FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 40
P1176/19

Lord President
Lord Menzies
Lord Doherty

OPINION OF THE COURT

delivered by LORD MENZIES

in the petition of

ENERGIEKONTOR UK LTD

Petitioner and Respondent

against

(FIRST) ADVOCATE GENERAL FOR SCOTLAND, on behalf of the Ministry of Defence

First Respondent

and
(THIRD) CWL ENERGY LTD

Third Respondent and Reclaimer

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Petitioner and Respondent: Mure QC; Wright Johnston & Mackenzie LLP
First Respondent (Advocate General for Scotland): Crawford QC; Morton Fraser LLP
Third Respondent and Reclaimer (CWL Energy Ltd): MG Thomson QC, van der Westhuizen; CMS Cameron McKenna Nabarro Olswang LLP

30 July 2021

Introduction – the issue before this court

[1] The principal issue in this case is whether there has been a breach of the rules of natural justice, or procedural unfairness which has prejudiced the reclaimer. The petitioner raised these proceedings for judicial review in December 2019. At that time the remedies

which the petitioner sought were in general terms, namely judicial review of (i) the policy of the Ministry of Defence in connection with safeguarding the Eskdalemuir Seismic Array and (ii) the noise budget allocation table prepared by and applied by the MOD in that regard. There was no specific attack on any particular noise budget allocation which had already been made. The petition was served on the Advocate General for Scotland as representing the MOD (designed as the respondent), and on the Scottish Ministers and the Advocate General for Scotland as representing the Department of Business, Energy and Industrial Strategy (as interested parties). No service was sought on any other persons.

[2] The court assigned 18 March 2020 as a permission hearing to consider (a) whether the petition was time barred in terms of section 27A of the Court of Session Act 1988, and if so, whether to extend the time period specified therein, and (b) whether to grant permission for the petition to proceed in terms of section 27B(2) of the 1988 Act. At that hearing the court heard submissions for the petitioner and the MOD; no other persons were represented or appeared. By interlocutor dated 17 April 2020 the Lord Ordinary extended the time period and granted permission for the petition to proceed (his opinion of that date is referred to as "the first opinion").

[3] Publicity about the case was then given in the renewables press, as a result of which the reclaimer learnt of the existence of the proceedings. The reclaimer was already in receipt of a noise budget allocation by the MOD by reason of a decision dated 18 January 2018. On 4 June 2020 it was allowed to enter the process as third respondent.

[4] On 16 October 2020, one week before the substantive hearing, the petitioner "refined" its submission to seek reduction of the MOD's decision dated 18 January 2018 to allocate noise budget to the reclaimer's proposed Faw Side windfarm development.

[5] At the substantive hearing on 23 October 2020 the Lord Ordinary heard submissions on behalf of the petitioner, the MOD and the reclaimer, including submissions about the "refined" remedy. By interlocutor dated 23 December 2020 the Lord Ordinary not only granted declarator that the policy of the MOD in respect of the allocation of noise budget to proposed windfarm developments within the consultation zone around the Eskdalemuir Seismic Array was unreasonable, *ultra vires* and unlawful, but also granted reduction of (a) the MOD's decision dated 18 January 2018 to allocate noise budget to the third respondent's proposed Faw Side windfarm development, and (b) the waiting list entitled "Eskdalemuir Applications Since Budget Breached".

[6] All parties are agreed that the MOD's policy was unreasonable, *ultra vires* and unlawful, so the declarator is uncontroversial and we need say no more about it. The arguments before us focused principally on whether, in light of the background to this case, the decree of reduction breached the principles of natural justice, or was otherwise vitiated by procedural irregularity which caused prejudice to the reclaimer.

The factual and planning background

[7] The Eskdalemuir Seismic Array is operated by the MOD. The Lord Ordinary gave a helpful summary of the planning background in his opinion dated 23 December 2020, as follows:

> "[4] The Array comprises an array of seismometers capable of detecting vibrations caused by nuclear tests. It is part of the verification regime provided for in the Comprehensive Nuclear Test Ban Treaty and operated under the surveillance of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organisation. There is an agreement dated 12 November 1999 (Cm 4675) between the UK and the Preparatory Commission on the conduct of activities relating to the International Monitoring Facilities for the Treaty. The Treaty presently has no force in UK domestic law. However, based upon its obligations under the Treaty and under the Vienna Convention on the Law of Treaties, it is the UK Government's

policy to protect the Array for the purposes of the Treaty. The MOD takes the lead through its Safeguarding Department within the Defence Infrastructure Organisation. That protection includes protection from seismic vibrations from other sources that could interfere with the Array's detection capabilities.

[5] The forces acting on wind turbines cause vibrations in their structure, some of which are transferred to the ground and can travel for many kilometres. A report commissioned in 2005 (the Styles Report) made recommendations regarding the siting of wind farms in the vicinity of the Array. The authors of the report recommended an aggregate seismic ground vibration threshold for all wind farms of 0.335 nanometres (nm) of ground displacement. This is known as the noise budget. In the light of the Styles Report, the MOD established two zones around the Array: (i) an exclusion zone of 10km within which the MOD would object to any wind farm development, and (ii) a consultation zone of 50km within which the MOD would require to be notified of relevant applications. Paragraph 3 of the Ministry of Defence (Eskdalemuir Seismic Recording Station) Technical Site Direction 2005 requires a planning authority to consult the MOD before granting any application for wind farm development within the 50km zone.

[6] The Eskdalemuir Working Group ('EWG') was established in 2004 to consider the potential impact of wind farms in the vicinity of the Array. It is funded by *inter alia* the MOD and Renewable UK (formerly the British Wind Energy Association) and is convened by the Scottish Ministers. Its members include a number of commercial wind farm operators including the petitioner and CWL. The EWG was responsible for commissioning the Styles Report and, in 2014, it commissioned a further report (the Xi Report) to re-examine the Styles methodology. The Xi Report concluded that the 2005 methodology should be replaced by a physics-based algorithm and that, if this was done, there was 'headroom' for additional wind farm developments within the 0.335 nm noise budget threshold.

[7] MOD policy is to allocate noise budget on a first come first served basis. The basis upon which the MOD decides whether or not to object to a wind farm development application is whether the granting of the application would or would not cause the noise budget threshold to be exceeded. In order to assess whether this would be so, the MOD uses an Excel spreadsheet called the Noise Budget Tool. This spreadsheet lists all existing and proposed wind farm developments within the consultation zone, together with *inter alia* their capacity, mean distance from the Array, and calculated amplitude (in nm). The effect of a wind farm development on the noise budget will depend primarily upon the number of turbines and their proximity to the Array. When a proposed new wind farm development is added to the spreadsheet, the Noise Budget Tool re-calculates the cumulative amplitude of the new development together with all of those already appearing in the spreadsheet. By this means the MOD assesses whether the amplitude of a further proposed development would cause the cumulative total to exceed the noise budget; if so, an objection will be lodged. It is very unlikely that a development objected to by the MOD on this ground would receive planning permission without the MOD having subsequently given its approval.

[8] The spreadsheet can be used to produce a table, in electronic or print form, containing details of all existing and proposed windfarm developments within the consultation zone, as at the date when the information is requested. A version of the table produced for the purposes of the present proceedings has had added to it a further column entitled 'status' (eg 'constructed' or 'granted'). Proposed developments intimated after the noise budget has been exceeded are not entered in such a table, but are instead placed by the MOD, on the same first come first served basis, on a 'waiting list' entitled 'Eskdalemuir Applications Since Budget Breached'.

[9] The statutory procedure for obtaining planning permission for a wind farm development differs according to whether or not the capacity of the proposed development exceeds 50 megawatts (MW). For a development exceeding that capacity, consent must be given by the Scottish Ministers under section 36 of the Electricity Act 1989 (an application requiring such consent is referred to as a section 36 application). The local planning authority is a statutory consultee. In terms of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, certain (but not all) section 36 applications must be accompanied by an environmental impact assessment (EIA) report. In terms of regulation 12(1) of the 2017 Regulations, a developer may (but is not obliged to) ask the Scottish Ministers to adopt a scoping opinion, which advises on what should be included in any EIA report accompanying a section 36 application. Where a scoping opinion is requested, the Scottish Ministers consult the MOD on the proposal.

[10] For a development with a capacity not exceeding 50MW, there is no requirement for a section 36 consent, and the application for planning permission is made to the local planning authority under the Town and Country Planning (Scotland) Act 1997. Again, certain applications must be accompanied by an EIA report, and the developer may (but need not) ask the planning authority to adopt a scoping opinion which advises on what should be included in such a report. If a scoping opinion is requested, the MOD will be consulted.

[11] The issue in the present petition arises out of a distinction drawn in the policy of the MOD, as regards the allocation of noise budget, between the treatment of applications for developments with capacity greater than 50MW and of those with capacity not exceeding 50MW. In relation to a proposed development whose capacity does not exceed 50MW, noise budget is allocated to the development when the MOD is notified by the local planning authority of the developer's planning application. However, in relation to a proposed development whose capacity exceeds 50MW, noise budget is allocated to the development when the MOD is notified by the Scottish Ministers of a scoping request by the developer in relation to an EIA report. The petitioner's contention in these proceedings is that this difference in treatment creates a preference in favour of larger (capacity > 50MW) proposed developments, which will be allocated noise budget at an earlier stage of the planning process than smaller proposed developments.

[12] From about 2015 the petitioner became interested in carrying out wind farm developments with capacities of less than 50MW at locations within the consultation zone. In September 2017, the petitioner applied to the local planning authority (Dumfries and Galloway Council) for a scoping opinion in relation to a proposed windfarm of 14 turbines at Little Hartfell, near Langholm. The planning authority consulted the MOD who advised that the noise budget would be 'allocated to planning application' [*sic*] on a first come first served basis, and that if the budget had been fully allocated at the time of submission of the application, it was possible that the MOD might object. On 9 February 2018, the petitioner applied for planning permission for a wind farm at Little Hartfell. The application was intimated to the MOD. On 26 February 2018 the MOD added the application to its waiting list. On 13 April 2018, the MOD submitted an objection to the application 'due to the potential unacceptable impact of the wind farm on the [Array]', on the ground that the limit of the noise budget had already been reached. That had occurred by virtue of the Faw Side application having been allocated noise budget, as narrated below.

[13] On 9 June 2020, Dumfries and Galloway Council granted planning permission for the Little Hartfell wind farm development. The grant of permission is subject *inter alia* to a condition that

> '…no part of any turbine shall be erected unless and until a Mitigation Scheme to address the impact of the development upon the Eskdalemuir Seismic Array has been submitted to and approved in writing by the Council as planning authority (in consultation with MoD)'.

[14] On 4 December 2017, CWL submitted a request for a scoping opinion to the Scottish Ministers' Energy Consents Unit (ECU) in relation to a proposed wind farm development consisting of 49 turbines with a maximum generating capacity of 315MW situated at Faw Side, approximately 11km from the Array. The request was submitted to the MOD by the ECU on 18 January 2018. On that date, in accordance with the policy narrated above, the MOD allocated noise budget to the proposed Faw Side development. However, as a consequence of its location and capacity, the amplitude of the proposed development (0.674nm) caused the noise budget to be exceeded. By letter dated 6 February 2018, the MOD informed the ECU that it would object to the development. The ECU issued its scoping opinion to CWL on 5 April 2018. On 22 May 2019, CWL submitted an application to the Scottish Ministers for a section 36 consent. By letter dated 26 June 2019, the MOD objected to the application, on the ground that the reserved noise budget had been reached. The MOD have since confirmed that the budget would be breached if more than two turbines were to be built at Faw Side. The application for section 36 consent has not yet been determined."

The history of these proceedings for judicial review

[8] As indicated above, the petition for judicial review was lodged in December 2019,

and thereafter the court appointed an oral hearing to consider whether permission should be granted for the application to proceed, and whether the petition was time barred, and if so, whether it was equitable to extend the three month time limit. The statutory provisions governing these matters are to be found in section 27A and section 27B of the Court of Session Act 1988, which provide, so far as relevant, as follows:

> "27A Time limits
>
> (1) An application to the supervisory jurisdiction of the Court must be made before the end of –
>
> (a) the period of three months beginning with the date on which the grounds giving rise to the application first arise, or
>
> (b) such longer period as the Court considers equitable having regard to all the circumstances …
>
> 27B Requirement for permission
>
> (1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.
>
> (2) … the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that –
>
> (a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and
>
> (b) the application has a real prospect of success.
>
> …
>
> (4) The Court may grant permission under subsection (1) for an application to proceed –
>
> (a) subject to such conditions as the Court thinks fit,
>
> (b) only on such of the grounds specified in the application as the Court thinks fit.
>
> …".

[9] At the permission hearing, the court heard submissions on these matters on behalf of the petitioner and the MOD. No other parties were represented; no service had been effected on the reclaimer, nor on any person with an interest in any of the wind farm

developments listed in the Noise Budget Tool, nor on the "waiting list" entitled "Eskdalemuir applications since budget breached".

[10] In his first opinion, the Lord Ordinary sets out the arguments for the petitioner and the MOD. Both accepted that, in reaching its decision as to whether it would be equitable to allow the petition to proceed, the court must have regard to all the circumstances. The petitioner listed nine circumstances as being relevant (see para [19] of the first opinion). Amongst these was "[no] issue of hardship or prejudice to the MOD arose"; no mention was made of potential prejudice to developers of sites listed on the Noise Budget Tool and/or the "waiting list". Similarly, the MOD did not mention prejudice to these other developers as being a circumstance to be taken into account. It is hardly surprising, therefore, that, while the Lord Ordinary recognised (at para [22]) that the decision whether to extend the three month period during which judicial review proceedings must be commenced is a matter of discretion for the court, having regard to all circumstances, the Lord Ordinary did not consider potential prejudice to the reclaimer or to any other such developers. It was simply not a matter raised before him. Indeed, he observed (at para [27]) that:

> "The mere fact of permission being granted will not, so far as I am aware, have any immediate practical consequences: the current situation is that due to its proposed capacity, the Faw Side proposal not only exhausts but greatly exceeds the currently available noise budget, so there does not appear to be any question of interference with progress with a development that would otherwise be under construction. Nor would the remedies sought affect any wind farm development which has already received the relevant planning approval."

He considered the question of any prejudice to the MOD (at para [28]) and concluded that no such prejudice had been identified. He did not consider prejudice to any other parties.

[11] Following the issuing of the first opinion, the judicial review proceeded. The reclaimer read about it in the renewables press in April 2020, and on making enquiries discovered that permission to proceed had already been granted. On 4 June 2020 the court

granted leave to the reclaimer to enter the process as third respondent, and on 6 July 2020 the court assigned 11 September 2020 as the date of the procedural hearing and 23 October 2020 as the date for the substantive hearing. Parties were allowed to adjust their pleadings until two weeks prior to the date of the procedural hearing. The reclaimer lodged answers, and adjusted these in late August 2020. About a week before the substantive hearing, the petitioner was allowed to "refine" the petition by adding a further remedy to be sought, namely the specific reduction discussed above. Having heard counsel for parties at the substantive hearing on 23 October 2020, the Lord Ordinary granted declarator and reduction on 23 December 2020, and issued his second opinion on that date.

Submissions for the reclaimer

[12] Whilst acknowledging that there was some overlap between his three grounds of appeal, senior counsel for the reclaimer adopted all three grounds of appeal and his note of arguments. In brief summary, the three grounds were as follows:

(1) The Lord Ordinary in extending the three month time limit did not have regard to all the circumstances. He failed to consider that the petition had not been intimated to the reclaimer or to any other interested developer and, accordingly, none of the affected parties had the opportunity to oppose the granting of permission to proceed out of time. The Lord Ordinary did not adequately consider what the effect of reducing the table would be on allocations previously made by the MOD and recorded in the table. If he had considered that granting permission for the petition to proceed out of time would include the ability to reduce such allocations, he should have required intimation of the petition to be made to the reclaimer and other interested developers, before proceeding with the hearing on whether to grant

permission out of time. Several circumstances (to which we return below) would have been brought to his attention by the reclaimer. If the Lord Ordinary considered that the respondent was seeking reduction of allocations and had regard to these circumstances, he could not reasonably have decided that it would be equitable to extend the time limit. In granting permission without prior intimation to the reclaimer and other interested developers, the Lord Ordinary limited the scope of the remedies which could subsequently be granted against them, which, in the circumstances, did not include reduction of allocations.

(2) The Lord Ordinary erred in law in allowing the respondent to change the remedies sought and in granting the new remedy.

(3) The Lord Ordinary erred in granting a remedy that is in itself discriminatory, without an explanation of the reasons for the discrimination. There was no rational basis for reducing only the Faw Side allocation decision and not any of the MOD's other similar allocations listed above it in the table. The Lord Ordinary gave no reason why this could properly be done. The decision to do this was irrational and unfair. There was similarly no rational basis for reducing the waiting list.

[13] Senior counsel relied on the sequence of events in 2018 and 2019. On 6 February 2018 the MOD wrote to the senior case officer at the Scottish Government referring to the scoping opinion request for a proposed section 36 application at Faw Side with 49 turbines and indicated that "at present the reserved noise budget has been reached so the MOD must object to this application due to the potential unacceptable impact of the windfarm on the [Array]." On 9 February 2018 the local authority received a planning application from the petitioner for 12 turbines at Little Hartfell, and on 6 March 2018 the MOD confirmed that the Little Hartfell site was first in the queue after Faw Side. Reference was made to two

affidavits lodged on behalf of the petitioner, each of Mr Duncan Taylor, who was the project manager of the petitioner responsible for all three of their developments affected by the Array. In the first of these affidavits Mr Taylor stated (at para 3.7) that the petitioner learned in early March 2018 that the seismic noise budget had been reached due to a scoping submission for a very large windfarm. He went on to state that this was when the petitioner first learned of MOD's budget allocation policy and the existence of a list or table which tracks windfarm development in the Eskdalemuir consultation zone. Further correspondence confirmed that Little Hartfell is first in the budget queue after Faw Side. Senior counsel submitted on the basis of this affidavit that the petitioner was aware by 23 April 2018, at the latest, of the discriminatory nature of the MOD's policy, that there had been an allocation of noise budget to the reclaimer's site at Faw Side, that this breached the noise budget, and that the reclaimer was ahead of the petitioner in the queue for allocation of more noise budget. Accordingly, the petitioner knew all it needed to know to challenge the policy by 23 April 2018 at the latest. What happened on 11 January 2018 was the exercise of an administrative function which was susceptible to challenge by judicial review, which would trigger the three month period for the purposes of section 27A; 23 April 2018 was the last possible date that it could be argued for the starting point of the three month period.

[14] In his first opinion the Lord Ordinary allowed the petition to proceed although not presented until December 2019, but at that time there was no suggestion that the petitioner sought reduction of the allocation already made in favour of the reclaimer. He was denied the opportunity to exercise his discretion on this matter because of the way in which the petition was presented. There was no indication at that time that the petitioner required the existing allocation in favour of the reclaimer to be quashed in order to achieve what it sought. In his first opinion the Lord Ordinary was considering a challenge to the lawfulness

of the MOD's continuing policy. The arguments presented to him did not focus at all on the need to reduce the existing allocation made to the reclaimer. There was no crave in the petition seeking such reduction, and no mention of the reclaimer (or any other developer with an existing allocation) in the schedule for service. The Lord Ordinary did not consider possible prejudice to the reclaimer as one of the factors when exercising his discretion.

[15] There were a number of factors which were prejudicial to the reclaimer. Senior counsel referred us to the affidavit dated 8 October 2020 from Mr Dafydd Thomson lodged on behalf of the reclaimer. He explained that one of the reasons that the UK has traditionally been a good place to invest is because of the policy stability. The reclaimer relied on confirmation of policy from the Scottish Ministers and the MOD following a meeting of the Eskdalemuir Working Group on 16 January 2019 that there would be no change of policy with retrospective effect. He stated that Mr Duncan Taylor and Mr Harrison, managing director of the petitioner, met him at the reclaimer's office on 12 June 2019 and asked the reclaimer to give them some of their budget for Faw Side to be used for their developments at *inter alia* Little Hartfell. The petitioner's position was that they would take the issue to court if the reclaimer did not agree to give them some of their budget. The reclaimer declined. Mr Thomson stated:

> "We knew that they were time barred from challenging the MOD decision to allocate Faw Side budget. We have been involved in judicial reviews and statutory appeals before and so we were well aware of the 3 month rule. At the time that meant we were unconcerned … Once they had visited our office we did not hear anything more from Energiekontor about court proceedings. We read about the judicial review proceedings in the renewables press in April 2020 … We were surprised that proceedings had been commenced without being intimated to us because it was obvious we were an interested party and would be affected by any decision."

[16] Mr Thomson also gave details of the reclaimer's expenses. Due to the size of a project involved in a section 36 application such as Faw Side, the reclaimer spent £345,000 on

option, legal and agent's fees, a further £332,000 for environmental consultants, £97,000 on an application fee for access to the grid and a bonded security requirement of £378,000. He observed that:

> "To do that with no certainty of allocation of budget and your position in the queue would not be reasonable and the smaller developments do not have the same level of outlays. As a developer you spend a certain amount up to the point of scoping, get your allocation, and then spend more knowing you have secured a place in the queue."

The reclaimer spent about £577,000 in respect of Faw Side prior to scoping, and since scoping they have incurred about £918,000. Before scoping on another site at Scoop Hill the reclaimer incurred costs of about £913,000 and since scoping further expenses of about £633,000. None of this information was placed before the Lord Ordinary at the first hearing.

[17] If the information contained in Mr Thomson's affidavit had been placed before the Lord Ordinary it is unlikely that he would have extended the time limit under section 27A so as to enable him later to quash the allocation in favour of the reclaimer. He was obliged to have regard to all the circumstances. Because of the way in which the petition was framed, he did not have all the circumstances before him. If the petition had sought reduction of the existing allocation in favour of the reclaimer, it is inconceivable that the reclaimer would have been omitted from the schedule for service. The information which the Lord Ordinary required was not available to him. The document headed "Note on Authorities for the petitioner" which was lodged in advance of the hearing on time bar was concerned solely with the existing continuing policy of the MOD; it gave no hint that the petitioner might subsequently seek reduction of existing allocations, nor did it address the possibility of prejudice to any other parties. This was reflected in the submissions for the petitioner which were recorded by the Lord Ordinary at paragraph [19] of his first opinion, which began as follows:

> "On behalf of the petitioner it was submitted that it would be equitable to allow the petition to proceed, having regard to all the circumstances. Those circumstances were as follows …".

There then followed a list of nine circumstances, but in none of these was there any suggestion that there might be prejudice to other developers in general, or the reclaimer in particular. Prejudice to others was only addressed in the fifth of these circumstances: "No issue of hardship or prejudice to the MOD arose". Similarly, the MOD (the only respondent at that time) made no submission that there might be prejudice to others.

[18] The Lord Ordinary (at paragraph [24] of his first opinion) noted that the noise budget allocation table was not – and still is not – routinely published, which suggested that it was only a secondary record of events. If the petitioner thought that by quashing the table it was seeking to quash the underlying allocations, the petition ought to have been intimated to the recipients of all allocations, and all those who had applications pending for allocations and were on the waiting list.

[19] One of the circumstances to which the Lord Ordinary gave no consideration (paragraph [25] of his first opinion) was all the work which was being carried out, and the expenses being incurred, by the reclaimer during this period, all as explained in Mr Thomson's first affidavit. Senior counsel submitted that there were several possible dates from which time might be said to begin to run for the purpose of section 27A – 11 January 2018, 6 March 2018 or 23 April 2018. Certainly by the last of these dates the petitioner knew everything it needed to know in order to raise the petition. It knew the identities of all developers who were recipients of noise allocations and those who had pending applications and were on the waiting list. Intimation ought to have been effected on each of these. The Lord Ordinary did not take into account the investment decisions made by the reclaimer in reliance on the events of January 2018. Not only did this result in

unfairness to the reclaimer, because it denied the reclaimer an opportunity to make submissions, it resulted in the court being unable to exercise its discretion properly under section 27A.

[20] The discretion which the Lord Ordinary was exercising in his first opinion was different from the discretion as to whether to grant a remedy, which he exercised in his second opinion. In the second opinion he did not consider the issues raised by section 27A – although the Lord Ordinary narrated the history of the proceedings and the fact that he had allowed an extension of time, he did not revisit the exercise of his discretion in terms of section 27A in light of the reclaimer's submissions or the revised remedy then sought.

[21] With regard to the remedy of reduction added shortly before the substantive hearing, senior counsel observed that the Lord Ordinary (at paragraph [15] of his second opinion) said that: "following clarification in an affidavit lodged by the MOD of the status of the table … the petitioner refined its submission to seek reduction of the allocation decision …". The change effected by the petitioner shortly before the substantive hearing was, senior counsel submitted considerably more than a "refinement". For the first time the petitioner targeted the reclaimer and sought reduction of the allocation to the proposed Faw Side windfarm development. If this had been done at the outset, this would inevitably have required intimation to the reclaimer, and the court could have exercised properly its discretion under section 27A. What the petitioner did shortly before the substantive hearing was to change the focus of the petition from quashing the table to quashing the underlying allocation. This was something which ought to have been done by means of a minute of amendment, following which these issues could have been ventilated and the Lord Ordinary could have applied his mind again to the section 27A discretion.

[22] Until the substantive hearing the petitioner did not make it clear, to the court or to the reclaimer, precisely what remedy it sought and whether this would have retrospective effect. In its answers to the petition the reclaimer made several calls on the petitioner to clarify this. For example, the petitioner was called upon to specify whether it considered that a declarator alone would require (or even lawfully enable) the MOD to re-determine allocations previously made and recorded in the table, and the reclaimer had a legitimate expectation that any new policy would not have retrospective effect. The petitioner was further called on to specify what it considered the effect of reducing the table would be and, in particular, whether it considered that some or all of the allocations of the noise budget previously made by the MOD, and recorded in the table, would also thereby be reduced. None of these calls were answered by the petitioner. None of these matters were considered in the first opinion. In the second opinion (at paragraph [38]) the Lord Ordinary observed, when considering whether to grant reduction, that reduction would have no immediate practical consequences. However, he failed to include in his consideration all the investment and expenditure spoken to by Mr Thomson in his affidavit.

[23] In a nutshell, senior counsel indicated that the reclaimer felt safe with the allocation which they received in January 2018, and the three month time limit had long expired, so they refused to deal with the petitioner. The petitioner then raised the petition without intimating it to the reclaimer, when it was obvious to them that the reclaimer would be significantly affected by the petition.

[24] Turning to ground two, senior counsel submitted that the Lord Ordinary erred in law in allowing the respondent to change the remedies sought, and in granting the new remedy. The first time that this new remedy was mentioned was in the petitioner's written submission lodged on 16 October 2020, one week before the substantive hearing. No

attempt was made to amend the petition or to add appropriate pleas-in-law. At the first hearing the petitioner did not ask for permission to seek reduction of previous allocation decisions made by the MOD in accordance with its policy, nor did it specify that this is what it considered the effect of reducing the table would be, and the Lord Ordinary did not consider what the prejudice to, or the consequences for, the reclaimer and other developers would be of reducing the table. The respondent also did not ask for reduction of the waiting list and the Lord Ordinary did not consider it. Although the Lord Ordinary has a wide discretion under Rule 58.13(2) of the RCS, that does not extend to entertaining a challenge of a different decision to that initially challenged or to granting relief different from that sought in a petition and for which there is no appropriate plea-in-law, particularly in the context of a petition that had already been raised long out of time. Reference was made to *Prior* v *Scottish Ministers* 2020 SC 528, particularly at paragraphs [36] to [40] of the opinion of the court, delivered by the Lord President (Carloway). Where the petitioner seeks not to change the grounds of challenge, but the object of challenge and those who will be affected, and where what is proposed is a focused attack on a particular decision affecting a particular person, it is appropriate to proceed by way of minute of amendment. This allows the court to consider the new issues, particularly in a time bar case. The exercise of the discretion under section 27A is quite different from the exercise of a discretion as to whether to withhold a remedy. Although the petitioner suggests that this is merely a refinement of what was originally sought, it focuses directly on the reclaimer and seeks a different remedy without any supporting plea-in-law. If it had formed part of the petition as originally lodged, the court could not reasonably have granted an extension of time under section 27A.

[25] The third ground of appeal was that the Lord Ordinary erred in granting a remedy that in itself is discriminatory, without an explanation of the reasons for the discrimination.

There was no rational basis for reducing only the Faw Side allocation decision and not any of the MOD's other similar allocations listed above it in the table, and the Lord Ordinary gave no reason why this could properly be done. The decision to reduce only Faw Side is irrational and unfair. If the intention was to seek a level playing field one would expect all pending applications submitted before the adoption of a new policy to be reduced, rather than just one. In addition to Faw Side, there were ten other developments listed above it on the table with a status shown as "pending" and in a similar position to Faw Side, and whose developers had not received intimation of the petition. The Lord Ordinary gives no reason why this could properly be done and his decision to reduce only Faw Side is unfair and irrational.

[26] Senior counsel submitted that the waiting list which was before the court at the substantive hearing was an out-of-date snapshot of the waiting list as it stood at 22 January 2019; the reclaimer subsequently obtained an updated version of the waiting list from the MOD from which it is apparent that there were an additional 21 entries.

[27] Furthermore, the Lord Ordinary had misapplied *Anderson Strathern LLP* v *Scottish Legal Complaints Commission* 2017 SC 120 and *Council of the Law Society of Scotland* v *Scottish Legal Complaints Commission* 2017 SC 718. As is clear from paragraph [83] of the latter, there are limits to be placed on retrospective application to previous decisions already made, which depend on the particular circumstances, including the impact that revisiting previous decisions might have on persons affected thereby.

[28] Senior counsel for the reclaimer relied on each of these grounds of appeal, and invited the court to quash part (ii) of the interlocutor dated 23 December 2020 which reduced (a) the MOD's decision dated 18 January 2018 to allocate noise budget to the

reclaimer's proposed Faw Side windfarm development, and (b) the waiting list entitled "Eskdalemuir Applications Since Budget Breached".

Submissions for the petitioner

[29] Senior counsel for the petitioner invited the court to refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutors of 17 April and 23 December 2020 He adopted his note of argument, and observed that the term "all the circumstances" in section 27A must be those before the Lord Ordinary at the time he considered the section 27A application; the Lord Ordinary cannot be criticised for not having regard to information which someone else might later put in. The affidavit of Desmond Egan dated 9 October 2020, with table attached, added to the petitioner's understanding of the status and purpose of the MOD's noise budget table, and the noise budget tool. What the petitioner sought to do in revising the remedy it sought was to restrict the remedy so that, instead of reducing the whole table, the court could focus on those parts that particularly affected the petitioner. At the substantive hearing in October 2020 the Lord Ordinary heard full arguments from the reclaimer, including arguments on the specific point about delay in raising the proceedings. The Lord Ordinary had ample material to enable him properly to grant permission for the petition to proceed out of time. In his first opinion he did everything required of him in terms of section 27A. *Prior* v *Scottish Ministers* involved quite different circumstances, in which the petitioner sought to substitute wholly different grounds. That fell to be contrasted with the present case, in which the petitioner was seeking the same remedy but seeking to restrict it.

[30] It had been submitted on behalf of the reclaimer that the reclaimer had been denied the opportunity of making submissions regarding delay and prejudice to it and other

potential developers at the permission hearing. However, the reclaimer took the opportunity to make detailed submissions on these matters to the Lord Ordinary at the substantive hearing – see their note of argument for that hearing, paragraphs 105-112. The MOD had written on three occasions (6 February 2018, 26 June 2019 and 14 August 2020) objecting to the Faw Side application and confirming the objection. The operation of the MOD's unlawful policy in 2018 caused Faw Side to leapfrog ahead of the petitioner's windfarm proposal at Little Hartfell. The local planning authority issued a scoping opinion in September 2017 in relation to Little Hartfell which contained the MOD's comments on the proposal. These indicated that the MOD may object, but did not suggest that the noise budget had been reached. The petitioner submitted a planning application for Little Hartfell on 9 February 2018; on 13 April 2018 the MOD stated that it would object to this because "at present the reserved noise budget has been reached so the MOD must object to this application due to the potential unacceptable impact of the windfarm" on the Array. The only reason why the reserved noise budget had been reached at that date was that on 11 January 2018 the MOD had allocated all of the then remaining available noise budget to the Faw Side development. The simple point was that the petitioner had made applications both for a scoping request and a planning application before the reclaimer made such requests for Faw Side, but because of the MOD's unlawful policy their positions were reversed.

[31] Senior counsel accepted that section 27A conferred a broad discretion on the court, and that the court required to have regard to all circumstances. He submitted that at the permission hearing the court had all the information it required, and it concluded that the question of what remedy should be granted should be decided at a substantive hearing. It was correct to do so.

[32] The Lord Ordinary was also correct to conclude, having heard submissions from the reclaimer, that reduction of the allocation of noise budget to Faw Side was the most appropriate remedy. He explained his reasoning for this conclusion at paragraphs [35]-[38] of his second opinion. The Lord Ordinary correctly identified the MOD's decision to allocate noise budget to Faw Side as the practical manifestation of the operation of its unlawful policy as affecting the petitioner. Reduction was thus an appropriate remedy for the petitioner in this case. It cleared the way for the MOD's promised consultation and new policy formulation. It ensured that planning decisions in coming years were not affected by decisions taken by the MOD in pursuance of an unlawful policy. It did not disturb allocations of noise budget made to companies not before the court. It did not in any way affect the MOD's continuing power to object to any windfarm proposal which night prejudice the Array. It was the reclaimer's Faw Side proposal that broke through the noise budget allocation limit.

[33] Part of the submissions for the reclaimer to this court rested on the argument that at the permission hearing the Lord Ordinary did not have the information about expenditure incurred and investment decisions made, which is contained in Mr Thomson's affidavit. However, he had this information at the substantive hearing, and took it into account in his reasons for granting reduction (at paragraph [38]). It would have been wrong for the Lord Ordinary to disregard or leave out of consideration the consequences of the MOD's unlawful policy.

[34] With regard to the submission for the reclaimer that there had been procedural unfairness, the Lord Ordinary heard all the submissions for the reclaimer at the appropriate time. They were allowed to become parties to the proceedings, and to make full submissions at the substantive hearing. It was always clear what was sought to be reduced

in this petition, namely the waiting list. Senior counsel moved the court to refuse the reclaiming motion.

Submissions for the MOD

[35] Senior counsel for the MOD made no motion in respect of the reclaiming motion, and appeared only in order to assist the court and answer any questions. She made no substantive submissions regarding the grounds of appeal. The MOD recognises that its policy was unlawful and accepts that it needs to reconsider this. She noted that there were separate tests to be applied in section 27A and section 27B, and that the former required the court to have regard to all the circumstances.

[36] Senior counsel indicated that the MOD agreed with the terms of statement 2.5 of the petition. The table is not a public document but an internal tool for the MOD, which refers to the cumulative total in order to decide whether to object to a particular proposal. Developers do not "own" the MOD's internal calculation or allocation. In the case of Faw Side, the MOD objected to the proposal when first consulted at scoping stage and continues to object to it. As was explained in Mr Egan's affidavit, the tool stops calculating once the budget threshold is reached. After this point, there are no further calculations, but the MOD makes a note of applications. The use of the word "allocation" is unfortunate, because there is no right conferred. All it relates to is a decision whether or not to object. If the decision is not to object, that amounts to no more than the removal of a constraint on development. She agreed with a point made by the court that it appeared from the Lord Ordinary's interlocutor dated 23 December 2020 that the Lord Ordinary had reduced something which does not exist. If anything were to be reduced, it should have been the MOD's decision on 11 January 2018 to input the relevant data regarding Faw Side into the tool.

[37] Following the publication of the court's decision on this matter, the MOD intended to consult widely as to a new policy.

Response for the reclaimer

[38] The petitioner relied on the Lord Ordinary's reasoning in paragraph [38] of his second opinion, in which he commented that the reclaimer's "optimism that it will be possible to show that there is greater capacity to allow windfarm development in the consultation zone and to develop Faw Side in full must, for the time being, be regarded as speculative". However, in making this remark the Lord Ordinary appears not to have had regard to paragraph 29 of Mr Thomson's affidavit, which indicated that over the last three years the reclaimer had spent approximately £1.5 million doing analysis of the current MOD noise budget allocation algorithm with a view to working with the MOD to show that there is greater capacity to allow windfarm development in the Array consultation zone. As far as he was aware, the reclaimer was the only developer taking a proactive technical approach, and he was optimistic that this analysis would enable Faw Side and Scoop Hill to be developed fully. This was what gave the reclaimer confidence in what they were doing. The reclaimer had identified two risks to the Faw Side development – (1) the risk of the exclusion zone being extended to 15 kilometres, and (2) the risk of their losing their place in the queue. In December 2018 the Government announced its decision that it would retain the 10 kilometre exclusion zone, which dealt with the first of these risks. Once the reclaimer had made its application for a scoping opinion, that resolved the second risk. This gave the reclaimer confidence to proceed to incur further expenditure. Given that the Lord Ordinary gave Mr Thomson's evidence the badge of credibility and reliability, his use of "speculative" in paragraph 38 was unfair.

[39] The permission hearing was allocated for a full day on 18 March 2020, and the Lord Ordinary had already indicated that he was satisfied that the petition had a reasonable prospect of success. The only matter to be considered was the issue of time bar and whether it was equitable to extend the three month period. It was obvious to the petitioner, if not to the court, that the reclaimer would be most adversely affected if the allocation in favour of Faw Side was reduced.

Decision

[40] All parties are agreed that the policy of the MOD in respect of the allocation of noise budget to proposed windfarm developments within the consultation zone around the Eskdalemuir Seismic Array is unreasonable, *ultra vires* and unlawful. The MOD conceded this before the Lord Ordinary, and there was no opposition to part (i) of the Lord Ordinary's interlocutor dated 23 December 2020. We need say no more about this, and that part of the interlocutor will stand.

[41] The second part of the interlocutor of 23 December 2020 is in a different position. In this, the Lord Ordinary granted reduction of (a) the MOD's decision dated 18 January 2018 (this should be 11 January 2018) to allocate noise budget to the (reclaimer's) proposed Faw Side windfarm development, and (b) the waiting list entitled "Eskdalemuir Applications Since Budget Breached". In this regard we consider that there is force in each of the grounds of appeal advanced on behalf of the reclaimer. We agree that these proceedings have been so tainted by procedural unfairness that the Lord Ordinary's interlocutor dated 23 December 2020, in so far as it grants reduction, cannot be allowed to stand.

[42] The problem initially arose because of the way in which the petition was framed, and the fact that it was not intimated to the reclaimer. There was nothing in the statement of

facts in the petition to suggest that the petitioner would focus on a particular development or seek to reduce an allocation of noise budget in favour of another developer. Statements 3 and 4 of the petition as presented were in the following terms:

> "3 The decision to be reviewed is the MOD's continuing policy in respect of the allocation of noise budget to proposed windfarm developments within the consultation zone around the Array.
>
> 4 The petitioner seeks the following remedies.
>
> 4.1 Declarator that the policy of the MOD in respect of the allocation of noise budget to proposed windfarm developments within the consultation zone around the Eskdalemuir Seismic Array is unreasonable, *ultra vires* and unlawful.
>
> 4.2 Reduction of the MOD's Eskdalemuir Noise Budget Table."

[43] If it had been made clear that the petitioner was attacking the specific decision of the MOD on 11 January 2018 to allocate an element of its noise budget to the reclaimer's Faw Side development, and reduction of that allocation, it is unlikely that the petition department would have accepted the petition without at least the reclaimer being added to the schedule for service. Even if the petition had been accepted, it would have been clear on a first reading of the petition that there was a risk of prejudice to the reclaimer (and perhaps others), and that procedural fairness required that they should be informed of the proceedings. As it was, the reclaimer only discovered about the proceedings after the Lord Ordinary had granted permission in terms of section 27A and section 27B, and as a result of publicity in the renewables press.

[44] It is not clear why the petition was lodged without any indication that the petitioner's focus was on setting aside the allocation in favour of Faw Side. It appears from Mr Duncan Taylor's first affidavit that the petitioner became aware in early March 2018 of the MOD's budget allocation policy, of the existence of a list or table, and shortly thereafter that Little Hartfell was first in the budget queue after Faw Side. We agree with the

submission for the reclaimer that by 23 April 2018 at the latest the petitioner was aware of all the necessary facts to enable proceedings for judicial review to be initiated. Moreover, it is clear from the material in Mr Thomson's affidavit (which was not subject to any challenge by the petitioner as to factual accuracy on this point) that by June 2019 the petitioner was targeting the reclaimer's site at Faw Side and asking the reclaimer to give them some of their budget for Faw Side to be used for their developments at *inter alia* Little Hartfell, and stating that they would take the issue to court if the reclaimer did not agree. The reclaimer declined. The petition was not lodged until December 2019.

[45] When the Lord Ordinary exercised his discretion in terms of section 27A, it is common ground between the parties that he required to have regard to all the circumstances. As the reclaimer was unaware of the proceedings at that time, it did not have the opportunity to present submissions. The Lord Ordinary was clearly aware that he required to have regard to all the circumstances, and he listed those presented to him on behalf of the petitioner at paragraph [19] of his first opinion. The fifth of the listed circumstances was that no issue of hardship or prejudice to the MOD arose. There was no suggestion that there might be any prejudice to any other party. The Lord Ordinary went on to list the circumstances placed before him for the MOD at paragraph [20], and again there was no suggestion that there might be any prejudice to the reclaimer or any other party. It is therefore perhaps not surprising that the Lord Ordinary gave no consideration to potential prejudice to other parties in reaching his decision. He had no information before him such as is contained in Mr Thomson's affidavit. In particular, he was not told that parties such as the reclaimer incur significant expenditure and make investment decisions on the basis of allocations of noise budget, and that the reclaimer had been doing this since the allocation in respect of Faw Side on 11 January 2018. If the Lord Ordinary had been furnished with this

information before or at the permission hearing, he might well have reached a different conclusion when exercising his discretion to extend the time period under section 27A.

[46] Was this problem cured by the Lord Ordinary having this information before him at the substantive hearing? We do not consider that it was, because at that stage the Lord Ordinary was not able to, and did not, revisit or reconsider his decision to allow the petition to proceed out of time. He did have regard to this material when exercising his discretion as to whether to grant reduction, but that involved a different discretion and focused on different issues. We consider that the fact that possible prejudice to the reclaimer did not feature as a consideration in the Lord Ordinary's decision in terms of section 27A resulted in such procedural unfairness that the decree of reduction cannot be allowed to stand.

[47] It is appropriate to note at this stage the information helpfully provided on behalf of the MOD regarding the status of the noise budget tool and table. The terminology "allocate" and "allocation" is inaccurate, as there is no allocation of a right. The interlocutor dated 23 December 2020 therefore apparently reduced something which did not exist. If the court were minded to grant reduction, what should have been reduced was the MOD's decision on 11 January 2018 to input relevant data regarding the Faw Side development into the noise budget tool. It is clear that that decision had important consequences for the reclaimer. It afforded it priority over developers whose data had not been input by that date.

[48] We also consider that the reclaimer's second ground of appeal is well founded. What the petitioner sought to do when it lodged its written submission on 16 October 2020, only one week before the substantive hearing, was to direct a focused attack on the MOD's decision dated 11 January 2018 regarding Faw Side. The reclaimer had made repeated calls in its answers, seeking clarity from the petitioner as to what effect reduction of the table would have on existing decisions about allocation. This was the first occasion on which the

petitioner sought to have the MOD's decision about Faw Side reduced. As discussed above, the petitioner was aware from April 2018 that the Faw Side development was ahead of Little Hartfell in the "queue", and if Little Hartfell was to have a prospect of proceeding then Faw Side had to be knocked out. This was made abundantly clear from the petitioner's actings at the meeting in June 2019. What the petitioner did in its written submission lodged on 16 October 2020 was not a "refinement". As noted above, until that point the remedy sought by the petitioner was a general remedy; it was directed at the MOD's "continuing policy in respect of the allocation of noise budget", and reduction of its table. There was no suggestion that the petitioner sought any retrospective effect, nor that it sought reduction of a particular decision in respect of a particular development. There was no plea-in-law directed towards such a result, and no attempt was made to allow such a plea-in-law to be added.

[49] *Prior* v *Scottish Ministers* was concerned with a different set of circumstances, and the court in that case was faced with a significant change in the ground of legal challenge in the petition. In the present case, the ground of legal challenge remains the same, but the object of challenge has been significantly changed. Many of the observations in the opinion of the court, delivered by the Lord President (Carloway) in *Prior* v *Scottish Ministers*, are applicable in the present circumstances – particularly those at paragraphs [36]-[40]. Two passages in particular are worth noting:

> "[39] There is a further important reason why the lodging of a minute of amendment should be insisted upon before allowing a petitioner to deploy an entirely new argument in judicial review proceedings. Permission to proceed is now a requirement of these proceedings … [t]he petitioners do not have permission to proceed on the ground now advanced. Had it been contained in the petition, the sifting Lord Ordinary may or may not have granted permission on that ground (1988 Act, sec 27B(4)(b)). Where a new ground is to be advanced, it requires to be the subject of a judicial decision which can be seen as the equivalent of the grant of permission. That decision is one which allows the petition to be amended.

> [40] The need for amendment applies equally in the context of an appeal or a reclaiming motion. A substantial change of tack may merit either a refusal of the amendment; possibly leaving the petitioner to attempt to lodge a new petition, or a remit for reconsideration by the Lord Ordinary (RCS 38.17(2)). What is not legitimate is for the petitioner to lodge a note of argument (RCS 38.13(2)(c)) which is not consistent with the pleadings."

[50] These observations apply with equal force to the situation in the present case, where an attempt is made in written submissions lodged at a late stage to deploy new arguments directed at a particular decision involving a particular development. The petitioner did not have permission to proceed along this line. There was no plea-in-law in support of this line of argument. In order to have the matter properly considered it required to be the subject of a judicial decision. The petitioner ought to have been required to lodge a minute of amendment seeking reduction of the MOD's decision of 11 January 2018 relating to the Faw Side development. For the reasons explained in *Prior* v *Scottish Ministers*, this is not a mere technicality. The absence of a minute of amendment and a judicial decision thereon is another feature of the procedural unfairness that has arisen in these proceedings.

[51] Finally, we agree that in granting reduction only of the MOD's decision regarding Faw Side, and in not considering the MOD's decisions in respect of other developments, the Lord Ordinary's decision was discriminatory, and he gave insufficient explanation as to why he considered this appropriate. Faw Side was merely the most recent of the pending applications in the queue. If it is appropriate to reduce the decision regarding Faw Side, why is it not appropriate to reduce the decisions in relation to some, or all, of the other pending applications? No doubt all of the developers of the other sites will have incurred expenditure and made investment decisions based on the fact and date of the decision relating to them – but so has the reclaimer. Why single out the reclaimer? This has the

appearance of prejudicing the reclaimer, and of unfairly discriminating against it. The Lord Ordinary did not explain why he considered it appropriate to do this.

[52] For these reasons we conclude that part (ii) of the Lord Ordinary's interlocutor dated 23 December 2020 cannot be allowed to stand, and we shall allow the reclaiming motion to the extent of recalling that part of the interlocutor. For the avoidance of doubt, we adhere to part (i) of the Lord Ordinary's interlocutor of 23 December 2020.