FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 68
P414/20

Lord President
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the petition of

THE SCOTTISH CREEL FISHERMEN'S FEDERATION

Petitioners and Respondents

against

THE SCOTTISH MINISTERS

Respondents and Reclaimers

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Reclaimers: C O'Neill QC (sol adv), P. Reid; Scottish Government Legal Directorate
Respondents: J d C Findlay QC, Upton; Gillespie Macandrew LLP

23 December 2021

Introduction

[1] This is a reclaiming motion (appeal) against the interlocutors of the Lord Ordinary dated 2 and 18 February 2021. The first of these granted decree of reduction in terms of Statement 4.3 of the petition; that is of the "Inshore Fisheries Pilot: Inner Sound of Skye: Consultation Outcome Report". The second ordained the petitioners:

> "to assess the 2019 Inner Sound Inshore Fisheries Pilot Proposal against the criteria published by them in their Inshore Fisheries Pilots – Proposal Form – Guidance".

[2] The fundamental issue is whether the Lord Ordinary was correct to hold that the Guidance, which was put in place in advance of the submission of proposals for pilot schemes, also applied to a new proposal which was lodged after the initial decision on the pilots had been taken.

Facts

[3] Marine Scotland are a directorate of the Scottish Ministers. They have certain powers of management over inshore fisheries. In October 2015 they published the Scottish Inshore Fisheries Strategy. This contains a broad vision for the development of more sustainable, profitable and well-managed inshore fisheries by modernising management and reaping long term sustainable rewards. The strategy is phrased at a high level of generality. Its aims are: the improvement of the evidence base for management decisions; the streamlining of fisheries governance; the promotion of stakeholder participation; and the embedding of management into wider marine planning. It acknowledges the key role of inshore fisheries groups in decision making; notably by the creation of a framework for effective inshore fisheries advice.

[4] On 25 May 2017, in advance of a meeting with the petitioners, the Cabinet Secretary for the Rural Economy and Connectivity announced an intention to create pilot schemes to look at ways of improving fishing management. The first would test a more local approach to management and the second would trial the impact of separating the different methods of fishing; creeling (static fishing) and trawling (mobile fishing). Those involved in commercial fishing were invited to submit their proposals for pilots.

[5] Marine Scotland issued Guidance on how interested parties should submit a proposal. The Guidance repeated the background plan whereby the pilots would

investigate, first, a localised approach and, secondly, the separation of the fishing methods. Under the heading "Notes on Proposals", it stated that proposals would be considered on the basis of:

- "How consistent is it (*sic*) with the Inshore Fisheries Strategy 2015, in particular the focus on:
  - Improving the existing evidence base
  - Improving governance
  - Integrating with wider marine management
- The clarity of the objectives – does the proposal clearly identify issues and the means of addressing them?
- What improvements will be achieved and consideration of how improvements will be monitored.
- The proposal being industry lead (*sic*) and developed by those involved in commercial fishing in the area.
- The practically (*sic*) of the proposal and how achievable it is, taking into account:
  1. International and national obligations
  2. The current quota system
  3. Control mechanisms (Legislation and Licensing)
  4. Financial implications
  5. Enforcement implications"

[6] The Guidance stated that further consultation might be needed, depending upon the "impact of and extent of the proposed management measures". Proposers were asked to complete a form. This contained 19 specific "questions". Most of these were not questions, but requests for details of the proposal. Question 5 asked the proposer to specify under which of the "two stated criteria" the proposal fitted. This reference to criteria was to the local approach and the separating of fishing methods. Questions 8 and 17 focused on impact, which was not specifically mentioned as one of the bases upon which the proposals were to be considered. Some of the five enumerated points did not form any part of the specific questions. The Guidance was reproduced in the proposal forms for completion. The closing date was 30 September 2017.

[7] Several proposals were made, including one submitted by some of the petitioners' member organisations for the Inner Sound of Skye. It suggested extending an existing prohibition of mobile fishing (trawling) in parts of the Sound for 6 months (October to March) and prohibiting it entirely in defined areas. After a review of the proposals and further discussions with the proposers, four were deemed suitable for public consultation "due to their practical application and being in line with the stated aims of the initiative". These were the Inner Sound, Mull, Orkney and the Outer Hebrides. Views were also sought on whether a fifth proposal, relating to Arbroath and Montrose, should be investigated further. The relative consultation paper stated that Marine Scotland wanted to hear "your views" on which of the proposals should be introduced. The intention was that two of the pilots would go ahead for a two year period at a cost of some £300,000.

[8] Views were not sought under reference to the five numbered points or the "basis" upon which the proposals were originally to be considered in terms of the Guidance. Rather, after a detailed description of the Inner Sound proposal, the consultees were asked the following two questions:

> "1. Do you agree that the pilot proposal… should be taken forward… ?
> 2. What is your view on the possible impact, both positive and negative, of amending the current six month restriction so that all mobile gear fishing is prohibited throughout the duration of the pilot?"

[9] In June 2018, Marine Scotland produced an Outcome Report of the consultation. There had been 122 responses from a broad range of interested parties, including fishermen's organisations, environmental groups and local authorities. The Report stated that, following consideration of how consistent the proposals were with the "criteria set out in the proposal form guidance and the responses received…", three of the pilots (Mull, Outer

Hebrides and Arbroath/Montrose) would be adopted and the others (Inner Sound and Orkney) would not.

[10] The responses were collated under reference to the two questions which had been asked. Themes from the supporters of the Inner Sound proposal referred to environmental and economic benefits, gear conflict and other benefits. Those opposed focused on economic impact, health and safety, displacement of fishing effort, environmental impact and shared access/management. The reasons for not taking forward the Inner Sound proposal were primarily:

- Concerns over the impact on mobile gear vessels that currently fish the area
- The similarity with the Torridon creel only zone
- The purported economic benefits are disputed
- Concerns over the ability to monitor impact of management interventions.

[11] Each of these topics was explored in more detail. The first concern was in relation to the small number of vessels which fished the area when permitted to do so. The area contributed a significant proportion of the value of their catch and the pilot would impact adversely upon them. The Torridon creel only zone had produced increased creeling and a consequent reduction in stocks. The proposal had not adequately set out measures to limit creeling. The proposal had argued that there was a greater economic benefit to be gained to local communities from creeling. Many responses had agreed with this and research commissioned by the petitioners had supported it. This was counterbalanced by research commissioned by other fishermen's associations and by other responses. The petitioners' proposal had set out very limited proposals for monitoring the impacts on stock and the environment. A lack of baseline data meant that quantifying changes would be challenging. The overall conclusion was that, while some of the features of the proposal were strong,

there was considerable opposition from the mobile (trawler) fishermen, whose viability might be adversely affected. This was coupled with the impact of displacement (ie the affected fishermen having to go elsewhere). The benefits were challenged and there was a question over monitoring.

[12] In terms of somewhat opaque minutes of a discussion or discussions around 25 September 2018, further representations from the petitioners' members persuaded Marine Scotland to "revisit the initial proposal" in order to establish "if there was anything missed from the original … proposal … and if it could be adjusted to offer any unique learning opportunities to inform our [Marine Scotland's] future strategy". A similar description was included in a further consultation paper which was issued in January 2019. This consultation was restricted to a new proposal for the Inner Sound. How the new proposal came to be accepted for consultation, after the relevant decision on the pilots had been taken, is not entirely clear. It seems that there was disquiet in the local area about the original Outcome Report. There were representations made to the local Members of the Scottish Parliament and to the Cabinet Secretary. Marine Scotland were asked to re-engage with the petitioners and/or their constituents.

[13] Although there does not appear to be any record of this, it was not disputed that the exercise upon which Marine Scotland had agreed to embark was a consideration of whether the new proposal should also be a pilot, notwithstanding the previous decision. This time, the learning opportunities were said to relate to "testing local fisheries management measures associated with the …Inner Sound…". Despite the terms of the minutes of 25 September 2018 and the subsequent consultation paper, it was averred by the respondents, and admitted by the petitioners, that the exercise was a "new consultation" and not a re-opening ("revisit") of the original consultation.

[14] The new proposal was not put forward on the form which was used in the original scheme. It was described in the new consultation paper. The plan was to introduce fisheries management measures, in addition to the existing 6 month prohibition, with an aim of trialling the separation of the two modes of fishing and introducing local management arrangements. There would be a mobile fishing area for 6 months of the year. Mobile fishing would be excluded from other areas in which creeling only would be permitted. There would be other measures, such as limits on the number of creel vessels and creels, quotas, minimum landing sizes, and the establishment of an Inner Sound Advisory Group.

[15] The consultation paper sought the views of those likely to be "impacted" by the "revised proposal" and whether the proposal should be taken forward. There were then a large number of specific questions under the headings: (1) proposed benefits (Q 1 &2); (2) proposed mobile gear management measures (Q 3); (3) eligibility criteria (Q 4 & 5); (4) requirement for on-board vessel monitoring system (Q 6 & 7); (5) controlling effort (Q 8); (6) track record of creel fishing (Q 9 & 10); (7) creel caught nephrops (ie lobsters) minimum landing size (Q 11 & 12); (8) annual quota for nephrops creel fishing (Q 13 & 14); and (9) individual vessel creel limits (Q 15 & 16).

[16] A new Outcome Report was produced in 2020. It summarised the responses, highlighted the main issues that had emerged, reached a conclusion and set out next steps. On the benefits of the new proposal (Q 1 and 2) the majority of responses were negative, mainly on the basis that the matter had been resolved in the earlier consultation. There were doubts about the effectiveness and impartiality of a pilot management group. On the management of mobile fishing (Q 3), the majority disagreed that the measures proposed would provide the relevant insight, since the proposal had not been developed from a balanced perspective. On eligibility (Q 4 – 5), the majority disagreed with the track record

test. The proposed zone was unsuitable for mobile fishing. A requirement for on-board Vessel Monitoring Systems (Q 7 -8) was thought appropriate. The majority disagreed with the idea of a fishing limit (Q 8) or (Q 9-10) that fishing by creel should be restricted to those with a track record. There was, said some consultees, a right to roam. The majority agreed (Q 11 - 12) that minimum landing sizes should be increased and disagreed (Q 13 – 14) with an annual quota. A restriction on the number of creels which a vessel could deploy was agreed (Q 15 -16).

[17] The conclusion stated:

> "The responses to the consultation make it clear that there is continuing opposition to the proposed inshore fisheries pilot in the Inner Sound of Skye. While some of the management proposals were well supported….the majority of the proposed measure (*sic*) set out in the consultation were strongly opposed by respondents".

Although the pilot lacked overall support, the *status quo* was not an option. Four strands of work would be taken forward to deliver improvements in monitoring, management, knowledge base and communication. On 26 February 2020, the Cabinet Secretary announced that he was establishing the Inner Sound local fisheries management advisory group to open up "dialogue".

The Lord Ordinary

[18] At the heart of the Lord Ordinary's reasoning, behind her decision to reduce the Outcome Report on the new proposal, was her view that the new proposal was still part of the Inshore Fisheries Pilots Initiative. The Guidance governed proposals which were part of the initiative. Therefore, the respondents would be bound to follow the Guidance in the absence of a good reason for not doing so. No such reason had been proffered. The Guidance was that proposals would be considered on the basis of what the petitioners

described as the five criteria; being the five bullet points in the Notes on Proposals section (see above). The criteria set out a structured and sensible approach by which to evaluate the proposals. If there was a further consultation, which was an option referred to in the Guidance, the responses would be taken into account, but only as part of the consideration of the criteria for deciding whether the pilot should proceed. The criteria were not simply there to decide the pilots on which to consult. The Outcome Report on the new proposal, in contrast to its predecessor, made no reference to the criteria and contained no attempt to assess the new proposal against them. The Lord Ordinary considered that the criteria had simply been overlooked.

[19] The reason for not proceeding with the new proposal, which was given in the Outcome report, was the "extent of opposition". Marine Scotland had expressed no views on the proposals, when set against the criteria. The Lord Ordinary considered that this justification was "stultifying to good government (*sic*)". There was no analysis of the responses which supported the proposal.

[20] On the individual grounds of challenge, which the Lord Ordinary accepted were overlapping, Marine Scotland had erred in: failing to act in accordance with procedural fairness in not applying the criteria (*R (Nadarajah* v *Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68; *R (WL (Congo)* v *Home Secretary* [2012] 1 AC 245 at para 35); failing to act in accordance with the petitioners' legitimate expectations for the same reason (*R* v *Inland Revenue Commissioners, ex parte MFK Underwriting Agents* [1990] 1 WLR 1545 at 1569); reaching an irrational decision also for the same reason; and failing to provide adequate reasons. On the basis that she considered that the petitioners were entitled to expect that the new proposal be considered against the five criteria, the Lord Ordinary granted the remedies sought (see para [1]). This included requiring the

respondents to re-assess the new proposal "in accordance with the requirements of administrative law". The Lord Ordinary did not exclude a consideration of the new Future Fisheries Management Strategy 2020 to 2030, but how the re-assessment was to be carried out was primarily a matter for the respondents.

Submissions

Respondents

[21] The respondents contended that the Lord Ordinary erred, first, in holding that the petitioners had a legitimate expectation that the new proposal would be assessed solely against criteria in the Guidance. The Lord Ordinary held that the Guidance had contained a "clear, unambiguous and unqualified representation" (*R* v *Inland Revenue Commissioners, ex parte MFK Underwriting* at 1569). The principle of legitimate expectation was that, where a public authority had issued a promise or adopted a practice which represented how they proposed to act in a given area, that promise or practice had to be honoured unless there was a good reason for not doing so (*R (Nadarajah)* v *Secretary of State for the Home Department* at para 68). The principle had been developed to protect persons from gross unfairness or abuse of power by a public authority (*Rainbow Insurance Co* v *Financial Services Commission* [2015] UKPC 15 at para 51). It was for the petitioner to establish the legitimacy of the expectation (*Paponette* v *Attorney General of Trinidad and Tobago* [2012] 1 AC 1 at para 37).

[22] Against that background, the Lord Ordinary failed to recognise that the criteria were not the sole basis upon which the original proposals were to be, and in fact were, assessed. The Guidance was clear that consultation may be required. Opposition to the petitioners' original proposal was a key factor in the decision not to take it forward but to undertake alternative work. Although the Lord Ordinary had accepted that the new proposal was

different from the original one, she failed to acknowledge that the facts surrounding the submission and the assessment of the new proposal were materially different. The second consultation considered a different proposal and was not a re-opening of the first consultation. The petitioners had been aware that the original proposal had been rejected because of the opposition and that other proposals had also been rejected or accepted only in part. The new proposal was considered by the respondents outside of the original process. The Guidance could not been seen as a clear, unambiguous and unqualified representation about how Marine Scotland would approach the new proposal. The basis upon which the new proposal was to be considered and consulted upon was whether it offered any "unique learning opportunities".

[23] Secondly, for the same reasons, the Lord Ordinary erred in holding that the respondents had acted in a way which was not procedurally fair. The Lord Ordinary had relied on *R (Lumba)* v *Secretary of State for the Home Department*, but it concerned an unpublished policy which had been applied. The present decision was not akin to one to confer or to refuse a benefit by reference to published criteria (cf *R (Help Refugees)* v *Secretary of State for the Home Department* [2018] 4 WLR 168 at para 72). Thirdly, the Lord Ordinary erred in finding that the respondents were entitled to have regard to the responses concerning the new proposal only in so far as these bore upon the criteria. Having consulted, the respondents were bound to have regard to the responses. The petitioners' original proposal was rejected in part because of concerns about the impact of displacement. The consultation on the new proposal made it clear that Marine Scotland were seeking views on the potential impacts of the overall proposal and the individual measures.

[24] Fourthly, the Lord Ordinary erred in holding that the respondents had acted irrationally by failing to take into account the criteria when making the decision. Not all

relevant considerations were material (*R (Hurst)* v *London Northern District Coroner* [2007] 2 AC 189 at para 57). The Lord Ordinary had wrongly equiparated the failure to take into account a material consideration with irrationality. The Lord Ordinary had failed to consider that the level of intensity of review, which was appropriate in this case, was low since the decision did not involve interference with fundamental rights and was one which the executive, rather than the court, was best placed to take (*IBA Healthcare* v *Office of Fair Trading* [2004] ICR 1364).

[25] Fifthly, the Lord Ordinary erred in holding that the respondents had acted irrationally in rejecting the new proposal under reference to the extent of the opposition. The Outcome Report on the new proposal not only recorded the fact of opposition, but also that there were substantive concerns, including the lack of a scientific basis for the proposal, its likely effectiveness and the potential negative financial impact. It referred to the positive measures which the respondents proposed to take. The respondents were also concerned about the health and safety consequences; the forcing of small trawlers out into the Minch. They were entitled to give substantial weight to the level of opposition.

[26] Sixthly, the Lord Ordinary erred in holding that the reasons were inadequate. There was no obligation to assess how the new proposal measured up to the criteria. The reasons in the Outcome Report left the informed reader in no real and substantial doubt as to the reasons for the decision and the considerations which were taken into account.

[27] Seventhly, the Lord Ordinary erred in granting an order ordaining the respondents to assess the proposal against the criteria. This was unreasonable. The Lord Ordinary had failed to have regard to relevant matters bearing upon the question of remedy, notably the passage of time since the Fisheries Strategy was launched in 2015 and the material changes of policy and economic conditions that had occurred since the new proposal was submitted,

notably the new Fisheries' Management Strategy 2020 to 2030. Eighthly, the Lord Ordinary erred in ordaining the respondents to assess the new proposal against the criteria. The interlocutor required consideration only against the criteria, but that did not reflect the Lord Ordinary's finding that it should be considered also by reference to the consultation responses.

Petitioners

[28] The petitioners submitted that, while the grounds of review relied upon included legitimate expectation, procedural fairness, rationality and the failure to give reasons, they were all variations on the central theme that the criteria in the Guidance, having been expressly stipulated, should have been properly considered and that the decision was unlawful because of a failure to do that. The Lord Ordinary had been entitled to hold that there was a clear, unambiguous and unqualified representation that the proposal would be considered against the criteria. The Lord Ordinary did not exclude the possibility of a reference to other considerations. Procedural unfairness was an alternative way of expressing the central theme. Legitimate expectation was also a variant of this. At a minimum, the five criteria were relevant considerations. Other considerations could have been taken into account, had adequate reasons been given for doing so. The decision was irrational because recording what the majority of consultees may have represented did not absolve the respondents from the responsibility of assessing the proposal in light of the criteria. There was no statement about whether the respondents had arrived at any conclusions on the applicability of the criteria and how any conclusions might have been reached. The Outcome Report on the new proposal did not give adequate reasons in that it did not address the substantial questions, let alone do so in an intelligible way. The Lord

Ordinary had given an explanation for granting the specific remedies. In so doing, she had taken into account the passage of time and the existence of the new strategy. The petitioners were entitled to have the proposal lawfully assessed, although that did not preclude consideration of the new strategy.

Decision

[29] The court is unable to accept the fundamental basis for the Lord Ordinary's decision to reduce the Outcome Report on the new proposal; *viz*. that the new proposal was part of the selection process for pilot schemes which the Cabinet Secretary had announced in May 2017, as an element of the Scottish Inshore Fisheries Strategy, and for which Marine Scotland had produced the Guidance. The Guidance was designed to create a framework within which proposals for pilots would be considered initially. It applied to the form of proposals submitted during that exercise. The petitioners' new proposal was submitted, considered, and rejected in the course of a separate and stand-alone decision-making process. That process of decision-making was fairly and properly conducted.

[30] The term "criteria" in terms of the Guidance is not, as the petitioners maintained, a reference to the five bullet points setting out the bases upon which the proposals were to be considered, but to the two aspects of localisation and separation to which the pilots were to be directed (see question 5). Nevertheless, the Guidance does set out these bases, albeit that they are very general in nature. They were, put shortly: consistency with the strategy; clarity of objectives; anticipated improvements; industry leadership; and practicality (including controls and financial and enforcement implications).

[31] Once the proposals had been submitted and adjudged suitable for public consultation (ie their basic viability had been accepted), it is highly doubtful whether the

Guidance had any continuing formal application to the process of selecting the two pilots. That process had moved onto a public consultation phase, as the Guidance had anticipated may have been required. The expectation thereafter was not that any former criteria should continue to apply but that the determination of which pilots would be selected would become a political decision, for the respondents to take, based on the responses to the questions asked in the consultation paper. These questions were not the same as the "bases" upon which the proposals were originally considered in terms of the Guidance. They were about whether the proposals were supported by the consultees and what, in relation to the original Inner Sound proposal, the impact of a total prohibition on mobile fishing might be.

[32] It is important to view the process for what it was. All that was being decided was whether certain pilots were to take place. No doubt, one or other of these pilots could have at least a temporary effect on some elements of the fishing industry, but the decision-making exercise should not be compared with one which might involve a permanent adverse effect on economic interests and certainly not with one which had the potential to interfere with a person's human rights. *Dicta* from cases concerning these types of decision are not helpful. After the acceptance of some of the pilots for consultation, the field became a battleground for the display of competing fishing and other interests, upon which decisions would be taken based on public responses rather than the previously stated criteria.

[33] The fact that reference was made in the original Outcome Report to the criteria in the Guidance having been taken into account tells the reader very little when it is noticed not only that the reference to "criteria" must have been to the two criteria described in the questions in the Guidance but also that the consultation responses were, as they were bound to be, taken into account. The reasons for the ultimate acceptance or rejection of proposals were not itemised against any of the bases described in the Guidance (although some would

inevitably play a part) but under reference to more general considerations, which had been consulted upon, of impact on both the fisheries and the local and wider communities.

[34] In any event, once the exercise of selecting the pilots had been completed, with the publication and implementation of the original Outcome Report, the advertised process, including the Guidance, ceased to have either application or relevance. As outlined above, exactly what Marine Scotland were doing when they agreed, as they appear to have done, to consider a new proposal from the petitioners or their constituents, remains opaque beyond that generality. The purpose of the exercise, as explained in the minutes of 25 September 2018, was not to consider a new proposal but to revisit the old one to see if there was "anything missed from the original" which might be "adjusted to offer any unique learning opportunities". This wording, which was to a large extent repeated in the new Outcome Report, must have meant something to the drafter, but to the reader its meaning, if other than obfuscation, remains something of a mystery. It does not suggest that there was any room for a reconsideration of a new proposal; yet that is what, it is admitted, happened.

[35] At least at the point at which the new proposal was put out for consultation, all reference to it being submitted, or later considered, according to any criteria had gone. The new proposal was not completed on an original form. It was accepted for public consultation and described in a new consultation paper. The questions asked in this new paper were sixteen in number. They were specific to the Inner Sound proposal and focused on the impact of that proposal. Various interested parties responded, in a similar manner to their earlier contributions, and these responses were taken forward for consideration.

[36] What Marine Scotland were then tasked with was the assessment of the responses. This amounted in summary to little more than an exercise to decide whether the proposed pilot was a good idea; ie would it achieve any practical benefit in terms of (as it was put

extremely broadly in the earlier Strategy) improving the evidence base for management decisions, streamlining governance and promoting fishers' participation and embedding management into wider marine planning. Put even more simply, would the pilot achieve anything in a practical sense relative to that Strategy's aims?

[37] The new Outcome Report consisted of a detailed analysis of the responses. It emphasised the strength of the opposition to the proposal in terms of benefit and practicality. The conclusion that Marine Scotland reached was that the pilot should not go ahead, partly because of the level of local opposition. This is not a reason which stultifies good governance, but one which has regard to the principles of democracy. The Outcome Report did not just record the level of opposition that prompted the decision, it itemised the nature of that opposition under reference to the answers to the sixteen questions which had been asked. Thus there were doubts about the effectiveness and impartiality of the proposed pilot management group. It was also doubted whether the measures proposed would provide the relevant insight. It was contrary to the alleged right to roam. Even then, Marine Scotland did not let matters rest there. Rather, they agreed to continue work, in the form of the four strands already referred to, in order to support the local management of the fisheries.

[38] The consultation process and the reasoning which followed cannot be faulted. There was no procedural unfairness. The petitioners were given an opportunity, indeed an additional chance, to put forward their proposals. Their legitimate expectation was that these proposals would be considered in the light of the consultation responses, which they duly were. The decision ultimately reached gave a clear and reasoned explanation for not proceeding with the pilot; *viz.* the strength and nature of the opposition to it. Strength of opposition may not always be a sound base for rejecting proposals which have to be

objectively valued against, for example, planning policy; but this was not a comparable exercise.

[39] The court will accordingly allow the reclaiming motion, recall the Lord Ordinary's interlocutors of 2 and 18 February, repel the petitioners' third to sixth pleas-in-law, sustain the respondents' third to seventh pleas-in-law and refuse the prayer of the petition.

[40] Had the court adhered to the interlocutor of the Lord Ordinary, in so far as dealing with the merits of the application, it would not have been inclined to sustain any of the arguments in relation to the remedy granted ordering reassessment of the new proposal. If it had been decided that the new proposal required to be assessed according to the original Guidance, that is precisely what the court would expect to happen. There is nothing unclear or doubtful about what the interlocutor of 18 February required. The respondents may not have agreed with the outcome but, especially in light of their constitutional position, they would have required to comply with it. There is no substance whatsoever in the contention that the Lord Ordinary failed to have regard to the passage of time since the Outcome Report on the new proposal was published or to what had happened in the interim. Had it required to do so, the court would have regarded these contentions as essentially obstructive to the proper implementation of a clear and unambiguous lawful order.