results in (i) the release of gases and (ii) the settling of solids at the bottom of the tanks. The second takes place in submerged aerated filter units ("the SAF"), which also produces gases and sediment. The latter is pumped back to the septic tanks. Desludging of the tanks, lasting between 1 and 4 hours, takes place on rotation, with one tank cleaned every 4-6 weeks.

[8] When the WWTP began operating, local residents noticed odours. The reclaimer alleged it produced noxious fumes. He and a number of residents complained to the respondent. From 15 June 2015 onwards, he kept a diary of smell incidents; and relayed most of his complaints to the respondent. One of the reclaimer's neighbours, Miss Elizabeth Mathews instructed an engineering expert, Professor Robert Jackson, to investigate the problem. In autumn 2015, he produced a report noting "strong, intense and offensive

sewerage odours on the steeply inclined earth embankment" between the WWTP and Tomboyach.

[9] In 2015 the respondent asked Mott Macdonald Ltd (referred to as "M²" in the Lord Ordinary's opinion) to investigate. They reported that the plant was generating higher odour emissions than expected for a treatment works of its size. The respondent sought to reduce the level of noxious odours. Desludging was identified as a prime candidate for the source of odours. From 2016 onwards Taytech Ltd were instructed to inject chemicals into the sludge to mask the smell. Following the declarator in January 2019, the respondent carried out various remedial works. In February 2019 Taytech fitted carbon filters to treat any odours escaping through the air vents on the SAF. Ross-shire Engineering Ltd also replaced the single cover on the SAF with seals to contain any foul odours within the system. In March and April 2019 respectively, carbon filters were installed on the septic tank covers, and on the covers of other chambers. Ultimately carbon filter trays beneath 17 manhole covers at the site were fitted. In January 2020 a hole in the chamber cover for the chemical dosing hose was blocked up, and the inlet covers were sealed. A fixed pump was installed in November 2019 to connect the septic tanks to the lorry tankers during desludging, which is a closed unit that restricts the emissions of smells. Previously, pumps on the tanker lorries sucked in the effluent, resulting in odours being expelled into the air.

[10] Three engineering experts Professor Jackson, Mr Peirson, and Dr McIntyre had given advice on reducing odours, and had agreed that, apart from desludging, the SAF was the main source of odours. The experts believed at the time that the plant was capable of being operated provided the solutions recommended by them were put in place (joint bundle 4161). In accordance with the experts' preferred solution, the respondent commissioned ERG (Air Pollution Control) Ltd to design and install an Odour Control Unit which sucks

gases from the SAF and blows them through a carbon filter. The OCU, which required planning permission, began operating on 19 September 2019. Laboratory tests carried out in October 2019 on used carbon media showed that they had done "a good job" in removing odours. The Lord Ordinary records that ERG's monthly tests show that the OCU has been "very effective" in eliminating odours from the SAF, as confirmed by the joint minute.

[11] During the "remediation" period the respondent also instructed M² and Silsoe Odours Ltd ("SOL") to conduct smell assessments in and around the WWTP. The respondent asked M² to set up a dedicated complaints helpline, and to respond quickly to complaints. In each case, an assessor would typically try to speak to the complainant before attempting to detect any odours for himself. The Lord Ordinary notes in his opinion that the reclaimer had been the main source of complaints.

[12] In relation to the assessment of odours, M² set up a team of graduate engineers (all male) to carry out this task each weekday and to respond quickly to any complaints. SOL arranged for two employees (both female) to make monthly visits to the site from July 2019 onwards. Both M² and SOL used Jerome meters (hand-held devices that measure the concentration of H^2S in the atmosphere.) H^2S is likely to be generated by the anaerobic process in the septic tanks, although waste water treatment plants may emit other odours which these meters do not measure.

[13] Assessors are tested and effectively "accredited". SOL has conducted smell sensitivity tests on both the M² and SOL assessors at its laboratory in the south of England in accordance with European Standard BS EN13725:2003. It has tested most of them more than once. Smell assessors are selected to be within the normal range of human smell sensitivity.

[14] Both firms employed a similar methodology for the testing. Having checked the weather and wind conditions, the assessors follow a set route around the site, carrying out a

sniff test and taking a Jerome meter reading at fixed points, recording findings as to the nature, intensity, duration, extent and potential source of any smells, using an industry-recognised scale of 1-5 to measure each of odour intensity and extent. M² assessors carried out their task on weekdays between 09:00 and 21:00, taking readings every 2 hours at 10 fixed points, 5 within the site boundary and 5 outside. SOL visited the site once a month from July 2019, except in November 2019. Most visits lasted 2 days. None has taken place on a desludging day. It took measurements at 18 fixed points, located (i) at the site, (ii) on the Spey Bridge, (iii) across the river, and (iv) at 4 points in the reclaimer's garden.

[15] Fortified by the findings of the smell assessors, the respondent believed that it had cured the odour problem; the reclaimer disagreed. It was on that basis that a further proof diet took place. Senior Counsel for the reclaimer invited the court to pronounce a further declarator of continuing nuisance, rather than interdict, subject to the respondent undertaking to remove the nuisance within a reasonable time, either by building a new plant, or by transporting the sewage to another plant for treatment. The Lord Ordinary declined the invitation and pronounced decree of absolvitor.

Evidence at proof

[16] In terms of a joint minute it was agreed that:

> "the OCU has reduced odour emanating from the SAF by a factor of greater than 10, or equivalent to more than 1 logarithmic change."

At least one such logarithmic change is needed to affect an individual's perception of a particular smell.

Local Witnesses

[17] Eleven witnesses, including the reclaimer, were led on his behalf. Of these five (and five other individuals) had given evidence at the prior diets of proof. They differed in their descriptions of the frequency of bad odours, but clearly gave evidence of rank and unbearable odours of a sufficient intensity, frequency and duration as might constitute a nuisance. Presumably it was in recognition of this, largely unchallenged evidence, that the respondent in January 2019 conceded declarator of nuisance.

[18] The Lord Ordinary gives "thumbnail" sketches of the evidence given by the witnesses at the final proof. We do not repeat these. It was not challenged that the thumbnails were representative of the evidence given. Some witnesses had detected little or no change. Several spoke of some improvement, but the gist of the evidence was that intolerable, unbearable smells continued to be emitted from the site, onto the reclaimer's property in particular.

[19] A further witness, Miss Rachel Smith, led for the respondent, has lived opposite the plant, across the river but closer to the site entrance than Tomboyach, since May 2017. She said she was not troubled by smells and said there were fewer instances that year than before. She works in a shop in the village, and smells were not a topic of conversation. She gave hearsay evidence that "everyone tells me that there were issues but they have been rectified".

Smell Assessors

M²

[20] The Lord Ordinary provided "thumbnails" of the evidence of the smell assessors, noting that he had selected records where a smell was detected. The thumbnails for prior to the operation of the OCU indicated findings of odours which were on numerous occasions

at intensity 3 (a clear smell), and extent up to three (on a scale where 1 means only detectable right at the location, or as a result of sudden wind change).

[21] The M² thumbnails after the installation of the OCU, reflecting about 30 entries, suggested odours which were generally faint, transient, intermittent and localised. The smells recorded reflected not only sewage smells, but wood smoke and manure. On some occasions a sewage smell of greater intensity was noted. On one occasion this was intensity of 3, following a spillage, and whilst it might have reached the reclaimer's property it was described as "inoffensive". On some occasions intensity 3 was recorded at an inlet or manhole cover, but was not noticeable from 1 m distance. On an occasion following desludging intensity 3 was recorded at the pumping station but the extent was 1, and it was not present only a couple of metres away. Intensity 4 (offensive) was recorded on 2 occasions, but the extent was again 1, detectable only when right on top of the source. On two occasions intensity 4 and extent 3 was recorded. The first was during engineering works when the manhole covers were open for prolonged periods during the morning; the other recording was at the splitter chamber and septic tank outlet but the extent was limited since the smell could not be detected at the SAF or the inlet cover. The only exception to their evidence that any odours had been faint, localised and intermittent was during desludging, when there had occasionally been more persistent smells of higher intensity. One witness said that the OCU had "totally eradicated" the smell that was there before; another that there had been a "100% difference" since the installation of the OCU.

[22] The Lord Ordinary also summarised a sample of M²'s responses to complaints made by the reclaimer. He set out the results from 13 dates, where the results of assessor investigation of complaints did not accord with the nature of the complaint made. The Lord Ordinary recognised that some of the complaints were made hours or even days before

M² had an opportunity to investigate. In some cases, however, where such gaps did not exist, it was striking that the investigators had very different perceptions to those of the reclaimer.

SOL

[23] The evidence of the SOL witnesses supported the M² testimony. Apart from their first site visit in July, when they detected a smell of sewage which they followed into the reclaimer's garden, they had hardly ever detected sewage smells outside the site itself. An exception occurred during their visit on 10 and 11 December 2019, when they detected a strong sewage odour coming from the top of the septic tanks. One witness said:

> "So rare are these occasions that I have at times annotated my sheets or the map marker app if I feel there are circumstances that might account for the odours and warrant further explanation."

Expert evidence

[24] Evidence was taken from Professor Jackson, Mr Peirson, and Professor Philip Longhurst. A further witness, Dr McIntyre had produced reports, but did not give oral evidence. Apart from providing individual reports, Messrs Jackson, Peirson and McIntyre had met on three occasions and signed joint reports. Their most recent meeting on 30 January 2020, resulted in a joint report containing a schedule with a series of questions posed by instructing solicitors; an agreed response by all three experts, where this had been reached; and a column containing commentary on the matters agreed or not agreed.

[25] The evidence indicated that the OCU had been successful in minimising the smell from the SAF. Professor Jackson accepted that as a result of the OCU the smell from the SAF has disappeared (JB, 4196). Mr Peirson confirmed that he had seen the results of monthly testing of the OCU and they showed that the unit had been very effective. The Lord

Ordinary noted that Professor Jackson and Mr Peirson both now attributed the remaining odours to the manholes, and to odours seeping around the carbon filter trays, based primarily on their analysis of the M^2 and SOL test results. Professor Jackson said these results showed him:

> "that the plant is emitting odorous gases. Whether they end up on the pursuer's property I don't know. Whether they are sufficiently intense to create a nuisance, I don't know. All I'm suggesting is that this, after six years of operation, has proven that this plant is generating and emitting odorous gases into the atmosphere".

It was put to him that any smells now at the site were localised and transient. He gave this response:

> "As detected by Mott Macdonald they are, but who knows what they might be in the future".

[26] Professor Jackson suspected that the smell from the SAF, which he described as being "overpowering" on his first visit, had the effect of masking other smells at the site. Professor Jackson also had a clear general view about the plant, believing that, because of its design, the risk of odour nuisance would remain for the rest of its working life (perhaps 25 - 30 years). He described the plant's design as unique, the configuration being one which added to the organic loading of the septic tank. He accepted that there may only be one localised incident a day, but his preferred solution was either "to put a lid on the whole thing", or to move the plant elsewhere. In his evidence he appeared to hold the respondent to a higher standard than he would otherwise have done, as a consequence of their representation in the planning application. Mr Peirson agreed. In the joint report, they both referred to the respondent as "raising the bar" in this way. Their position was that the respondent required to eliminate rather than minimise odours, because of the assertion made in their planning application.

[27] The reclaimer placed great reliance on the response to question 9, "Do the experts consider that the design of the plant is 'fit for purpose'? If not, why not?". This was also a central factor in the Lord Ordinary's approach to the expert witnesses. It is thus reproduced in full.

Under "matters agreed" the response stated

> "No. The plant may be 'fit for purpose' in purely terms of having the capability to treat sewage to the required standards, but it is not fit for purpose in terms of being able to treat incoming sewage whilst being able to adequately control odour emissions. Given the defenders' performance to date, and on the balance of probabilities, recurring odour nuisance to residents will, from time to time, prevail during the design lifespan of the treatment works."

Under "matters not agreed and commentary", it stated:

> "Dr McIntyre is of the opinion that no WwTP can be termed "fit for purpose" in treating wastewater to the required standard whilst being able to <u>eliminate</u> odour generation and emission.
>
> Professor Jackson and Mr Peirson both consider that the plant is unfit for purpose in the context of its current location given that its purpose is to effectively and safely treat foul wastewaters in a sustainable manner such that the amenity value of surrounding properties is not compromised.
>
> Professor Jackson is of the opinion that the process configuration selected by Scottish Water will, without doubt, continue to generate odorous gasses throughout the year, with very little seasonal variation due to the underground septic tanks being insulated from surface weather conditions. With respect to 'fit for purpose' Scottish Water has no intention of controlling the generation of these odorous gases and thereby eliminate them. Scottish Water's approach to the problem is to minimise odours only by: controlling the containment of these gases within the separate process elements of the works; controlling the emission of these gases into the atmosphere; and restricting/retaining any emitted gases to within the confines of the treatment works' curtilage.
>
> Mr Peirson's concerns are based on the fact that it took several years for SW to acknowledge that there was an odour issue at BoG, and that material efforts to remedy the nuisance have only progressed under the auspices of the Court. This history potentially casts doubts on the Defenders (sic) commitment and ability to provide long term odour control in such a sensitive location. It is not sufficient to add engineering controls, some of which are still being developed, without demonstrable commitment to ensure that they will continue to be effective for the coming decades. Even at this stage there are very significant doubts about the

> operational practicality of the manhole tray carbon filters and the new desludging arrangements. SW has documented checklist tasks on site which include twice weekly septic tank inspectition and monitoring tasks but the carbon filter trays have prevented these taks being completed. Desludging is reported by the Pursuer to have been prolonged by inconsistent pump operation.
> In my opinion SW have not demonstrated that it is practical to expect operators who only attend the site three days a week to monitor and manage the BoG WwTW without odours. SW have not, in my opinion, demonstrated that they are competent to develop and implement robust odour management plans and procedures that are appropriate for such a sensitive location."

[28] There was conflicting evidence about the effectiveness of the carbon filters. Mr Peirson and Professor Jackson noticed grit present around the lip of some manhole covers. They query whether they are hermetically sealed, as they detected offensive smells during a site visit on 13 February 2020. By contrast the respondent monitors the performance of the filters and replaces them at least every 6 months. Laboratory tests in October 2019 on used carbon media suggested that they had done "a good job" in removing odours.

[29] Professor Longhurst had studied the impact of emissions from waste plants on communities since 1993. Three points in his evidence were noted by the Lord Ordinary in particular. Namely that: (1) there was no scientific method to determine what smell was acceptable to a particular individual. Everyone differed in, for example, their ability to tolerate the smell of human sewage. Emotions may play a role. Persons exposed to noxious fumes may exhibit feelings of depression, frustration, and anger. They were more likely to be annoyed if the odour occurred at unpredictable times. (2) He had studied the number of complaints directed at the WWTP and found that they had reduced since the remedial works were carried out, noting specifically that there was a "marked change" even for such a small sample. (3) Correlating the complaints with wind direction, and excluding instances of low wind speed, 44% were made with wind blowing away from Tomboyach, which was

"unusual and inconsistent with normal patterns of dispersion". He accepted that he was not a meteorologist and that the local topography was complex. In his opinion, however, it was highly unlikely that these smells could have come into Tomboyach from the WWTP.

The Lord Ordinary's decision

Merits

[30] The Lord Ordinary identified the test for actionable nuisance as that pronounced by Lord President Cooper in *Watt* v *Jamieson* 1954 SC 56, at 58:

> "The critical question is whether what [the pursuer] was exposed to was *plus quam tolerabile* when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects."

That could be refined into two narrower questions. First, whether odours from the WWTP continued to reach the reclaimer's land, which was a simple issue of fact. Secondly, would a reasonable person tolerate them? This question involved a more complex inquiry, requiring an objective evaluation of the nature, intensity and duration of any such smells having regard to the overall context.

[31] On the first issue, the Lord Ordinary accepted that the WWTP continued to emit odours which reached the reclaimer's property.

[32] In addressing the second question the Lord Ordinary turned first to the issue of the nature, frequency, and intensity of the smells. On this matter he considered there to be two conflicting bodies of evidence, essentially that of the reclaimer's witnesses and the smell assessors. He noted that while the expert opinion greatly assisted his understanding of the configuration and operation of the plant and, more generally, of waste water treatment facilities, on the central question of continuing nuisance, the primary evidence came from the factual witnesses. A critical date was 19 September 2019, when the OCU became

operational. What really mattered to assessment of whether there was a continuing nuisance were the nature, degree and frequency of odours after that date.

[33] He preferred the evidence of the assessors to those of the reclaimer's witnesses. He did so because of the weight and cogency of their evidence. He found that evidence to be more accurate because (a) they were independent, (b) the methodology itself was systematic and exacting, (c) they all carried out their task in a meticulous way, (d) they had detailed records of their findings, (e) it took place several times of day over many months, and (f) they were all clear that there had been a marked fall in odours since the OCU begun operating. In his view their evidence provided a detailed and complete mosaic. His impression was that the assessors were actively pleased to find smells (relieving some of the monotony of their task), in other words, there was no attempt to ameliorate the figures.

[34] By contrast, he held that the evidence led by the reclaimer was largely anecdotal. Some came from persons who visited the village from time to time, whose opportunities to detect smells were more limited than those of residents. He recorded that some detected no change pre and post OCU, which seemed odd, given the agreement between the parties that the OCU had materially altered matters. In his view they were not reliable about the big picture; unlike the evidence of the smell assessors, their evidence provided an "unfinished jigsaw".

[35] The Lord Ordinary's conclusion therefore was that whilst the WWTP continued to emit offensive odours, they were irregular, faint, transient and only occasionally extended to the reclaimer's property.

[36] The Lord Ordinary turned to consider "all the surrounding circumstances of the offensive conduct and its effects", which had to be given "due weight", as per the test in *Watt*. He considered several factors. First, that Scottish Water did not intend to cause a

nuisance and had taken careful steps to try to cure the problem. Second, that there were few complaints from persons other than the reclaimer. Third, that the WWTP performed an important public service which would create major disruption if it had to move elsewhere or cease operations.

[37] Three further points were addressed by the Lord Ordinary. First many of the complaints related to desludging. The Lord Ordinary was not satisfied that the processes caused "a nuisance on every occasion, but even if they do, I hold that they are reasonably tolerable", having regard to the degree to which they invaded the reclaimer's property and disturbed his amenity (Stair Memorial Encyclopaedia, Nuisance (Reissue), at paragraph 51). Second, the regrettable misstatements made by the respondent in their planning application formed part of the overall context to which he had regard, but did not determine his decision. Third, he did not accept the experts' statement that the WWTP was "not fit for purpose". Such a finding usurped the function of the court and in any event required to be seen in the context of Dr McIntyre's rider to it.

Disposal

[38] In a supplementary note addressing disposal and expenses, the Lord Ordinary noted the general rule that, after hearing evidence on the merits of a case, absolvitor is the usual disposal: Court of Session Practice (K26-30). Dismissal is competent but rare, usually where a preliminary plea has been reserved: Macphail Sheriff Court Practice (para 17.12). The decree of absolvitor superseded the decree of declarator, making it plain that there was not a continuing nuisance as at 2020. The Lord Ordinary rejected the argument that in the circumstances of this case the pursuer should be entitled to retain the option of raising a fresh action without facing a lengthy legal argument on *res judicata*, which might follow on a

decree of absolvitor. Absolvitor was an order designed to avoid repetitive litigation on the same matter.

Expenses

[39] The reclaimer had already been awarded the expenses of process up to 12 August 2019. It was conceded that the reclaimer was entitled to his expenses up to 19 September 2019 when the OCU came into operation. The Lord Ordinary overlooked this, and although he awarded expenses to the respondent from 19 September 2019, he omitted to plug the gap from August by an award to the reclaimer. The reclaimer had asked for expenses to be awarded up to the date of judgment. The Lord Ordinary did not accept that, but did recognise some merit in the reclaimer's argument on expenses. He thus restricted the award to the respondent to 75% of the total (and excluded those expenses associated with the expert Dr McIntyre).

Analysis and decision

Merits

[40] In his Note of Argument, senior counsel for the reclaimer accepted "that credibility and reliability of witnesses is pre-eminently a matter for the judge at proof, and it is only in rare and exceptional cases that an appellate court will interfere with a finding by a Lord Ordinary on such matters". He recognised the magnitude of the task facing him in presenting an appeal based on a challenge to the findings of primary fact made by a judge at first instance. The reclaimer complains that the Lord Ordinary was plainly wrong, in that his decision cannot reasonably be explained or justified. He has misunderstood or miscategorised the evidence. Since no issue of credibility arose in this case, the issues turning on reliability at best, this court was less constrained in its ability to intervene than it

otherwise might be. Reference was made to *Woodhouse* v *Lochs and Glens (Transport)* 2020 SLT 1203.

[41] The grounds of appeal reflect the well-known words of Lord Thankerton in *Thomas* v *Thomas* 1947 SC (HL) 45, at p54, asserting that the Lord Ordinary's reasoning was not satisfactory, and that he unmistakably has not taken advantage of having seen and heard the witnesses. The relevant passage in *Thomas* has been elaborated upon in numerous cases, most notably by the UK Supreme Court in *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203, confirming that in a case such as the present, involving a challenge to findings in fact, the test requires the court to be satisfied that the findings were clearly erroneous. At paragraph 62 of *Henderson* Lord Reed explained that asking whether the judge's findings were "plainly wrong" meant determining "whether the decision under appeal is one that no reasonable judge would have reached". The phrase "plainly wrong" implies that the decision cannot reasonably be explained or justified (*ibid,* para 67). One way the matter has been expressed, by Lord Malcolm in *Anderson* v *Imrie* 2018 SC 328, at para 99, is that "if a judge avoids error, applies the correct legal principle, and comes to a decision which was open to him, it cannot be categorised as a wrong decision". It is worth noting that the reasons for affording this primacy to factual findings at first instance are not only based on the issue of assessment of credibility, but that "it is likely that the first instance judge will have gained a much more nuanced and therefore more complete understanding of the facts in the case and their respective importance than it is possible for appeal judges to obtain from the transcript and the documentary productions" (Lord Brodie in *Anderson* v *Imrie,* para 35, paraphrasing Lord Hoffman in *Biogen Inc* v *Medeva Plc* [1997] RPC 1 at p45). This of course echoes the well known comments of Lord Shaw of Dunfermline in *Clarke* v *Edinburgh and District Tramways Co* 1919 SC (HL) 35 that the

advantages enjoyed by the judge of first instance are "sometimes broad and sometimes subtle".

[42] There are two overarching, general, aspects to the reclaimer's argument. The first relates to the Lord Ordinary's general approach to the case; the second to his categorisation of the evidence.

[43] The submission relating to the first of these is that the Lord Ordinary did not approach the case, as it is maintained he should have done, on the basis that nuisance having already been established it was for the respondent to show that the measures taken had abated the problem to the extent that there was no continuing nuisance. We do not understand the Lord Ordinary to have approached the case on any basis other than this. At paras 6 and 10 of his opinion he identifies the reclaimer's argument that the nuisance had continued unabated, and the respondent's contention that the remedial works have succeeded in alleviating the position. Implicit in this argument seems to be the propositions (i) that the nature and extent of any persisting problem had to be presumed to be the same as that which had existed at the time of the declarator; and (ii) that the nature and extent of any persisting problem had to be measured by means of some sort of direct comparison between the position at that time and the position at proof. In our view these are unrealistic suggestions. Of course, the declarator and admission of nuisance was the background against which the issue of whether successful alleviating measures had been taken fell to be determined. However, the primary source of odours, apart from desludging, at the time of the declarator had clearly been identified by the experts as the SAF, the proposed remedy being the installation of the OCU. By the time of the final proof, it was accepted that "since the installation of the OCU, the emissions from the SAF unit have substantially reduced" (written submissions for the pursuer), although it was maintained that odours continued to

emanate at nuisance levels from *inter alia* desludging and the manhole covers. The critical issue at proof was whether, notwithstanding the remedial measures, there remained a nuisance. That could only be determined by assessment of the factual situation at the time of the proof. The only realistic way of addressing the issue was to approach it as the Lord Ordinary did, applying the test for nuisance, and asking (i) do odours from the plant still enter onto the reclaimer's property; and (ii) if so, do they do so at a level greater than is reasonably tolerable, objectively assessed, thus constituting nuisance.

[44] It was maintained, under reference to *Greenline Carriers (Tayside) Limited* v *City of Dundee Council* 1991 SLT 673, that it was incumbent on the Lord Ordinary to state a view as to the circumstances in which the odours might constitute a nuisance , in terms of extent, duration and frequency. We do not accept that this is a general proposition to be drawn from *Greenline,* the circumstances of which were very different. The Lord Ordinary did not have to determine what level of odour – by reference to extent, duration and frequency – might be reasonably tolerable. The permutations would be numerous. What the Lord Ordinary required to do was apply the legal test to the circumstances as found by him, and to decide whether the level of odours established in the evidence was such as to be beyond what might be reasonably tolerable. That is what he did.

[45] Allied to this aspect of the reclaimer's case is the argument that the Lord Ordinary failed to give adequate weight to the evidence of the expert's joint report, and in particular the opinions of Professor Jackson and Mr Pierson under question 9 as to "fitness for purpose". The Lord Ordinary stated (para 45) that he did not accept the experts statement that the plant was not fit for purpose, since (a) in his view this usurped the function of the court; and (b) it had to be seen in the context of Dr McIntyre's rider that "no WWTW can be

termed 'fit for purpose' in the sense of being able to treat wastewater to the required standard whilst being able to eliminate odour generation and emission".

[46] The reference to whether the plant was "fit for purpose" reflects questions asked of the experts by the instructing solicitors. With respect, it is not clear that this is a helpful approach to the issues in the case. "Fitness for purpose" is a vague term, which does not seem to have been the subject of agreement as to either fitness or purpose. Question 10, asked for an explanation of purpose, and "whether it can include the emission of odours to the nuisance of the neighbouring property" (emphasis added). There is no agreed response even to the first part of that question, and the second part introduces a legal concept which is a matter for the court. Professor Jackson and Mr Peirson consider that the plant is unfit for purpose if it can't treat foul wastewater in a sustainable manner "AND protect the amenity value of surrounding properties". The response goes on to say that Dr McIntyre did not consider that the plant was unfit for purpose by virtue of continuing to emit odours, as long as those odours were minimised and did not cause a nuisance. Both those answers (properly) begged the question whether as a matter of fact the amenity was affected, and to such a degree as constituted nuisance, this being the very question which the court had to resolve. Dr McIntyre was clearly of the view that fitness for purpose did not require elimination of all odours at all times.

[47] The answer to question 9 states that the plant is not fit for purpose "in terms of being able to treat sewage whilst being able to adequately control emissions". This would indeed appear to be offering a conclusion to the main factual issue for the court to determine on the basis of evidence. Moreover, it seems to be a conclusion based at least in part on the experts own interpretation and assessment of the M² and SOL witnesses. The next sentence in the answer even more clearly trespasses on the court's territory. Professor Jackson and

Mr Peirson both offer views based on their own assessment of the respondent's efforts, and willingness or otherwise, to address any problem at the site, again trespassing on the role of the court. The Lord Ordinary was entitled to consider that these views usurped the function of the court. Apart from providing the Lord Ordinary with technical information, and assisting him to understand what the source of any odours might be, the evidence of the experts did no more than establish that the plant would produce odours and that there was a risk of nuisance therefrom. The extent to which it did produce odours, and whether a nuisance continued, was a matter for the Lord Ordinary to assess as a matter of fact. As to the fact that Dr McInytre did not give evidence, that might affect the weight to be given to that part of the joint report, but it was consistent with the evidence given by Mr Peirson that all sewage works give rise to odours; and the planning condition which was imposed at the outset to require an odour management plan to be put in place to control odours. In our view there is no basis for suggesting that the Lord Ordinary did not properly study or take into account to the extent appropriate the terms of the agreed report.

[48] The second overarching aspect of the reclaimer's argument is the submission that the Lord Ordinary was wrong to say that the testimony consisted of two conflicting bodies of evidence. It is maintained that evidence that there was no smell during the "occasional attendance" of the smell assessors was not inconsistent with the reclaimer's case: he had not maintained that there was a constant disgusting smell on his property, rather that the regular smells were beyond that which was reasonably tolerable. It was submitted that the evidence of the smell assessors was not inconsistent with this and that the Lord Ordinary mischaracterised the evidence as two conflicting bodies of evidence.

[49] In our view the Lord Ordinary's characterisation is a fair summary overall of the evidence. It is no doubt true that the case for the reclaimer was presented on the basis that

there was not a constant presence of foul omissions. However, it is quite clear that his evidence, and that of his supporting witnesses, was directed towards describing odours which were of an intensity, duration and extent of a quite different order to those experienced by the smell assessors. The reclaimer's original evidence in his affidavit of 25 October 2018 described the smell as "hellish", saying that he could not put out washing or sit in his garden for a cup of tea. At worst it was unbearable, but even when "milder" it was still bad enough that he could not sit outside. Sometimes it lasted all day, other times only for a few hours. His affidavit of 20 January 2020 described only a "marginal" improvement, although in both his affidavit and oral evidence he did concede that it was "slightly less bad" than previously. Most of his supporting witnesses acknowledged that the smell was not as bad as it had been, but nevertheless they still employed epithets such as disgusting, pungent, intolerable, and retch-inducing to refer to odours regularly present in the reclaimer's garden and reaching at times into his house.

[50] This is all very different in degree, intensity and extent from the evidence given by the smell assessors, and Miss Smith. There were also instances where there was a direct conflict between the evidence of the reclaimer or one of his witnesses, and an assessor, speaking to the same incident. We agree with senior counsel for the respondent that the two bodies of evidence could not sensibly be reconciled, and the Lord Ordinary's characterisation is a reasonable one.

[51] Senior counsel for the reclaimer submitted that the Lord Ordinary's reasons for preferring the evidence of the smell assessors were inadequate.

(i) It was argued that the Lord Ordinary's assessment of the smell assessors as independent carried with it the implication that the reclaimer's witnesses had tailored their evidence or been influenced by their acquaintance with him. In our view it is wrong to

draw the inference that the Lord Ordinary considered the reclaimer's witnesses to be biased. All the Lord Ordinary seems to have meant is that the assessors were employed to carry out an independent task for which they had been trained and tested.

(ii) The statement that the assessors had a systematic and exacting methodology was challenged as unsupported by evidence, there having been no evidence, for example, about their training in the use, or calibration, of the Jerome meter. Again, we reject this submission. The point is that what was involved in the task was a systematic assessment carried out according to a prescribed methodology, designed to address both intensity and extent, at fixed points, and in each case according to a uniform scale. This is to be contrasted with the more *ad hoc* approach to these issues reflected in the evidence of the reclaimer's witnesses.

(iii) As to the statement that they carried out their task in a meticulous way, it was submitted that it is not even clear what this means, and in any event it could not affect the validity of the results. In our view this point is linked to the previous one. The Lord Ordinary noted that the assessors focused on sewage smells, but took care to record other smells when encountered, such as manure or wood burning. Each M^2 survey took 20-40 minutes; each SOL one took 90 minutes. Detailed information as to the way in which they carried out their tasks was included in their affidavits, including their efforts to follow smells to source. Examples can be seen in the affidavits of: David Alexander (para 10); Sarah Bevan (para 10); and Graeme Boath (para 17). The Lord Ordinary was entitled to describe them as meticulous.

(iv) That they kept detailed records is a factor which was submitted to be irrelevant to their findings, and in any event applied equally to the reclaimer who kept a diary. Again this is a matter associated with the systematic and methodical approach of the respondent's

witnesses. It may be a relatively small point, but the fact that the assessors kept detailed contemporaneous records contrasts with the evidence of the witnesses for the reclaimer, apart from the reclaimer himself, and is not an irrelevant consideration. The records provided confirmation, in addition, that the assessors appeared to have carried out their work according to the prescribed methodology.

(v) The remark that the assessments took place several times a day over many months could, it was submitted, apply also to the evidence of the reclaimer. This point again emphasises the importance the Lord Ordinary placed on the systematic and methodical approach of the smell assessors. Moreover the point being made is that the reclaimer's submission that the assessor's role involved only occasional attendance for limited periods of time is something of a misdescription.

(vi) In referring to the fact that the assessors spoke to a fall in odours since the OCU began to operate it was submitted that the Lord Ordinary was addressing the wrong question. The issue was not whether there had been such a fall but whether there continued to be odours beyond the level of reasonable tolerance. In our view the issue of whether there had been a fall in odour since the OCU began to operate is clearly relevant to the determination of the nature, extent and frequency of odours which the Lord Ordinary had to address. The fact that there was consistent evidence to this effect from assessors is a factor the Lord Ordinary was entitled to take into account in his evaluation of their evidence. Senior counsel for the reclaimer submitted that there was a risk of elevating the evidence of the assessors to the level of "science", and thereby according it a status it did not merit. We are satisfied that the reasons given by the Lord Ordinary for preferring their evidence did not fall into that trap.

[52] Allied to criticisms of the Lord Ordinary's reasons for accepting the evidence of the assessors, were criticisms of his reasons for rejecting the evidence for the reclaimer. These reasons are in our view essentially the obverse of the reasons given for accepting the evidence of the assessors, and are equally within the limits of what would be open to a reasonable judge.

(i) It was submitted that the Lord Ordinary erred in referring to this evidence as anecdotal, especially if he meant to refer to the OED definition of the word as meaning hearsay or unreliable. In using the word anecdotal the Lord Ordinary should not be taken as suggesting that the evidence was hearsay, or even *per se* unreliable. He was surely using the word in its popular colloquial sense of incidental, impressionistic, rather than systematic. It is used to contrast the position with the systematic methodology referred to above.

(ii) We do not accept that the Lord Ordinary was factually incorrect in stating that some of the evidence for the reclaimer came from visitors or non-residents. Many of the witnesses were full time residents, but it is undeniable that others were visitors or non-residents. It was submitted that the fact that some witnesses had little opportunity to detect smells was of minimal importance compared with the critical fact that they did in fact do so. That may be so, but the weight to be attached to these matters in the context of the evidence as a whole was entirely for the Lord Ordinary.

(iii) It was submitted that the Lord Ordinary's comment that it seemed odd that some of the reclaimer's witnesses did not notice any change pre- or post- OCU, given the agreement that this had materially altered matters, made no sense. We disagree. The joint minute agreed that there had been a logarithmic change, and it was clearly accepted on behalf of the reclaimer that the OCU had materially reduced odours from the SAF. We recognise that there was no agreement as to a reduction of odours overall. However, given the fact that the

SAF had originally been identified as the most likely source of odour, with no reference to manhole covers, or anything else other than desludging, this was something the Lord Ordinary was entitled to take into account.

[53] All these points regarding rejection or acceptance of evidence are jury points which were quintessentially for the Lord Ordinary to evaluate. We cannot say that his reasoning was deficient or that the decisions made were not open to any reasonable judge. Similar points were made about the, fairly limited, reliance placed by the Lord Ordinary on Professor Longhurst, and we reject them for the same reason. It may be a statement of the obvious that there is no scientific method to determine what smell is acceptable to a particular individual, but it is no less relevant to note for all that. A reduction in complaints may be associated with complaint fatigue; it may tell us nothing about the extent or duration of odours but it is an adminicle of evidence available to the Lord Ordinary to consider. It does not seem that the Lord Ordinary placed any real weight on this evidence anyway, or Professor Longhurst's musings (indulged in to some extent by other experts) about the effect of the wind at the site. In the paragraph which follows his narration of Professor Longhurst's evidence he stated that he felt that the expert evidence, whilst assisting him in understanding the processes involved in the plant, did not assist on the primary factual issues he had to address.

[54] It was submitted that the reclaimer's witnesses having been considered sufficiently credible and reliable to merit the making of the original declarator, there was no reason to reject their additional evidence. This is a non-sequitur. The original evidence was largely unchallenged. The nuisance was conceded. The declarator was pronounced on the joint invitation of the parties. By the time of the final proof, the post-OCU evidence was not only

challenged but open to contradiction from other evidence in the case. The context was quite different and the Lord Ordinary was entitled to recognise that.

[55] Finally, it was submitted that the issues referred to by the Lord Ordinary in connection with his obligation to give "due weight to all the surrounding circumstances of the offensive conduct and its effects" were irrelevant. One of these was that the respondent had not intended to cause a nuisance. On the face of it, intention is not relevant to whether a nuisance has occurred. However, the matter must be put in the context of the evidence of the expert witnesses suggesting that the respondent should be held to a higher standard because of the misstatement in the planning application, which the Lord Ordinary acknowledged in the same section of his opinion. We have already dealt with the "fitness for purpose" issue. In saying "I am not satisfied that they cause a nuisance on every occasion, but even if they do, I hold that they are reasonably tolerable, having regard to the degree to which they invade Mr MacBean's property and disturb his amenity", the Lord Ordinary was not using the word "nuisance" in its technical sense. He was clearly not referring to desludging constituting a nuisance in the *Watt* sense; it is a fair reading of his opinion that he accepted that odours arose during desludging but that in extent, intensity, duration and frequency they did not meet the test for actionable nuisance. There was evidence from which he was entitled to reach that conclusion, including from Mr Peirson who had observed the current desludging process and stated that odours from desludging now appear to have been effectively mitigated by deployment of chemicals (jb4459).

[56] Apart from the overarching points which we addressed at the outset of this analysis, there is a further general point made by the reclaimer which we should address. It was repeatedly submitted for the reclaimer that the Lord Ordinary's approach was "superficial"; that his explanation of the processes involved in the plant were superficial; that his approach

to the agreed expert report was superficial; that his analysis of the evidence as a whole lacked depth; and that he should have dealt with all these matters at greater length. We do not agree. The Lord Ordinary required to make clear what evidence he accepted and rejected, and why. He had to provide sufficient information to explain the factual findings to which he applied the law. He required to do so in sufficient detail to make his reasons comprehensible, and so that one may examine whether they were reasonably arrived at. What is adequate for that purpose will, of course, depend on the circumstances of each case; where the decision hinges on technical, scientific evidence some more detail may reasonably be expected. The present case did not depend on such evidence. As we have already noted at para [47] the expert evidence did no more than establish that the plant would produce odours and that there was a risk of nuisance therefrom: it did not assist in determination of the central issues of fact upon which the case hinged.

[57] The Lord Ordinary's opinion is clear, easy to read, and to understand, and concise. His economical style is to be commended. He was not required to set out in detail the evidence in general. He has set out enough of it that the casual reader may understand the primary issues in the case; and that the parties understand what evidence was accepted and what was rejected. It is trite to state that the fact that a particular piece of evidence is not recorded or specifically mentioned does not mean that it was ignored or left out of account: "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration" (Lord Reed, *Henderson* v *Foxworth Investments*, para 48). The parties to a case know full well what the evidence was. They do not need to see a full narrative of it set out in the court's opinion, nor an extensive summary of their own submissions. What is required is that it is clear that the Lord Ordinary has dealt with the issues in the case. This court can clearly understand the

basis of the Lord Ordinary's decision, and the parties can be in no doubt of it. A failure to set out at length the evidence relied on by parties does not carry an implication that the evidence was not considered, tested and evaluated. In fact the Lord Ordinary has made it plain that he did do this. It is as much a mistake to consider the length of an opinion as a marker of its quality as to judge the quantity of evidence a mark of its cogency. In reality, the opinion is the opposite of superficial; the Lord Ordinary has managed to distil the core issues in the case, the critical pieces of evidence, and the contentions of the parties into an incisive and coherent whole. In *Henderson* v *Foxworth Investments* Lord Reed observed (para 57) that:

> "the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made.

[58] We are satisfied that the criticisms of the Lord Ordinary's decision are without merit, and that the reclaiming motion on the merits must be refused.

Disposal and expenses

[59] The argument advanced for the reclaimer differed from the ground of appeal in that it is now maintained that the Lord Ordinary should have pronounced a further declarator, confirming the original nuisance, but refusing interdict on the basis that he had concluded that the nuisance had stopped. The argument was advanced under reference to *Dodd* v *Hilson* 1874 1R 527. In that case the Lord Ordinary found that the defenders were not entitled to pollute a stream by discharging waste from their dyeing process. The defenders lodged a minute undertaking to remediate, and maintained that they were now carrying on their business without a polluting discharge. The pursuer not accepting this, the Lord

Ordinary appointed a man of skill to investigate. The report was that there was no appreciable risk of pollution. The Lord Ordinary pronounced absolvitor and awarded expenses to the defenders from the date of their minute. On appeal the court substituted a declarator that the defenders were not entitled to discharge the liquid refuse arising from their dye-works into the lade in question, whereby the water in the said lade may be polluted or rendered unfit for primary purposes. This is clearly a very different set of circumstances from the issue of nuisance arising in the present case. It would be odd in the extreme for the Lord Ordinary in the present case to pronounce declarator of a nuisance which had ceased. In fairness, senior counsel for the reclaimer recognised this, and did not press the point. What he did advance was that the case remained relevant to the issue of expenses, since as well as substituting declarator for absolvitor the Inner House awarded expenses to the pursuer. The Lord Justice Clerk stated:

> "I am unwilling to interfere with the Lord Ordinary's judgment in a question of expenses, but there is a point of general importance involved here. I think that when a party who is brought into Court as a wrongdoer admits that he has been doing wrong, but says that he is going to do so no longer, the evidence of the change must be furnished at his own expense."

The other judges agreed, Lord Neaves adding: "Of course the pursuer's opposition must not be nimious."

[60] Senior counsel for the reclaimer recognised that the issue of expenses was very much a matter in the discretion of a Lord Ordinary; and moreover that he had not been referred to *Dodd* v *Hilson* but nevertheless submitted that the reclaimer should be entitled to the expenses caused by the respondent's offer to show that their plant no longer created a nuisance.

[61] The Lord Ordinary was faced with circumstances in which the primary source of the nuisance conceded by the respondent had clearly been identified as the SAF; the experts'

recommendation to resolve that was the design and installation of an OCU; that was done; the reclaimer maintained that a smell nuisance continued; the experts now maintained that the source was different; and the Lord Ordinary rejected both propositions. In his supplementary note the Lord Ordinary summarised the submissions made for the reclaimer in support of the motion for expenses. The points advanced had been:

(i) the defenders arguably caused the litigation by building the waste water treatment plant adjacent to the pursuer's property;

(ii) the pursuer is a private individual who had taken on a government monopoly;

(iii) the defenders had adopted inconsistent positions in the course of the proof, first denying, then admitting, then again denying nuisance;

(iv) the onus was on them to establish that the nuisance had ceased;

(v) the pursuer was entitled to test that proposition;

(vi) he ought to have been given a chance to check the effectiveness of the OCU;

(vii) the pursuer and his witnesses were not found to be unreliable or incredible;

(viii) the defenders regularly lodged documents late during the proceedings.

[62] The Lord Ordinary recognised that there was merit in some of these points, but not such as to justify an award of expenses. He could have dealt with this in a number of ways. He could have allowed expenses for a further two or three months after the 19 September 2019 to allow time for the reclaimer to be satisfied about the remedial works. Instead he sought to establish an equitable balance between the factors mentioned by Mr Smith and the defenders' success in the cause by the application of a broad brush, restricting the expenses to the respondent to 75%. This was an entirely reasonable approach for him to take. The point made in *Dodd* was that where a party admits to doing wrong evidence of a change

must be furnished at his own expense; that proposition is adequately reflected in the balanced decision on expenses reached in this case.

[63] The Lord Ordinary having resolved all the live issues of fact in the case, was justified in granting decree of absolvitor. As to expenses, we will extend the award to the reclaimer from 12 August 2019 to 19 September 2019 but otherwise we will leave the order standing.