FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 39
P190/21

Lord President
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the Petition of

NLEI LTD

Petitioners and Reclaimers

against

THE SCOTTISH MINISTERS

Respondents

Petitioners and Reclaimers: Steele QC, O'Carroll; Shepherd & Wedderburn LLP
Respondents: Mure QC, Edwards; Scottish Government Legal Directorate

26 August 2022

Introduction

[1] This judicial review concerns the respondents' refusal to grant consent for the development of a wind farm on the Queensberry Estate near Crawfordjohn, Sanquhar and Wanlockhead. By interlocutor dated 15 October 2021 (2021 SLT 1541) the Lord Ordinary refused to grant the remedy sought in the petition for review. The petitioners have reclaimed that interlocutor. They seek an order quashing the respondents' decision. For ease of reference, the following abbreviations are occasionally used:

1989 Act	**The Electricity Act 1989**
1991 Act	The Natural Heritage (Scotland) Act 1991
2008 Act	The Climate Change Act 2008
2019 Order	The Climate Change Act 2008 (2050 Target Amendment) Order 2019
2009 Act	The Climate Change (Scotland) Act 2009
2019 Act	The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019
2017 Regulations	The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017)
SNH	Scottish Natural Heritage (now NatureScot)
SES	The Scottish Energy Strategy
OWPS	The Onshore Wind Policy Statement
NPF 3 and 4	National Planning Framework 3 and 4
SPP	Scottish Planning Policy
CCC	The Committee on Climate Change
GW	Gigawatts
MW	Megawatts

Statutory Provisions

[2] The Electricity Act 1989 prohibits (s 4) the generation and supply of electricity without a licence. The respondents can exempt (s 5) a person from that requirement. Consent is required for the construction of a generating station capable of producing more than 50 mw (s 36). The procedure governing an application for consent is set out in Schedule 8. In the event of an objection by a local planning authority, the respondents normally require to hold a public inquiry. Paragraph 2(2) of the schedule provides that:

> "before determining whether to give [their] consent, [the respondents must] consider the objection and the report of the person who held the inquiry"

Consent will normally carry with it any necessary planning permission (Town and Country Planning (Scotland) Act 1997, s 57(2)).

[3] Schedule 9 of the 1989 Act makes provisions for the "preservation of amenity". In particular, paragraph 3 states that:

> "(1) In formulating any relevant proposals, a licence holder or a person authorised by an exemption …
>
> (a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and
>
> (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.
>
> (2) In considering any relevant proposals for which … consent is required … [the respondents] shall have regard to—
>
> (a) the desirability of the matters mentioned in paragraph (a) of sub-paragraph (1) above; and
>
> (b) the extent to which the person by whom the proposals were formulated has complied with his duty under paragraph (b) of that sub-paragraph."

[4] Section 3 of the Natural Heritage (Scotland) Act 1991 provides that:

> "(1) … it shall be the duty of SNH … to take such account as may be appropriate … of—
>
> …
>
> (c) the need for social and economic development …
>
> …
>
> (e) the interests of owners and occupiers of land; and
>
> (f) the interests of local communities".

[5] Section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 provides, in relation to buildings or other land in a conservation area, that:

> "special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area".

[6] Section 1 of the Climate Change Act 2008 provided that:

> "(1) It is the duty of [the respondents] to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline".

The Act established (s 32) the Committee on Climate Change, which is tasked with advising the UK Government on the appropriate percentage. The percentage was changed to 100% by the Climate Change Act 2008 (2050 Target Amendment) Order 2019.

[7] Section 1 of the Climate Change (Scotland) Act 2009 (repealed, see now s A1) provided that the respondents must ensure that net Scottish emissions for 2050 are 80% lower than the 1990 baseline. Section 2 sets an interim target of 42% by 2020. The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 brought forward the target year to 2045 and substituted 100% as the necessary reduction. Interim targets of 56% by 2020, 75% by 2030 and 90% by 2040 were stipulated.

[8] Section 44 provides that:

> "(1) A public body must, in exercising its functions, act:
>
> (a) in the way best calculated to contribute to the delivery of the targets set in … this Act;
>
> …
>
> (c) in a way that it considers is most sustainable."

The Public Inquiry

Introduction

[9] On 12 June 2017, the petitioners submitted an application for consent to the construction and operation of a wind farm comprising 30 (originally 35) turbines, with a maximum height of 149 metres and a generating capacity of 147 mw. The site consists of some 3,500 hectares of open moorland, with relatively steep sided valleys and associated plateaux, interspersed with pockets of conifer. The site is not within any designated National Park or Scenic Area but it is partially located within, or adjacent to, three local Scenic or Special Landscape Areas. The Wanlockhead Conservation Area is two kilometres away. Muirkirk and North Lowther Uplands Special Landscape Area are to the west. The site would require, amongst other things, some 29 kilometres of track, 26 of which would be new, and a sub-station building.

[10] Objections were received from over 300 individuals, including Dumfries and Galloway Council, several community councils and Scottish Natural Heritage (now NatureScot). There were 95 letters of support, including one from the Nithsdale Community Trust. The respondents' reporter carried out a public inquiry over seven days in October 2019. He made several unaccompanied visits to the site; the last being in February 2020.

The petitioners' submissions

[11] The petitioners presented the reporter with a 64 page submission dated 16 December 2019. This was divided into seventeen sections, most of which (including those on Landscape and Visual, Socio-Economics, Hydrology etc, Ecology, Built Cultural Heritage and Noise/Traffic) are not directly relevant. The second section dealt with the "Legal Framework". This stated that schedule 9 to the 1989 Act was engaged because of the

respondents' duties. It explained that the petitioners had done all that they could to mitigate or avoid adverse impacts. The factors in paragraph 3 of schedule 9 were considerations which would have to be considered as part of an environmental impact study (Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017). The Regulations, like schedule 9, were designed to ensure that environmental matters were taken into account in the decision making process, but they did not dictate the outcome. There were no specific statutory presumptions in a section 36 application; rather, all matters were potentially material considerations. Greater weight should be given to energy policy because it was more up to date than planning policy.

[12] The third section consisted of five pages on energy policy. The proposal's 147 mw output would constitute a significant contribution towards renewable energy targets. The submission adopted the evidence, and repeated the conclusions, of David Bell, a planning consultant. Mr Bell had produced a Planning Policy Inquiry Report of some 54 pages plus appendices. He concluded that a number of United Kingdom and Scottish Government policies committed Scotland to certain international obligations on climate change. The first was the *Scottish Energy Strategy*, which described onshore wind as a key contributor, specifically to the new 2020 target of having 56% of energy from renewable resources. The existing 2020 target had yet to be met.

[13] The second was an *Onshore Wind Policy Statement* which recognised that onshore wind had to play a vital role in meeting Scotland's energy needs. The *SES* had updated the targets for 2020, 2030 and 2050. The language on the role of onshore wind was stronger than that in *National Planning Framework 3* and *Scottish Planning Policy*. The *OWPS* referred to the

move towards larger and more powerful turbines. Both documents represented the leading edge of government policy.

[14] The 2009 Act had set world-leading targets, including an 80% reduction by 2050. The Scottish Government had published a final climate change plan in February 2018, and a new climate change Bill in May 2018, which set out even more ambitious targets. The scale of the challenge was considerable. The mood on tackling climate change had changed in 2019. The 2019 Act had altered the key targets, including bringing the net-zero date forward to 2045 and increasing the 2030 interim target to 75%. The duty on public bodies under section 44 of the 2009 Act required the respondents to act in a manner which was best calculated to contribute to the delivery of the targets, and in the most sustainable way.

[15] The Scottish Government had acted on the stark warnings of the Intergovernmental Panel on Climate Change, that by 2030 it will be too late to limit global warming to 1.5 degrees. The recent Committee on Climate Change reports had made it clear that the world was now experiencing the impact of a global temperature rise. The Government was seeking transformative change. An emergency required action. Decisions in the planning system had to be responsive. The renewable energy policy framework was an important consideration and one that should attract significant weight.

[16] Reference was made to the decisions of other reporters. That on the *Pencloe Wind Farm* (2 March 2018; WIN-190-4) had said that the latest policy statement on energy and onshore wind had emphasised the need for an intensification of effort. The latest 50% target by 2030 was deliberately challenging and might require 17 gw (17,000 mw) of capacity. In the *Hopsrig* application (28 January 2019 PPA-170-2135), the reporter had disagreed with

Dumfries and Galloway Council's view that the *SES* and *OWPS* added little to *NPF 3* and *SPP*.

[17] The eleventh section of the petitioners' submission dealt with SNH's balancing duty under the 1991 Act. This required SNH to take account of the interests of owners and occupiers of land (s 3(1)(e)), and those of local communities (s 3(1)(f)), and to act in accordance with their duties under the 2009 Act (s 44). SNH's director had described the balancing duty as a "red herring" and "box ticking"; a breath-taking dismissal of SNH's obligations. SNH's internal procedures were lacking objectivity and impartiality. A decision to object had been taken before balancing had been carried out. SNH's reasoning undervalued the contribution of the proposal to energy production. It ignored the *OWPS* and the *SES*. SNH had commented that there was no evidence that the proposal was needed to achieve the targets. The SNH view, that it would be good if the targets could be reached with a lower impact on natural beauty and amenity, was contrary to planning and energy policy. SNH had overstated the adverse impacts and understated the economic and environmental benefits. Since the expression of their views, matters had moved on significantly, in terms of the response to global warming and the climate crisis, as a result of new policies and targets. SNH had failed to act openly and transparently. They had failed to carry out a thorough analysis, given the scale of the development. They had drawn up a Landscape of Scotland map without the appropriate fieldwork or consultation and an unprofessional core area map. They had failed to reconsider matters once their initial concerns had been answered by the petitioners. In a written response to SNH's submission, dated 28 February 2020, the petitioners repeated and expanded upon their criticisms of SNH's balancing exercise. There was detailed reference to the new climate change targets.

Post Submission Activities

[18] On 20 December 2019, Dumfries and Galloway Council wrote to the reporter expressing concerns, on their own behalf and that of SNH, about the petitioners' comments upon their witnesses. The respondents maintain a website on which information on public inquiries is stored. They had published all of the parties' submissions, except those of the petitioners. A *Case File Publication Protocol* stated (at para 1.1.3) that the respondents aimed to publish all documents, but not those that were defamatory (para 1.1.2). Documents, which contained personal or "inappropriate comments" regarding the local planning authority's "handling of the case, or about the particular planning officer", were said to fall into this category. It was on this basis that a decision was taken not to publish the petitioners' submissions, although exactly what was concerning the Council and SNH was unclear.

[19] In due course, all of the documents used in the inquiry, and whether published or not, were placed in an electronic case file. When reports were prepared, the reporters would not expect the respondents to have to look at the background material to the report unless something unusual or incorrect was apparent.

The Inquiry Report

Summary

[20] The reporter issued his decision (WIN-170-2004) in a report dated 21 October 2020. The reasons for such a lengthy delay in issuing the decision were not known to the respondents. The report is both excessively detailed and repetitive. It consists of some 170 pages plus appendices.

[21] In his summary (report p 5), the reporter noted that the proposal founded on the recent strengthening of the importance of renewable energy. The petitioners' case was that there had been a major expansion in renewables which were required to meet new net zero commitments. The First Minister had announced a climate change emergency. Dumfries and Galloway Council had agreed with that announcement. Although there were significant adverse landscape and visual effects, the proposal could be accommodated within the landscape. The summary outlined the criticisms of the internal processing by SNH; notably a failure to carry out their balancing duties. This was said to call into question the reliability of their evidence.

[22] The reporter summarised (at pp 6-8) the contrary case for Dumfries and Galloway Council, SNH and the other objectors. The proposal would have unacceptable adverse landscape and visual impacts which would affect the scenic quality of the Lowther Hills. These were not outweighed by the benefits which the proposal would bring in terms of its contribution to energy targets. The proposal was contrary to energy policy, national planning policy and the development plan.

[23] The reporter recommended (p 9) that the respondents refuse consent and deemed planning permission. He determined, in his summary (pp 8 and 9), that the proposal would provide some substantial benefits, including its contribution towards meeting energy targets. However, it would have significant and unacceptable adverse landscape and visual effects on the Thornhill Uplands Regional Scenic and the Leadhills and Lowther Hills Special Landscape Areas. There would be an impact on the landscape and historic setting of Wanlockhead. The proposal would "gain no favour" from *SPP* as a development that contributed to sustainable development. In considering *NPF 3*, it would not promote

Scotland as "a natural resilient place". The proposal would conserve flora, fauna and the features of special interest. It would protect sites, buildings and objects of architectural, historic or archaeological interest. However, the petitioners' mitigatory measures were insufficient to ensure that the natural beauty and historic interest of the area would be preserved. The significant adverse effects on the natural beauty of the area outweighed the benefits.

Principal Sections

[24] Having neatly summarised the reasons for his recommendation, the reporter proceeded to repeat these, albeit in an expanded form, in the five chapters of the main body of his report. Because of the thrust of the petitioners' submissions, it is necessary to go into these in some detail. Chapter 1 is headed "Background". It sets out the reporter's understanding of the legal context. The reporter reasoned (para 1.29 *et seq*) that, in terms of schedule 9 to the 1989 Act, duties were imposed on "those formulating proposals". They required to take steps to mitigate any effect which the proposal would have on those factors. Those who were considering a proposal had to have regard to the specified factors and the extent to which those formulating the proposal had complied with their duty to mitigate. The reporter considered: the targets set for the UK and Scotland in, respectively, the 2008 and 2009 Acts as amended respectively by the 2019 Order and the 2019 Act (paras 1.37 and 1.38); the petitioners' environmental statement (later an Environmental Impact Assessment) and further environmental information, both of which were required under the 2017 Regulations.

[25] Chapter 2 set out the policy context, notably the *UK's renewable energy strategy* (2009) and the *UK renewable energy roadmap* (2011 with further updates in 2012 and 2013); the UK's

Clean Growth Strategy (2017); the CCC's *Net Zero – The UK's contribution to stopping global warming* (2019); the Scottish Government's *2020 Routemap for Renewable Energy in Scotland* (2011); the Scottish Government's *Electricity Generation Policy Statement* (2013), *Scottish Energy Strategy* (2017), *Onshore Wind Policy Statement* (2017) and *Climate Change Plan – Third Report on Proposals and Policies 2018-2032;* and national planning policy and guidance, *NPF 3* and the Dumfries and Galloway Local Development Plan 2 (2019). The reporter noted (para 2.4) that parties had agreed that the proposal should be assessed against the criteria in paragraph 3 of schedule 9 to the 1989 Act.

[26] The reporter described certain statements made by the respondents. At an SNP conference in April 2019, the First Minister announced that there was a climate change emergency. On 14 May 2019, the Cabinet Secretary for Climate Change told Parliament that amendments to the Climate Change Bill had set the 2045 target for net zero emissions; the most stringent target anywhere in the world.

[27] The reporter set out the parties' arguments, much as he had already done in the initial section. He turned to his findings on the policy context. These included (para 2.68) that there was no dispute that climate change was now a critical factor in both energy and planning policy. The 2019 Act target for 2045 was a notable change in circumstances with statutory weight. *SPP* highlighted that *NPF 3* facilitated a transition to a low carbon economy. *NPF 4* would address options to speed up a reduction in omissions, but there was, at the time of the report, no change in the policy context or any indication of what planning options might be changed radically to enable such a reduction. Achieving net zero was not entirely reliant on onshore wind generation, but on a range of measures. The reporter continued (at para 2.68):

> "… As they are not embedded in policy the Ministerial statements and council's declaration carry limited weight in decision-making but provide a clear direction and commitment to tackling climate change and reducing greenhouse gas emissions…
> 2.71 … The balancing exercise remains with respect to assessing whether a proposal is the right development in the right place weighing the costs and benefits over the longer term. Therefore, … there is limited justification to suggest that the case for the development proposed is 'materially strengthened' as argued by the applicant. The weight to be afforded to the benefits of the proposal is one for the decision-maker …".

[28] Chapters 3 and 4 of the report dealt in detail with landscape and visual impact, together with "other relevant matters". These sections occupy more than half of the report. Their content is not repeated. One of the conclusions (paras 4.42 and 4.43) was that there would be significant effects on the setting of the Wanlockhead Conservation Area, notably the approaches to the settlement and views down the Wanlock water valley. The feeling of isolation and remoteness were key elements. The turbines would be a prominent and detracting feature. They would harm the upland setting and "deteriorate the atmosphere of isolation and remoteness".

Conclusions

[29] The reporter set out his conclusions in chapter 6. He considered the petitioners' criticisms of SNH in failing to carry out their balancing duties. He determined that this was not a question for him. Although the decision to object was taken before the completion of the written balancing duties form, that did not mean that these duties had not been considered in evaluating the proposal. The reporter found SNH's processes to be reasonable. Even if they had not been, that did not render their evidence of no weight.

[30] The conclusions (para 6.3 *et seq*) largely repeat once more what he had already said. The petitioners had had regard to the desirability of preserving natural beauty, of

conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest. Forms of mitigation had been suggested. The proposal would support emission reduction targets and help to tackle the climate change emergency. It would support the aims of *NPF 3* to make Scotland a low carbon and natural resilient place. In terms of *SPP*, the economic impact would be substantial and positive. The proposal would make a valuable contribution to emission targets.

[31] In what appears to be the decisive element of his conclusions, the reporter states once more that:

> "6.21 However, the proposal would have significant landscape and visual effects, including cumulative effects, which would be unacceptable based on the scale and distinct landscape features and scenic quality of the area in which the proposed turbines would be sited, viewed from and impact upon. This conclusion is supported by the fact that the proposal would have a significant impact on both the Thornhill Uplands Regional Scenic Area and the Leadhills and Lowther Hills Special Landscape Area. There would also be an impact on the landscape and historic setting of Wanlockhead. These conclusions have led me to find that the proposal would gain no favour from Scottish Planning Policy as a development that contributes to sustainable development; that the proposal would not accord overall with the provisions of the development plan; and in consideration of the National Planning Framework 3, that it would not overall promote Scotland as a 'natural resilient place' affecting a landscape that significantly contributes to Scotland's identity."

The reporter concludes (at para 6.22) that, having regard to the requirements of schedule 9, the proposal would conserve flora, fauna and features of special interest. It would protect sites, buildings and objects of architectural, historic and archaeological interest. He noted (at para 6.23) that the application had been revised and the petitioners had proposed mitigation measures. These were "insufficient to ensure that the natural beauty and historic interest of the area would be preserved". It was on that basis that he recommended that the application should be refused.

The respondents' decision

[32] The respondents' decision is contained in a letter to the petitioners dated 8 January 2021. On environmental matters, this states that the respondents had considered the application "fully and carefully", including the representations to the reporter and his findings, conclusions and recommendation. The respondents had regard to the factors in paragraph 3 of schedule 9 to the 1989 Act. They had had regard to the extent to which the petitioners had done what they reasonably could to mitigate the effects of adverse factors. The respondents found that the main determining issues were:

> "the environmental impacts, including the landscape and visual impacts, including cumulative effects, likely to occur as a consequence of the proposed Development; the benefits of the proposed Development, including its renewable energy generation, greenhouse gas emissions savings and net economic impact; and the degree to which it would be in conformity with national planning policy, the local development plan, national energy policy and other relevant guidance."

The respondents quoted from para 6.21 of the report (above) on the unacceptable landscape and visual effects. They referred to the reporter's consideration of energy policy. They noted that the reporter had held that the proposal would provide substantial benefits in relation to meeting emission targets. These were outweighed by the adverse effects on the natural beauty of the area.

[33] The respondents agreed with the reporter that the proposal would provide benefits in relation to helping to meet renewable targets. However, they considered that the proposal would give rise to unacceptable significant adverse landscape and visual impacts and would adversely impact on the historic setting of Wanlockhead. Therefore, the respondents agreed with the reporter's findings, reasoning and conclusions. They adopted them for the purposes of their own decision to refuse the application.

A point from the pleadings

[34] Following the publication of the respondents' decision, the petitioners became concerned about the absence of a link in the respondents' website to their submissions. That might have indicated that these submissions had not been considered by the respondents. Yet the decision letter had stated that "The [respondents] have considered fully and carefully the Application … and all other material information." The answers to the petition averred (ANS 17) that the respondents had considered the application, the inquiry report and "relevant inquiry documents (including, for the avoidance of doubt, all of the petitioner's closing submissions to the inquiry)". Later (ANS 45) it was said that the respondents' decision had relied on an "internal casework file containing all documents pertaining to the petitioner's application, including … all of the petitioner's closing submissions to the inquiry".

[35] A request to ascertain when the respondents, or their advisors, had accessed parties' submissions revealed that they had not been accessed prior to the respondents' decision. The answers were adjusted to read that:

> "Since there was no cause in this case for … [the respondents] to refer to any documents considered by the Reporter, the [respondents] themselves did not consider the petitioner's closing submission to the inquiry …"

The Judicial Review

[36] The petitioners challenged the respondents' decision on several grounds. The first was that the reporter had erred in law in his interpretation of paragraph 3 of schedule 9. He had reasoned that the criteria applied to the petitioners, as persons who had formulated the proposals, but the schedule did not impose any obligation on the petitioners. The obligation

to mitigate adverse effects applied only to licence holders or exempted persons (*Trump International* v *Scottish Ministers* 2016 SC (UKSC) 25). The petitioners fell into neither category. The Lord Ordinary accepted that there had been a "clear error of law". However, it was necessary, if this challenge were to succeed, for the error to be material (*Bova* v *Highland Council* 2013 SC 510 at para [57]; *Carroll* v *Scottish Borders Council* 2016 SC 377 at para [66]). Regardless of whether the petitioners were under a duty to mitigate, the respondents were under a separate obligation to consider the criteria (schedule 9, para 3(2)(a)). The reporter and the respondents were both obliged to consider them. They had done so. The error was therefore not material.

[37] The second challenge was that the respondents had failed to have regard to previous appeal decisions bearing upon the issue, even if they had not been brought to their attention. In the application for the *Fallago Rig 2* wind farm extension (25 June 2020), the reporter had been criticised by the respondents for applying paragraph 3 of schedule 9 as if it contained a requirement on the developer to mitigate. Prior decisions were a material consideration (*Gladman Developments* v *Scottish Ministers* [2019] CSIH 34). The respondents had not corrected the error and had thus acted inconsistently and therefore unreasonably (*Ogilvie Homes* v *Scottish Ministers* 2021 SCLR 99 at para [39]). They had failed to apply the reasoning on energy policy which they had in the *Paul's Hill II* decision (11 December 2020). The reporter in *Paul's Hill* had said that the support which the proposal had had from *SPP* had been strengthened by the *OWPS* and the recent legislative changes. There was a clear policy that onshore wind energy was a positive contributor to the objective of low carbon emissions. The CCC had recognised the need for much greater progress in this area, leading to the declaration of the climate emergency.

[38] The Lord Ordinary held that there was no inconsistency between the respondents' decision and their earlier decisions for wind farm extensions at *Paul's Hill* and *Fallago Rig*. The respondents had to balance landscape and visual impact against renewable energy gains. How that balance was struck was a matter of planning judgement. The balancing exercise was different from that in the wind farm extension applications because, in those, the landscape and visual aspects had been acceptable. There was no inconsistency in the respondents not correcting the error in law, that the duty to mitigate under paragraph 3 of schedule 9 imposed a substantive duty on the developers, when they had already issued such a correction to the reporter in an earlier case.

[39] Thirdly, the petitioners complained that, in the balancing exercise, climate change should have outweighed visual impact. The Lord Ordinary repeated that the balancing exercise involved planning judgement. There was nothing in the 2009 or 2019 Acts and related Government policies and ministerial statements which said that renewable energy and climate change should be the sole or determining factors. The reporter afforded those issues considerable weight, but gave greater weight to visual impact and landscape.

[40] Fourthly, the petitioner argued that the reporter ought not to have attached any weight to SNH's objection because of their failure to carry out the balancing exercise required under section 3 of the 1991 Act. The Lord Ordinary rejected this contention. The reporter had carefully considered the manner in which SNH had addressed their balancing duties. The correct forum for an allegation of a breach of their statutory duty would be an action for judicial review against them.

[41] Finally, the Lord Ordinary held that the reporter had not demonstrated apparent bias by not publishing the petitioners' submissions. The test was not met. Non-publication of

the submissions made no difference to the decision. The decision not to publish was taken by officials who thought that certain sentences in the petitioners' submissions fell into the category of defamatory statements according to their publication protocol. The decision was based on the policy, not on the merits of the application.

Submissions

Petitioners

[42] The petitioners accepted at the outset that the court should not entertain "captious" objections in planning matters (*Highland Council* v *Scottish Ministers* [2014] CSIH 74 at para [56]). It should be slow before interfering with matters of planning judgement (*Abbotskerswell Parish Council* v *Secretary of State for Housing, Communities and Local Government* [2021] Env LR 28 (p 637) at paras 51-52). A decision letter should be read as a whole, without excessive legalism or criticism (*ibid* at para 53). The reasons must nevertheless be intelligible and adequate (*ibid* following *South Buckinghamshire DC* v *Porter* [2004] 1 WLR 1953 at para 36).

[43] The grounds of appeal contend that the reporter erred: (1) by failing to take the petitioners' submission into account; (2) by placing an obligation on the petitioners to comply with the duties in schedule 9 of the 1989 Act; and (3) in his approach to section 44 of the 2009 Act.

[44] The petitioners' submission was a material consideration and failure to have regard to it was an error of law (*Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345). The respondents accepted that they had not considered the submission. They had thus deprived themselves of the opportunity to consider the petitioners' arguments on the correct

interpretation of paragraph 3 of schedule 9, the respondents' climate change duties and the challenge to SNH's involvement.

[45] The Lord Ordinary accepted that there had been an error in the reporter's (and hence the respondents') interpretation of paragraph 3 of schedule 9. As a result, an absolute environmental duty was wrongly placed on the petitioners (report, para 6.23; decision letter p 8). He failed to address two further errors: (1) that the parties had agreed that the proposal should be assessed against the criteria in paragraph 3; and (2) that the petitioners had complied with a non-existent duty to have regard to the criteria. The respondents repeated the error in having regard to the extent to which the petitioners had mitigated any adverse impacts. It could not be said that, but for these errors, the same outcome would have been reached.

[46] The court should normally exercise its discretion and reduce a decision where a clear error of law had been identified (*Baroness Cumberlege* v *Secretary of State for Communities and Local Government* [2018] Env LR 10 at para 142). Having found that sites, buildings and objects of architectural, historic or archaeological interest would be protected, it was illogical and irrational for the reporter to conclude that the adverse impacts on the setting of Wanlockhead were a reason for refusal when he had found that there were no such effects.

[47] The reporter disregarded the net zero targets. He did not take the new interim targets for 2030 (75%) or 2040 (90%) and the new annualised targets into account. He erred in holding that the new, more stringent targets under the 2019 Act did not materially strengthen the application. He acted irrationally in holding that ministerial statements on climate change should carry limited weight because they were not embedded in policy. The Lord Ordinary erred in determining that there was nothing which stated that climate change

should be the sole or determining factor. That had not been argued; only that the correct legislation should be applied. These failings resulted in a flawed balancing exercise.

[48] The Lord Ordinary failed to determine the point about the *Paul's Hill II* application. It did not concern paragraph 3 of schedule 9. The petitioners' complaint concerned the differences in the approaches taken by the respondents on their climate change obligations in *Paul's Hill* and the present case. The respondents acted inconsistently with the earlier decision.

Respondents

[49] The respondents' statutory obligation (1989 Act, sch 8, para 2(2)(b)) was to consider any objection to the proposal and the report. The report had contained references to the petitioners' submissions. The respondents would only look at the materials submitted to the reporter if there was a reason to do so. There was none in this case.

[50] The Lord Ordinary correctly concluded that the reporter's error in his interpretation of paragraph 3 of schedule 9 was not material. The application was refused because it gave rise to adverse landscape and visual impacts and would adversely affect the historic setting of Wanlockhead. Although the duty to mitigate did not apply to the petitioners, the respondents were still bound to have regard to the criteria in paragraph 3 (*Trump International* v *Scottish Ministers* at para [11]; *William Grant & Sons Distillers* v *Scottish Ministers* 2013 SCLR 19 at para [17]). The petitioners' evidence and submissions had proceeded on the basis that paragraph 3 placed a duty on them, and that they had fulfilled that duty. The report was clear that the significant and unacceptable landscape and visual effects of the proposal would outweigh the benefits. The petitioners' approach was "hypercritical" (*Mansell* v *Tonbridge and Malling Borough Council* [2019] PTSR 1452 at para

[41]). There was no real possibility that a different decision would have been reached had the error not been made (*Bova* v *Highland Council* at para [57]).

[51] The Lord Ordinary correctly concluded that there was no inconsistency between the present case and either *Fallago Rig 2* or *Paul's Hill II.* Consistency in decision-making was the optimal starting point, but there will be different factors in different cases which require a different decision (*Ogilvie Homes* v *Scottish Ministers*).

[52] The respondents accepted that their climate change duties were important. Neither the 2009 and 2019 Acts, nor the energy policy statements, had the effect of giving sustainable energy decisive weight. The weight to be placed on competing relevant considerations was a matter for the decision-maker (*R (Friends of the Earth)* v *Heathrow Airport* [2021] PTSR 190, at paras 116-122; *Abbotskerswell Parish Council* v *Secretary of State for Housing, Communities and Local Government*). It was not open to the petitioners to re-argue what weight should be placed on lawful, competing considerations (*Tesco Stores* v *Secretary of State for the Environment* [1995] 1 WLR 759 and 780; *Moray Council* v *Scottish Ministers* 2006 SC 691, at paras [29] and [30]).

Decision

[53] A report to the respondents following upon a public inquiry must provide adequate reasons for any recommendation. The reasons must deal with the substantial questions in issue in an intelligible way. The report should leave the informed reader in no doubt about what the reasons for the recommendation were and what material considerations were taken into account (*Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 348). That does not mean that a reporter is obliged to record everything that is

raised or submitted during the course of the inquiry. The report is not a conveyancing document and the reporter is not a lawyer (*L & C Properties* v *Aberdeen DC* 1983 SC 145, Lord Robertson at 159). However, if something is of such importance that it ought to be put to the respondents as a material factor which may affect their decision, a failure to do so is likely to vitiate any subsequent decision if a recommendation, which is followed, fails to outline that matter, whether it is one fact or law.

[54] The report should be intelligible. This is seldom achieved by one of excessive length or repetitive in content. The lengthier and more repetitive the report, the greater will be the need for the respondents' advisers to produce an accompanying précis which can be readily digested by the relevant minister. Concise expression is not to be discouraged (*Carroll* v *Scottish Borders Council* 2016 SC 377, Lord Menzies, delivering the opinion of the court, at para [55](7), citing *Moray Council* v *Scottish Ministers* 2006 SC 691, LJC (Gill) at para [30]). The purpose of the report is to distil the relevant information into an appropriate form whereby the respondents can make their decision without reference to the background material.

[55] There is no requirement for the respondents to read the parties' submissions to the reporter. They are not *per se* material considerations, although they may contain descriptions of what are. It is sufficient if the relevant points made in submissions are fairly presented within the distilled product. The report in this case would have benefited from substantial pruning, but that is not to say that it failed to meet the test of adequacy.

[56] It is regrettable that the respondents initially averred that they had considered the petitioners' submission when that was factually inaccurate. Greater care should have been taken to check the accuracy of the answers to the petition. This is especially so with

pleadings emanating from government. However, the averments were corrected at adjustment. The court will proceed on the agreed basis that the respondents did not read the submission.

[57] The question then becomes one of whether the report contained an adequate summary of the relevant issues and a comprehensible and sufficiently reasoned recommendation. The court has itself attempted (above) to summarise the 64 pages of the petitioners' submission. These pages describe the legal context of the criteria in paragraph 3 of schedule 9 to the Electricity Act 1989 and include a reference to the petitioners having done all that they could have done to mitigate adverse impacts, even although they now submit that they were not obliged to do so. They contain an outline of the legislation and governmental policy on energy and climate change. They include an attack on SNH's balancing duty under the 1991 Act.

[58] In his summary, the reporter initially described the petitioners' case as including the recent increase in the importance of renewable energy. There is a specific reference to SNH's processing, notably the contention that they had failed to include and to balance the relevant factors. In the main body of the report, the reporter considers the legal context. He refers to the petitioners' environmental statement. He deals, at considerable length, with energy policy and climate change. In so doing, he goes well beyond the petitioners' submission in terms of detail. He repeats and expands upon his summary of the parties' submissions. In his conclusions he deals specifically with the petitioners' criticisms of SNH, as well as the other issues raised by the petitioners. In short, there is no substantial force in the criticism that the reporter did not fairly put the petitioners' case forward in his report to the respondents. He did so at length and repeatedly.

[59] The court agrees with the petitioners' general proposition that, where there has been an identifiable error on the part of a decision-maker, the court should be slow before deciding not to quash that decision. However, in order to merit reduction of the resultant decision, the error must be a material one, in the sense that, had it not been made, the decision might have been different (*Carroll* v *Scottish Borders Council*, at para [66] citing *Bova* v *Highland Council* 2013 SC 510, Lord Menzies, delivering the opinion of the court, at para [57]). It is not disputed that both the reporter and the respondents erred in law in so far as they considered that paragraph 3(1)(a) of schedule 9 to the 1989 Act imposed an obligation on the petitioners. That provision applies only to licence holders and those authorised by an exemption. The petitioners do not fall into either category. It is not disputed that the respondents also erred in considering the extent to which the petitioners had complied with a duty under paragraph 3(2)(b), since they had no such duty. The question is whether these errors were material to either the recommendation or the decision. Had they not been made, was there a real possibility that the recommendation and decision would have been different? The Lord Ordinary held that the error made no difference. The court agrees.

[60] The reporter was surrounded by many different pieces of legislation in the energy and planning fields. Some of these, such as section 44 of the Climate Change (Scotland) Act 2009, impose very general, almost abstract, duties on public bodies to behave in a particular manner. Others, including paragraph 3 of schedule 9 and that relative to SNH under section 3 of the Natural Heritage (Scotland) Act 1991, involve the relevant body taking a great number of, mostly generally described, matters into account, but the legislation does not direct that any one of them should be given particular priority. The climate change

legislation has set ever increasing reduction targets upon the shoulders of the respondents. Policy statements have stressed the importance of renewable energy, of which onshore wind farms form an important element. None of these statements gives a reporter specific guidance on how the significant change in the level of importance to be afforded to renewable energy alters the mode of assessment of the weight to be given to renewable energy when set against other factors, such as the effect which a large wind farm might have on the landscape generally or on the setting of a conservation area in particular. The reporter was correct to describe the ministerial statements as carrying limited weight, since they had not made their way into official government policy, beyond pointing the way towards a greater focus on carbon emission reduction.

[61] The reporter's error in finding that there was a duty on the petitioners to mitigate adverse effects on the "natural beauty of the countryside", and other related matters, did not affect his, and the respondents', obligation to consider these elements; albeit alongside the benefits of renewable energy. That exercise was the one which the reporter carried out. He detailed meticulously the myriad of applicable statutory provisions and governmental policies, before reaching what was ultimately a simple conclusion of planning judgement. That was, in short, that the proposal would have unacceptable significant landscape and visual effects which would adversely affect the scenic quality of several nearby designated areas, notably those involving the Lowther Hills and the setting of Wanlockhead. Critically, these were not outweighed by what were accepted to be important renewable energy benefits. This basic conclusion exists independently of the reporter's, and respondents', erroneous conclusion on the petitioners' mitigatory measures. Unless the petitioners can

undermine that fundamental planning judgement, the challenges to the recommendation and the decision must fail.

[62] At the root of the petitioners' criticisms is a complaint that the reporter and the respondents did not give sufficient weight to the effects of climate change and the benefits of renewable energy when set against landscape and visual aspects. That complaint is understandable from a developers' point of view. At the same time it highlights the difficulty which their arguments face in the planning context. Failure to afford a particular factor a particular level of weight is not *per se* an error which is susceptible to judicial review. The scope of review in a challenge to a planning judgement is that set out in *Wordie Property Co* v *Secretary of State for Scotland* (LP (Emslie) at pp 347-348). The challenger must be able to point to "a material error of law … irrelevant considerations … [a failure] to take account of relevant and material considerations" or demonstrate that the judgment "is so unreasonable that no reasonable [minister] could have reached … it".

[63] In *RSPB* v *Scottish Ministers* 2017 SC 552 (LP (Carloway), delivering the opinion of the court, at [207]), the *dictum* in *R (Prideaux)* v *Buckinghamshire County Council* [2013] Env LR 32 (Lindblom J at para 30) was adopted, *viz.*:

> "It is not the role of the court to test the ecological and planning judgments made in the course of the … decision-making process. Assessing the nature, extent and acceptability of the effects that a development will have on the environment is always – apart from the limited scope for review on public law grounds – exclusively a task for the planning decision-maker."

[64] The court has rejected the petitioners' contentions in so far as they were based on an error of law in the application of the criteria in paragraph 3 of schedule 9. An error of law was made, but it was not material to the ultimate decision. The same consideration applies to the arguments based upon the reporter's statement that it had been agreed that the

proposal was to be tested against the criteria in paragraph 3 and his use of particular words which were not exactly those in a particular statute. These arguments, whilst quite properly advanced, do not detract from the fundamental decision that the reporter made. He concluded that the proposal would have significant, unacceptable adverse landscape and visual effects on the scenic quality of the area. The court is unable to detect any contradiction in the reporter's findings that, although the proposal would protect sites, buildings and objects of interests, it nevertheless impacted on, *inter alia*, the landscape and historic setting of Wanlockhead.

[65] The reporter did not disregard the energy reduction targets or the ministerial statements. On the contrary, he referred to them at length. He correctly noted that they were of considerable importance, yet not fully incorporated into formal planning or energy policy. These policies did not stipulate that decisive weight had to be given to the achievement of energy targets when balanced with other environmental elements such as landscape and visual effects. The decisions in the *Paul's Hill II* and *Fallago Rig 2* extension applications are not to a contrary effect. In all of this, despite the petitioners emphasising the contribution which the production of 147mw might make towards energy renewable targets, this would be a relatively small component in the overall onshore total (over 8,000mw). That total is only one form of renewable energy and such energy is only one of several methods of tackling climate change.

[66] It may be that a decision which prefers the preservation of an atmosphere of isolation and remoteness over the attainment of energy targets will not meet with universal approval, but it is quintessentially one of planning judgement which Parliament has assigned to the organs of government and not the courts to resolve. The reporter and the respondents may

have made some errors of law. Had they not been made, the result would have been the same.

[67] For these reasons, this reclaiming motion must be refused. The court will adhere to the Lord Ordinary's interlocutor of 15 October 2021.