

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 10

ABE-B298-18

JUDGMENT OF SHERIFF ANDREW MILLER

in the cause

GEORGE McCALLUM NIBLOCK
AS CONVENOR OF ABERDEENSHIRE ENVIRONMENTAL FORUM

Pursuer

against

ABERDEENSHIRE COUNCIL

Defenders

Pursuer: Whittle;
Defender: Ingram;

ABERDEEN, 31 October 2018

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved, namely:

Findings in Fact

- (1) The pursuer is George McCallum Niblock.
- (2) The defenders are Aberdeenshire Council.
- (3) This action concerns a stretch of the A96 dual carriageway extending over a distance of approximately 6.8 miles from the northern border of the Aberdeen City Council local authority area to the town of Inverurie, Aberdeenshire, together with the grass verges and landscaped areas adjacent to each carriageway and including the carriageway, central reservation and roundabouts (hereafter 'the road').

- (4) This court has jurisdiction.
- (5) The pursuer is a retired local government chief officer with a particular interest in street cleansing.
- (6) The pursuer has been a member of Aberdeenshire Environmental Forum for 27 years and currently serves as its convenor and acting secretary.
- (7) Aberdeenshire Environmental Forum exists to provide a forum for discussion in relation to environmental matters affecting the Aberdeenshire Council local government area.
- (8) For approximately the last ten years, Aberdeenshire Environmental Forum has run an initiative called Aberdeenshire Litter initiative (ALi) in conjunction with Aberdeenshire Council. This initiative involves organising members of the public to take part in litter-picking at beaches and other locations in Aberdeenshire. Most of the litter-picking equipment used by ALi has been provided by Aberdeenshire Council.
- (9) ALi also campaigns to improve street cleansing and to raise awareness of environmental issues.
- (10) The pursuer expressed concerns to the Scottish Government Cabinet Secretary for the Environment by e-mail dated 23 February 2017 about the general performance of duty-holders throughout Scotland in complying with the duties arising from section 89(1) and (2) of the Environmental Protection Act 1990 ("the 1990 Act") with regard to the cleanliness of roads and land falling within the ambit of those duties.
- (11) For a period of approximately eight years prior to the raising of this action, the pursuer expressed concerns to officials of the defenders, both in his personal capacity and on behalf of Aberdeenshire Environmental Forum, with regard to the defenders' performance in relation to street cleansing throughout Aberdeenshire. During that period the pursuer

communicated and met with a number of the defenders' officials in order to express his concerns. He also requested that the defenders provide him with copies of any written street cleansing strategies, policies, operational plans and service standards. No such documents were disclosed to the pursuer by the defenders.

(12) Ultimately the pursuer came to focus his concerns on the road, which he regarded as being representative of the general condition of streets and roads throughout Aberdeenshire with regard to the prevalence of litter and detritus and illustrative of the defenders' general performance in relation to street cleansing.

(13) On 29 January 2018 the pursuer took a series of 24 photographs showing locations along the road. The photographs show the presence, at some points along the road, of litter on the carriageway, central reservation, and adjacent verges and landscaped areas and of dirt, grit and other detritus on the carriageway.

(14) On 23 February 2018 solicitors acting on the pursuer's behalf served upon the defenders a notice in terms of section 91(5) of the 1990 Act ('the section 91 notice') informing the defenders that the pursuer was "aggrieved by the defacement by litter and refuse as well as the want of cleanliness of [the road]..." The notice also advised the defenders of the pursuer's intention to make a complaint to Aberdeen Sheriff Court in terms of section 91(5) of the Environmental Protection Act 1990 concerning the matter. Along with the section 91 notice, the pursuer's solicitors provided the defenders with copies of the photographs taken by the pursuer on 29 January 2018.

(15) Only some of the photographs taken by the pursuer on 29 January 2018 indicate the location along the road of the areas photographed.

(16) In response to the section 91 notice, the defenders undertook cleaning works to various parts of the road during March 2018 including the cleaning of all bus stops along the route and of all footpaths leading to those bus stops.

(17) The pursuer carried out further inspections of the road on 25 March 2018, 5 and 6 April 2018 and 7 July 2018. On 25 March 2018 and 7 July 2018 the pursuer took further photographs of various points along the road. The photographs show the presence, at some points along the road, of litter on the carriageway, central reservation and adjacent verges and landscaped areas and of dirt, grit and other detritus on the carriageway.

(18) The photographs taken by the pursuer on 25 March 2018 and 7 July 2018 were not disclosed to the defenders until they were lodged as productions in connection with this action.

(19) The initial writ in this action was presented for warranting, and warranted for service, on 11 April 2018.

(20) The defenders have responsibility for over 5,500km of roads and approximately 1,600km of footpaths. They are the second largest roads authority in Scotland.

(21) The department of the defenders which has responsibility for street cleansing is its Roads, Landscape and Waste Service.

(22) In 2014 the defenders identified a need to reduce their budgeted spending by over £49 million by the financial year 2018/19.

(23) The defenders' Roads, Landscape and Waste Service currently has an annual budget of around £54.3 million. Of that budget, £2.888 million is currently allocated to street cleansing. This budget has increased from £2.495 million since 2014.

(24) Street cleanliness is monitored in each local authority area in Scotland each year by three surveys of the condition of 5% of streets within each local authority area using the

Local Environment Audit Management System (LEAMS) administered by an independent body, Keep Scotland Beautiful. During the years 2016-2017 and 2017-2018, the defenders achieved LEAMS street cleanliness scores of 96.6% and 92.8% respectively, indicating the approximate percentage of the streets surveyed which were assessed as being of an acceptable level of cleanliness during the surveys conducted in those years. Both scores were above the national average.

(25) In addition the defenders seek feedback from members of the community within their area via a "reputation tracker", in terms of which an independent contractor carries out telephone surveys of 150 residents within the Aberdeenshire Council area per month. The survey attempts to assess levels of public satisfaction with a variety of services provided by the defenders, including street cleansing. Between August 2017 and August 2018, levels of public satisfaction with street cleansing, according to the reputation tracker, have consistently exceeded 80% and during March, April and May 2018 were 98%, 98% and 99% respectively.

(26) The defenders have in place procedures whereby each road and street within their Council area is subject to scheduled cleansing operations at a frequency set according to the defenders' assessment of need.

(27) The defenders also have in place procedures to respond to reports from members of the public or members of staff indicating the accumulation of litter or refuse at particular locations.

(28) The road is checked by members of the defenders' staff on a weekly basis so that the accumulation of litter along the road can be assessed and, where the defenders' staff consider it necessary, dealt with.

(29) Members of the defenders' staff carry out litter-picking work along the road each month, weather permitting. The defenders have in place a system whereby the road is divided into segments of approximately one mile each in length. In each segment the defenders have identified safe areas in which their staff members can park their vehicles in order to carry out litter-picking operations on the verges adjacent to the road without interrupting the flow of traffic on the road.

(30) Litter-picking operations on the central reservation or on roundabouts of the road require traffic management measures such as the closure of the offside lane or other parts of the road.

(31) Responsibility for the management of the trunk road network in Scotland, including the road, lies with an independent contractor, BEAR Scotland, under a contract with the Scottish Ministers. In terms of said contract, BEAR Scotland is also responsible for the landscaping of the land adjacent to the carriageway, including the trimming of foliage.

(32) In terms of said contract, BEAR Scotland has primary responsibility for addressing road safety issues affecting the road.

(33) Any traffic management measures required for the purpose of enabling the defenders to conduct litter-picking operations on the road would require to be put in place by or with the cooperation of BEAR Scotland.

(34) During the period 1 January 2018 to 29 August 2018 the defenders received two reports of litter on or adjacent to the road, apart from the complaint made by the pursuer to which this action relates. One of those requests related to a build-up of litter at a slip road to the village of Kintore. The other report related to the presence of a wooden log on the carriageway. The defenders quickly took steps to address both reports.

(35) Litter from vehicles and road users and dirt, grit and detritus comes to rest on the carriageway of the road and on the adjacent land. When it is removed from any given location along the road by the defenders, further litter, dirt, grit and detritus is likely to come to rest at that location subsequently as an inevitable consequence of the normal everyday use of the road.

(36) Photographs taken by the pursuer on 29 January 2018, 25 March 2018 and 7 July 2018 show that, on those dates, litter, dirt, grit and detritus was present at points shown in the photographs along and adjacent to the road.

(37) It is not possible to establish whether the photographs taken by the pursuer on any two of the three dates referred to in the preceding finding in fact, namely 29 January, 25 March and 7 July 2018, show the same litter, dirt, grit and detritus at any given location along the road.

Finds in fact and law

(1) By raising these proceedings the pursuer complains that he is aggrieved by the defacement, by litter or refuse, of the road and that he is aggrieved by the want of cleanliness of the road, for the purposes of section 91(1) and (2) of the 1990 Act.

(2) The defenders are the principal litter authority for the road, in terms of section 89(1) of the 1990 Act.

(3) The defenders are the local authority responsible for the road in terms of section 89(2) of the 1990 Act.

(4) The pursuer has failed to establish that the road was defaced by litter or refuse or was wanting in cleanliness within the meaning of section 91(6) of the 1990 Act when these proceedings were raised or at the date of the proof in the proceedings.

(5) Esto the pursuer has established that the road was defaced by litter or refuse or was wanting in cleanliness within the meaning of section 91(6) of the 1990 Act when these proceedings were raised and at the date of the proof in the proceedings, the defenders have proved that they have complied with their duties under section 89(1) and (2) of the 1990 Act as respects the road, in terms of section 91(7) of the 1990 Act.

Finds in law

(1) The pursuer having failed to establish that the conditions for the making of a litter abatement order in terms of section 91(6) of the 1990 Act are established in relation to the road, the pursuer's first and second craves should be refused.

(2) Esto the pursuer has established that the conditions for the making of a litter abatement order in terms of section 91(6) of the 1990 Act are established, the defenders having proved that they have complied with their duties under section 89(1) and (2) of the 1990 Act as respects the road, in terms of section 91(7) of the 1990 Act, the pursuer's first and second craves should be refused.

Interlocutor

The sheriff, having resumed consideration of the cause, Repels the first and third pleas in law for the pursuer, refuses the first and second craves for the pursuer, sustains the first plea in law for the defender, assigns a hearing on expenses for 14 November 2018 at 10.45 am within Aberdeen Sheriff Court, Civil Annex, Queen Street, Aberdeen and continues consideration of the pursuer's third crave and second plea in law and the defenders' second plea in law to said hearing.

NOTE***Relevant provisions of the Environmental Protection Act 1990*****[1] Section 89— Duty to keep land and highways clear of litter etc.**

(1) It shall be the duty of—

(c) each principal litter authority, as respects its relevant land,
to ensure that the land is, so far as is practicable, kept clear of litter and refuse.

(2) Subject to subsection (6) below, it shall also be the duty of—

(a) each local authority, as respects any relevant highway or relevant road for which it is responsible,

to ensure that the highway or road is, so far as is practicable, kept clean.

(3) In determining what standard is required, as respects any description of land, highway or road, for compliance with subsections (1) and (2) above, regard shall be had to the character and use of the land, highway or road as well as the measures which are practicable in the circumstances.

.....

(7) The Secretary of State shall prepare and issue a code of practice for the purpose of providing practical guidance on the discharge of the duties imposed by subsections (1) and (2) above.

.....

(10) Any person subject to any duty imposed by subsection (1) or (2) above shall have regard to the code of practice in force under subsection (7) above in discharging that duty.

[2] Section 91— Summary proceedings by persons aggrieved by litter.

(1) A magistrates' court may act under this section on a complaint made by any person on the ground that he is aggrieved by the defacement, by litter or refuse, of—

- (a) any relevant highway;
- (b) any trunk road which is a special road;
- (c) any relevant land of a principal litter authority;
- (d) any relevant Crown land;
- (e) any relevant land of a designated statutory undertaker;
- (f) any relevant land of a designated educational institution; or
- (g) any relevant land within a litter control area of a local authority.

(2) A magistrates' court may also act under this section on a complaint made by any person on the ground that he is aggrieved by the want of cleanliness of any relevant highway or any trunk road which is a special road.

.....

(4) Proceedings under this section shall be brought against the person who has the duty to keep the land clear under section 89(1) above or to keep the highway clean under section 89(2) above, as the case may be.

(5) Before instituting proceedings under this section against any person, the complainant shall give to the person not less than five days written notice of his intention to make the complaint and the notice shall specify the matter complained of.

(6) If the magistrates' court is satisfied that the highway or land in question is defaced by litter or refuse or, in the case of a highway, is wanting in cleanliness, the court may, subject to subsections (7) and (8) below, make an order ("a litter abatement order") requiring the defendant to clear the litter or refuse away or, as the case may be, clean the highway within a time specified in the order.

(7) The magistrates' court shall not make a litter abatement order if the defendant proves that he has complied, as respects the highway or land in question, with his duty under section 89(1) and (2) above.

(8) The magistrates' court shall not make a litter abatement order where it appears that the matter complained of is the result of directions given to the local authority under section 89(6) above by the highway authority.

(9) A person who, without reasonable excuse, fails to comply with a litter abatement order shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale together with a further fine of an amount equal to one-twentieth of that level for each day on which the offence continues after the conviction.

(10) In any proceedings for an offence under subsection (9) above it shall be a defence for the defendant to prove that he has complied, as respects the highway or land in question, with his duty under section 89(1) and (2) above.

(11) A

(a) direction under section 89(6A); or

(b) code of practice under section 89(7)

shall be admissible in evidence in any proceedings under this section and if any provision of such a direction or code appears to the court to be relevant to any question in the proceedings it shall be taken into account in determining that question.

(12) Where a magistrates' court is satisfied on the hearing of a complaint under this section—

(a) that, when the complaint was made to it, the highway or land in question was defaced by litter or refuse or, as the case may be, was wanting in cleanliness, and
 (b) that there were reasonable grounds for bringing the complaint,
 the court shall order the defendant to pay such reasonable sum to the complainant as the court may determine in respect of the expenses incurred by the complainant in bringing the complaint and the proceedings before the court.

(13) In the application of this section to Scotland—

- (a) for any reference to a magistrates' court there shall be substituted a reference to the sheriff;
- (b) for any reference to a complaint there shall be substituted a reference to a summary application, and “complainant” shall be construed accordingly;
- (c) for any reference to the defendant there shall be substituted a reference to the person against whom the proceedings are taken;
- (d) for any reference to a highway and a relevant highway there shall be substituted a reference to a road and a relevant road; and
- (e) for any reference to a highway authority there shall be substituted a reference to a roads authority,

and any person against whom proceedings are brought may appeal on a point of law to the Court of Session against the making of a litter abatement order.

General background

[3] Section 89(1) of the Environmental Protection Act 1990 (“the 1990 Act”) imposes a duty on each ‘principal litter authority,’ as respects its ‘relevant land,’ to ensure that the land is, ‘so far as is practicable’ (emphasis added), kept clear of litter and refuse.

[4] Section 89(2)(a) of the 1990 Act imposes a duty on each local authority, as respects any ‘relevant road’ for which it is responsible, to ensure that the road is, so far as is practicable (emphasis added), kept clean.

[5] The present action relates to a 6.8-mile stretch of the A96 dual carriageway in Aberdeenshire, extending between the northern boundary of the Aberdeen City Council local authority area, which lies immediately to the south of the Aberdeenshire Council local authority area, and the town of Inverurie, Aberdeenshire, where the pursuer lives. Unless the context suggests otherwise, any references in this judgment to ‘the road’ should be taken

to refer to this stretch of the A96, including its roundabouts, traffic islands, central reservation, any pavements immediately adjacent to it and the land immediately adjacent to it. The pursuer has raised this action in his capacity as convenor of Aberdeenshire Environmental Forum, a group which apparently carries out functions concerning environmental matters, including the provision of a general discussion forum for environmental issues in the Aberdeenshire Council area.

[6] For the purposes of these proceedings, the defenders accept that they are the local authority which is responsible for the carriageway of the road, in terms of section 89(2)(a) of the 1990 Act, and that they are the principal litter authority in relation to land adjacent to the road, in terms of section 89(1)(c) of the Act. Accordingly the defenders accept that they are the body which is required to comply with the duties imposed by those provisions with regard to the road. Nothing turns on any technical issues with regard to the interaction of these two provisions in relation to the carriageway of, and the land adjacent to, the road.

[7] The Scottish Ministers issued a code of practice in relation to compliance with the duties imposed by section 89 of the 1990 Act (the Code of Practice on Litter and Refuse (COPLAR)), in terms of section 89(7) of the 1990 Act. In particular, a version of COPLAR was issued in 2006 ('COPLAR 2006') and an updated version was issued in June 2018 ('COPLAR 2018'), subsequent to the raising of these proceedings. The version which was in force at the time when the proceedings were raised was thus COPLAR 2006.

[8] In terms of section 89(10) of the 1990 Act the defenders, being subject to duties imposed by section 89(1) and (2) of the 1990 Act, are obliged to have regard to "the code of practice in force under sub-section (7)", which I take to be a reference to the version of COPLAR in force at the material time, in discharging those duties.

[9] In broad terms, the pursuer's position is that the defenders have, over a period of years, failed to address concerns raised by him in his personal capacity and as convenor of Aberdeenshire Environmental Forum with regard to the standard of street cleaning throughout Aberdeenshire. The pursuer is a retired local government chief officer who has a particular interest in street cleansing issues. The pursuer regards the road as representative of the defenders' general performance in relation to street cleaning throughout Aberdeenshire and as illustrative of his concerns regarding that issue. It is against this background that the attention of the pursuer focussed on the road. The pursuer avers that the defenders have failed to comply with their duties under section 89(1) and (2) of the 1990 Act, on the basis that inspections of this stretch of road carried out by him in January, March and July 2018 showed the presence of litter of various kinds at points along the road, central reservation, roundabouts and adjacent verges and landscaped areas and the presence of dirt, grit and other 'detritus' at various points on the carriageway. The pursuer's case is simply that the presence of this material indicates that the defenders have failed to comply with their statutory duties under section 89 of the 1990 Act with regard to the road.

[10] The pursuer has raised these proceedings as a means of forcing the defenders to comply with their duties (as he sees them) under section 89(1) and (2) of the 1990 Act. The pursuer claims to be a person aggrieved by the defacement, by litter or refuse, of the road for the purposes of section 91(1) of the 1990 Act and to be a person aggrieved by the want of cleanliness of the road for the purposes of section 91(2) of the 1990 Act. He accordingly asks the court to make a litter abatement order in terms of section 91(6) of the 1990 Act requiring the defenders to clear the litter and refuse away and to clean the carriageway within a period specified in the order, which he suggests should be four weeks.

[11] The general position of the defenders is that the pursuer's crave, being directed not towards an accumulation of litter or a surface cleanliness issue at a particular location but rather towards the entirety of this 6.8-mile stretch of dual carriageway, goes beyond the scope of the 1990 Act, that it should therefore be refused as incompetent and that in any event they have discharged their duties and they continue to discharge their duties under section 89(1)(c) of the 1990 Act to ensure that the land adjacent to the carriageway is, in so far as is practicable, kept clear of litter and refuse and under section 89(2)(a) of the 1990 Act to ensure that the carriageway is, in so far as is practicable, kept clean. Accordingly, by the operation of section 91(7) of the 1990 Act, the court is not entitled to make a litter abatement order with regard to the road.

[12] The defenders argue that it is not practicable to keep the entirety of this long and busy stretch of trunk road permanently free of litter and detritus to the letter of the 1990 Act and the COPLAR guidance, that they have in place an acceptable programme of monthly litter-picking along the stretch of road in addition to assessing the condition of the road with regard to litter accumulation each week and dealing reactively with any reports of significant litter accumulation from third parties and that the available information gathered via third party assessments indicates that they generally discharge their duties under section 89(1) and (2) of the 1990 Act to an acceptable level.

Relevant procedural history

[13] The pursuer's writ was presented for warranting as a summary application on 11 April 2018 and was warranted for service the same day. After sundry procedure I heard proof on 29 August 2018. The pursuer was represented by his solicitor Mr Whittle and the defenders by their solicitor Mr Ingram. The pursuer gave evidence, as did three of the

defenders' officials, namely Philip McKay, Head of Roads, Landscape and Waste Services, Andrew Sheridan, Waste Team Manager and David Armitage, Policy Manager. In relation to the pursuer and Messrs McKay and Sheridan, evidence in chief was largely by affidavit, supplemented by further examination in court. Mr Armitage's entire evidence was encapsulated in his affidavit. I heard legal submissions on 19 September 2018, when I made avizandum.

[14] I was told at the proof that, at an earlier hearing, another sheriff had dispensed with the need for a shorthand writer. There are accordingly no shorthand notes of the proof.

Evidence given by the pursuer

[15] Mr Niblock is aged 70 and lives in Inverurie, Aberdeenshire. He is now retired, having had a long career as a chief officer in three local authorities, namely East Kilbride District Council between 1966 and 1990, Gordon District Council between 1990 and 1996 and Aberdeenshire Council between 1996 and 2004. Mr Niblock is a Chartered Environmental Health Officer and a Chartered Waste Manager. He is a Fellow of the Chartered Institution of Waste Management, of which he served as chairman in Scotland and which nominated him as their designated advisor to the Scottish Government, the Convention of Scottish Local Authorities (COSLA) and the Scottish Environment Protection Agency (SEPA) for a period of around 15 years prior to his retirement.

[16] During his career Mr Niblock had a particular interest, which he retains, in street cleansing. He is the convenor and acting secretary of Aberdeenshire Environmental Forum, of which he has been a member for some 27 years. The forum facilitates discussion on environmental matters affecting Aberdeenshire and regards itself as a 'critical friend' to Aberdeenshire Council, with which it has collaborated for the last ten years in running the

Aberdeenshire Litter initiative (ALi), which mobilises hundreds of volunteers to collect litter throughout Aberdeenshire using equipment provided by Aberdeenshire Council. ALi also campaigns to improve street cleansing throughout Scotland. On behalf of ALi Mr Niblock has articulated concerns regarding the standard of street cleansing throughout Scotland, including in communications with the Scottish Government Cabinet Secretary for the Environment.

[17] For around eight years prior to the raising of these proceedings, Mr Niblock was in correspondence with, and held meetings with, various officials of Aberdeenshire Council to express his concerns, both as an individual and in his capacity as a representative of Aberdeenshire Environmental Forum, in relation to the standard of street cleansing throughout the Aberdeenshire Council area. Mr Niblock clearly harbours concerns that the defenders fail to comply with their statutory duties in terms of section 89(1) and (2) of the 1990 Act in relation to the cleaning of roads and associated land throughout Aberdeenshire. According to Mr Niblock's affidavit, he has requested copies of the defenders' written street cleansing strategies, policies, operational plans and service standards in relation to street cleaning. None have been disclosed to him. His affidavit expresses his belief, which appears to me to be a reasonable inference, that the defenders have no such written policies and plans. Mr Niblock has sought to progress his complaints and concerns via the defenders' complaints procedures, but has not been satisfied with the outcome. Against that background he resolved, apparently with the benefit of legal advice, to raise these proceedings with a view to seeking a litter abatement order in terms of section 91(6) of the 1990 Act as a means of forcing the defenders to comply, on Mr Niblock's analysis, with their duties in terms of section 89(1) and (2) of the 1990 Act and the associated COPLAR guidance.

[18] Mr Niblock identified the 6.8-mile stretch of the A96 dual carriageway between his home town of Inverurie and the northern border of the Aberdeen City Council local government area to represent the entire Aberdeenshire Council local government area for these purposes. In Mr Niblock's view, the state of that stretch of road, and its adjacent verges and landscaped areas, so far as compliance by the defenders with their duties under section 89(1) and (2) of the 1990 Act is concerned, is representative of the general condition of roads and streets within Aberdeenshire and is indicative of the general approach of the defenders to the issue of compliance with their statutory duties under section 89 of the 1990 Act.

[19] In preparation for the raising of these proceedings, Mr Niblock travelled along the road on 29 January 2018 and took a number of still photographs showing the condition of the carriageway, central reservation, roundabouts and the adjacent grass verges and landscaped areas. The resulting 24 photographs are produced as production 5/1/6. They depict the presence of litter at some of the locations photographed together with the presence of accumulations of dirt and grit, which Mr Niblock referred to as "detritus" on the carriageway at certain points along the road. These photographs were intimated to the defenders along with a notice in terms of section 91(5) of the 1990 Act by solicitors acting on Mr Niblock's behalf on 23 February 2018, giving notice of the general nature of Mr Niblock's complaint and of his intention to raise these proceedings. Mr Niblock accepted in cross-examination that, although some of these photographs incidentally include landmarks which would identify the location photographed, at least to a viewer with knowledge of the road, others contain no indication of the location photographed. However, Mr Niblock maintained that the photographs were representative of the general condition of this stretch of road, which ought to have been obvious to the defenders, even in the absence of his

photographs. According to Mr Niblock, he carried out a further inspection of the road on 25 March 2018, when he found the condition of the road and the adjacent land to be substantially unchanged, although three sections of footpath adjacent to the carriageway (locations not specified) appeared to have been cleaned. On this occasion Mr Niblock took further photographs, which are produced as productions 5/5/28 to 5/5/33 inclusive. These photographs were not intimated to the defenders until they were lodged as productions after the raising of this action. According to Mr Niblock's evidence, the photographs from 25 March 2018 show that the general condition of the road and its adjacent land, with regard to general cleanliness and contamination by litter, was substantially the same as it had been on 29 January. Mr Niblock maintained that the photographs from 25 March illustrated a number of his concerns. They showed footpaths which appeared not to have been cleaned for some time and which might, according to Mr Niblock, have presented a slip hazard to pedestrians, particularly to a pedestrian with care of a child or an animal. Some footpaths appeared to be overgrown with moss or obstructed by foliage. Dirt, grit and other such 'detritus' could be seen on parts of the carriageway. According to Mr Niblock, such material is capable of obscuring road markings or affecting road surface traction, representing a potential safety hazard. Some of the photographs show litter within the central reservation. Others show small metal objects, which appeared to be vehicle components, which Mr Niblock found on the carriageway on 25 March 2018.

[20] Mr Niblock accepted that the responsibility for landscaping the areas adjacent to the roadway, as opposed to keeping them free of litter, lay not with the defenders but with Scottish Ministers (more particularly with their road maintenance contractor BEAR Scotland).

[21] On 25 March 2018 Mr Niblock also observed a number of plastic bottles, numbering around 12 to 15, in the central reservation along the road. According to Mr Niblock, the bottles contained liquids of an unknown nature, which he suspected, based on his professional experience, to be urine.

[22] In Mr Niblock's estimation, the photographs taken by him demonstrated that the defenders were in breach of their statutory duties in terms of section 89(1) and (2) of the 1990 Act because, quite simply, they demonstrated that the areas shown in the photographs were not clean and were contaminated by litter, dirt, grit and detritus.

[23] According to Mr Niblock, the level of contamination of the road and adjacent land corresponded to grade C in terms of page 3 of COPLAR 2006 ("consistent distribution of litter and refuse with minor accumulations").

[24] In terms of Appendix 4 of COPLAR 2006 (page 18), the hard surfaces along this route, ie the carriageway, pavements, roundabouts and traffic island, were within zone 6a, which, as applied to the circumstances of this case, recommended that the defenders return the area from grade C to grade A standard ("no litter or refuse") within four weeks. The grassed areas adjacent to the carriageway are within zone 6b of Appendix 4 to COPLAR 2006, which recommends that steps be taken within four weeks to return an area contaminated to grade C to grade B standard ("predominantly free of litter and refuse, apart from a few small items") within four weeks. According to Mr Niblock, comparison of the photographs taken by him on 29 January 2018 and 25 March 2018 showed that the defenders had not taken the action recommended by the code of practice within the time limit specified there.

[25] Mr Niblock accepted that page 3 of COPLAR 2006 states that:

“It is for the courts to decide the size of areas to be considered for the purposes of assessing defacement by litter and refuse, where relevant by comparing photographic evidence with the photographic examples in the code of practice, and considering any directions by the Scottish Ministers. However, it is suggested that for streets, a realistic area to be considered should be in the order of 50 metres in length...”

[26] Appendix 3 of the COPLAR 2006 contains photographs which are intended to illustrate each of the ‘grades of cleanliness’ A to D which are described in the code.

According to Mr Niblock, this passage from the code means that if any part of a given 50 metre section of a road is contaminated to grade C in COPLAR 2006, the entire 50-metre stretch should be considered to be at grade C, no matter how clean the rest of that 50-metre stretch may be.

[27] It appears that Mr Niblock revisited at least part of the road on 29 May 2018, when he photographed the carcass of a fox lying on the carriageway at an unknown point along the road. He returned to the road on 7 July 2018 when he took further photographs, which are lodged as productions 5/5/34 to 5/5/42. These show the condition of various points along the road and its adjacent areas on that date. The fox carcass was still in position at that time. Also present at another unknown point on the road was a carcass of a badger. According to Mr Niblock, both were still present on the morning of 29 August 2018 when he travelled to court to give evidence. Otherwise, Mr Niblock’s position was that the photographs taken on 7 July 2018 indicated that the condition of the road and its adjacent land that day was substantially the same as it had been when the earlier photographs had been taken on 29 January 2018 and 25 March 2018. He observed that on 7 July 2018 one of the footpaths which appeared to have been cleaned between January and March was dirty again.

[28] Mr Niblock accepted in cross-examination that, as with the photographs taken by him on 25 March 2018, the photographs taken by him on 7th July 2018 were not intimated to the defenders until they were lodged as productions for the purposes of this action.

[29] Mr Niblock noted that, by 7 July 2018, COPLAR 2018 had replaced COPLAR 2006. COPLAR 2018 is different in a number of respects from COPLAR 2006. In COPLAR 2018, the duty to keep land clear of litter and refuse (section 89(1)) is considered under reference to six grades of litter and refuse (A to F). Animal carcasses fall within grade F and require to be removed "at the earliest practicable opportunity". The duty to keep roads clean in terms of section 89(2) of the 1990 Act is considered in terms of four grades of "detritus" (A to D). COPLAR 2018 suggests response times, within which it is suggested that the relevant authorities should deal with the different grades of litter, refuse and detritus (pages 19 and 23). According to Mr Niblock the defenders had failed to comply with the recommended response times under both the 2006 and 2018 codes of practice having regard to the level of contamination depicted in the photographs taken by him in January, March and July, notwithstanding his acceptance of the "cyclical" nature of litter, which I understood to mean that any given area, having been cleaned of detritus or cleared of litter, would in due course inevitably become contaminated and require to be cleaned or cleared again.

[30] It was put to Mr Niblock in cross-examination that the defenders enjoyed favourable results in relation to a 'cleanliness index' produced by an independent body, Keep Scotland Beautiful, using the LEAMS auditing system (see below), suggesting that the defenders perform to an acceptable standard in comparison to other local authorities with regard to the cleanliness of roads and streets throughout Aberdeenshire. Mr Niblock maintained that,

whatever the LEAMS assessment tool might measure, it did not measure compliance with the duties imposed by section 89 of the 1990 Act.

[31] Mr Niblock stated that, in addition to the photographs referred to during his evidence, he had taken further photographs and 'dashcam' video footage along the road, all of which had been lodged as productions. None of the additional photographs and video footage had been intimated to the defenders until lodged as productions for the purposes of this action. Mr Whittle stated that Mr Niblock's view was that the photographs referred to by him during his evidence were fully representative of the generality of his photographic and video evidence, with the result that he did not consider it necessary to refer to any other photographs, or indeed to his dashcam video footage, in evidence. Mr Ingram confirmed that he accepted that the photographs referred to during Mr Niblock's evidence were indeed representative of the generality of the photographic and video evidence lodged on Mr Niblock's behalf and that the defenders did not seek to take any point with regard to Mr Niblock's decision not to refer to further photographic or video evidence.

Evidence led on behalf of the defenders

Philip McKay

[32] The defenders called Philip McKay, aged 49, who is the Head of Roads, Landscape and Waste Services for Aberdeenshire Council, having been appointed as Head of Roads and Landscape Services in August 2009. Waste Services were added to Mr McKay's remit in 2015. Mr McKay holds an Honours degree in Civil Engineering and is a Chartered Engineer, Chartered Member of the Institution of Civil Engineers, a Chartered Manager and a Fellow of the Chartered Management Institute.

[33] Mr McKay's remit includes the management of over 5,500 km of road network and around 1,600 km of footpaths. Aberdeenshire Council is Scotland's second largest roads authority. Mr McKay's department is also responsible for the delivery of waste collection operations from over 120,000 domestic properties every week and the delivery of street cleansing across the whole of the Aberdeenshire road network. Mr McKay accepted that Aberdeenshire Council is the organisation which has the relevant duties in terms of section 89(1) and (2) of the 1990 Act for the purposes of this action with reference to the road.

[34] Mr McKay's department currently receives an annual budget of approximately £54.3 million to support the delivery of all of its functions. In February 2014, Aberdeenshire Council identified a need to reduce its overall budgeted spending by over £49 million by the financial year 2018/19, ie the current financial year. During that period and against this background of budgetary constriction the funding allocated to street cleansing throughout Aberdeenshire has been increased from £2.495 million to its current level of £2.888 million.

[35] Mr McKay made reference to two separate indicators which he regarded as providing support for the proposition that Aberdeenshire Council performs its statutory duties in terms of section 89 of the 1990 Act with regard to the cleaning of roads and adjacent areas to an acceptable standard. The first of those indicators involves an assessment of street cleanliness assessed using the Local Environment Audit Management System (LEAMS), administered by Keep Scotland Beautiful. Under reference to production 6/2/10 (Keep Scotland Beautiful National Cleanliness Benchmarking Report for 2016-2017), Mr McKay explained (page 11) that the cleanliness of a selection of 5% of streets within each local authority area is surveyed three times each year, using the LEAMS methodology, which in turn takes account of the COPLAR guidance. One of those surveys is carried out by staff from Keep Scotland Beautiful. The other two surveys are carried out by local

authority staff. The results of each survey are published. The results from the 2016-2017 Keep Scotland Beautiful National Benchmarking Report indicate that Aberdeenshire Council performs comparatively well, with an overall 'street cleanliness score' of 96.6%, which exceeds the national average and serves as a reliable indicator that streets in Aberdeenshire are of an acceptable standard of cleanliness.

[36] The second performance indicator referred to by Mr McKay was Aberdeenshire Council's "reputation tracker". This involves telephone surveys of 150 residents of the Aberdeenshire Council local authority area each month, carried out by an independent contractor. Under reference to production 6/2/5, Mr McKay pointed out that "street cleansing" is one of the issues surveyed and that, in March, April and May 2018 98%, 98% and 99% respectively of those surveyed expressed themselves to be satisfied with the council's performance in relation to street cleansing. Mr McKay commented that the level of public satisfaction with street cleansing, as confirmed by the reputation tracker, is generally in excess of 80%.

[37] Although Mr McKay accepted that neither LEAMS nor the reputation tracker directly measures the defenders' compliance with its statutory duties in terms of section 89(1) and (2) of the 1990 Act, because neither measures compliance with the response times recommended in COPLAR, he maintained that these results clearly indicate high levels of performance and public satisfaction with regard to the general cleanliness of roads and streets throughout Aberdeenshire, which Mr McKay characterised as the ultimate purpose of the duties imposed by section 89 of the Act.

[38] Mr McKay accepted that the pre-eminent guidance with regard to compliance with duties under section 89 of the 1990 Act is COPLAR. He pointed out that the defenders' duties are subject to considerations of practicability. He accepted in cross-examination that

both COPLAR 2006 and COPLAR 2018 give examples of circumstances in which it may be impracticable to comply with the relevant statutory duties within the timescales recommended by the codes (production 5/1/4 COPLAR 2006, page 7 and production 5/3/35 COPLAR 2018, page 11). In each case the examples given related to public holidays, severe weather and the need to comply with legal obligations, for example to avoid damaging sensitive habitats. However, each version of the code nevertheless encourages duty holders to make every effort to comply with their duties “at the earliest opportunity”, even if circumstances arise which make it impracticable to do so within the recommended time limits. Mr McKay pointed out that the examples given in COPLAR are not exhaustive and that COPLAR does not preclude reliance upon other factors as amounting to circumstances which render compliance with the duties under section 89(1) and (2) within the recommended time limits impracticable. He pointed out that page 6 of COPLAR 2006 provides that:

“It is for the courts to decide whether or not it was impracticable for a person under the duty to discharge it,”

and that page 11 of COPLAR 2018 code provides that:

“It is up to the body to evidence why the special consideration times were applied or if it believed it was not practicable to fulfil their duty”.

[39] Ultimately Mr McKay’s position was that, having regard to the scope of his department’s remit, the general context of budgetary pressure in which his department operates, the measures already taken by his department to address the duties arising from section 89(1) and (2) of the 1990 Act (see evidence of Mr Sheridan below) and the high levels of performance and public satisfaction indicated by the LEAMS and reputation tracker results, it is not practicable for him to devote further resources to street cleansing services. Other areas within his remit have greater priority at present, one example being road

maintenance. However, Mr McKay stressed that he is fully aware of the need for Aberdeenshire Council to comply with its duties in terms of section 89(1) and (2) of the 1990 Act, and with COPLAR. He indicated that COPLAR 2018 appears to set more challenging requirements for compliance with these statutory duties than COPLAR 2006, particularly with regard to response times. Mr McKay recently made recommendations to the defenders' policy group as to how those challenges might be addressed.

Andrew Sheridan

[40] The defenders called Mr Andrew Sheridan, aged 53, Team Manager for Collections and Cleansing for Aberdeenshire Council since 2015. Mr Sheridan has worked within the Waste section of Aberdeenshire Council since 2004. In his current post he is the Strategic and Operational Lead for refuse and recycling collection and street cleansing functions across Aberdeenshire. Specifically, Mr Sheridan is responsible for the delivery of street cleansing services in relation to the road network and pavements across Aberdeenshire.

[41] Mr Sheridan acknowledged the duties on Aberdeenshire Council in terms of section 89(1) and (2) of the 1990 Act. Those duties are discharged by a combination of routine, scheduled street cleansing, the frequency reflecting an assessment of need (with the result that the city centre receives attention every day but a rural village may only be cleaned every six months) together with reactive response to reports of litter accumulation received from third parties including members of the public and from members of the defenders' own staff.

[42] Mr Sheridan noted that the road is known to be affected by litter on an ongoing basis. Supervisors from Mr Sheridan's department drive along the road at least once a week to assess the level of litter visible along the road and its adjacent verges. A system of routine

monthly litter-picking is in place for the road. Litter-picking has taken place along this stretch of road each month during 2018 apart from February, when this work was not possible due to extreme weather. For these purposes the road is sectioned off by the defenders into segments, each approximately one mile long. The defenders have identified locations where staff can safely park their vehicles in order to litter-pick roadside verges without the need to interrupt the flow of traffic. Litter-picking operations on the central reservation or on roundabouts, however, require traffic management measures, for example the closure of the offside lane, which would require the co-operation of BEAR Scotland, the contractors appointed by the Scottish Ministers to manage the trunk road network including this stretch of road. Mr Sheridan accepted that the photographs taken by the pursuer in February and March 2018 indicated the presence of litter on the verges and in the central reservation and the presence of grit, dirt and other detritus on the carriageway at some of the locations photographed. Although he was aware of litter in the central reservation, it had, in his opinion, never reached a level which would justify the traffic management measurements required to enable litter-picking of the central reservation.

[43] Mr Sheridan described cleansing operations undertaken by the defenders in March 2018 in response to the section 91 notice served on behalf of the pursuer. Those operations were targeted at the areas where, in Mr Sheridan's judgement, the need was greatest. He accepted that some of the locations depicted in the photographs taken by the pursuer in January 2018 had required attention, under explanation that they had received appropriate attention. Other locations shown in the photographs had not, in Mr Sheridan's judgment, required attention. Mr Sheridan highlighted the recurrent nature of litter on and adjacent to this stretch of road. The fact that litter is visible in photographs taken in late January and late March does not indicate that the same litter is shown in both photographs. It was

entirely possible that, in the meantime, the defenders had cleared away litter, only for it to be replaced by other litter.

[44] Mr Sheridan did not accept that any of the litter or detritus depicted in the photographs taken by the pursuer gave rise to a safety risk. He observed that the detritus and metal components shown in the pursuer's photographs were not on the 'running surface' of the carriageway. He pointed out that responsibility for landscaping the areas adjacent to the road, including the cutting back of bushes and foliage from footpaths, lay not with the defenders but with BEAR Scotland. According to paragraph 14 of his affidavit, the defenders sweep main roads as and when they judge that the level and location of detritus poses a risk to road users. The defenders monitored the detritus along the road and concluded that the level and location of detritus present did not pose a safety risk. Targeted sweeping of parts of the carriageway was completed in October 2017. The defenders have instructed a traffic management company to facilitate lane closures in order to allow the brushing of the carriageway at further particular roundabouts on the road. That work was scheduled for the week commencing 23 July 2018 but did not proceed due to the non-availability of the traffic management company. The work then began on 6 August but had to be abandoned due to high traffic volume. The defenders intend to arrange a further date for this work, depending on the availability of traffic management measures. These issues illustrate the difficulty of putting traffic management measures in place to facilitate road cleaning and litter-picking on the road.

[45] Mr Sheridan accepted that at least some of the photographs taken by the pursuer on 29 January 2018 would correspond to cleanliness grade C of COPLAR 2006. However, Mr Sheridan's approach to the assessment of grade C differed from that of the pursuer. Mr Sheridan stressed that a 50-metre stretch of road or street would require to be affected by a

“consistent distribution of litter and refuse with minor accumulations” in order to meet the criteria for grade C contamination under COPLAR 2006. A single contaminated patch would not, as suggested by the pursuer, render the entire 50 metre stretch, and therefore the road of which that 50 metre stretch was part, of grade C contamination.

[46] Mr Sheridan made reference to production 6/2/12, which he described as a schedule from the contract between the Scottish Ministers and BEAR Scotland for the management, inspection and maintenance of trunk roads in Scotland, including the road with which this action is concerned. He pointed out that paragraph 4.34.2 of the schedule places an obligation on BEAR Scotland to liaise with the responsible litter authority when any planned traffic management might allow safe access to the central reservation for litter and refuse clearance. However, according to Mr Sheridan, BEAR Scotland does not, in practice, provide the defenders with sufficient advance notice of planned traffic management to allow for such opportunities.

[47] Mr Sheridan accepted that paragraph 4.34.7 of the schedule notes that the relevant local authority continues to be responsible for the clearance of litter and refuse from trunk roads and for keeping trunk roads clean in compliance with the 1990 Act despite the involvement of BEAR Scotland in the management of the trunk road network.

[48] However paragraph 4.34.8 of the schedule places the primary responsibility for removal of any litter or refuse which presents a risk to the safety of road users on BEAR Scotland, and obliges BEAR Scotland to notify the local authority in writing if the standard of cleanliness of a road for which they have responsibility falls below that required by the current version of COPLAR.

[49] Mr Sheridan pointed out that paragraph 4.35.1 of the schedule appears to place primary responsibility for the removal of dead animals from the carriageway on BEAR Scotland.

[50] Like Mr McKay, Mr Sheridan made reference to the data generated by the LEAMS system and the reputation tracker as indicators of a generally high level of performance and public satisfaction with regard to the standard of cleanliness of roads and streets throughout Aberdeenshire.

[51] Paragraph 6 of Mr Sheridan's affidavit notes that, during the financial year 2017/18, his department received 739 'service requests' in relation to cleansing, which I assume to be requests for cleansing issues to be addressed, across all six of Aberdeenshire's 'political areas,' which I take to refer to its local government wards. Of those, 181 requests related to sweeping and 60 to litter issues. When any such request is received, the defenders deploy a supervisor from Mr Sheridan's department to check the area to which the request relates and decide what action, if any, is required in order to address the issue raised. Any action which is considered to be necessary is arranged as soon as is possible. The only two reported issues in relation to the road during 2018, apart from the pursuer's complaint, were a build-up of litter on a slip road to the village of Kintore, which was reported by staff from BEAR Scotland, and a report from a member of the public of a log on the carriageway, both of which were swiftly dealt with by the defenders.

David Armitage

[52] The defenders' final witness was Mr David Armitage, aged 67, the Roads Policy and Asset Manager for Aberdeenshire Council. Mr Armitage adopted his affidavit but neither

Mr Ingram nor Mr Whittle had any further questions for him and therefore his affidavit comprised the whole of his evidence.

[53] According to Mr Armitage's affidavit, he has an Honours degree in Civil Engineering, a Master's degree in Transportation Engineering and Planning and he is a Chartered Engineer and a Member of the Institution of Civil Engineers and the Chartered Institute of Highways and Transportation. Mr Armitage was employed by Grampian Regional Council from 1978 until the creation of Aberdeenshire Council following local government re-organisation in 1996, from which time he has been employed by Aberdeenshire Council. During his career he has held a number of different roles in the general field of roads and transportation, including the management of trunk roads within Aberdeenshire, Moray and Highland Council areas prior to the appointment of BEAR Scotland as the contractor with responsibility for management and maintenance of all trunk roads in Scotland, including the stretch of the A96 with which this case is concerned.

[54] Mr Armitage's affidavit notes the duties placed on road works authorities in terms of the New Roads and Street Works Act 1991 to use best endeavours to co-ordinate the execution of works of all kinds in relation to the roads for which they are responsible and highlighted the challenges which arise in relation to the co-ordination of necessary works including street cleaning on high speed dual carriageways such as the stretch of road with which this action is concerned, given the potential for the closure of carriageways and other traffic management measures in order to facilitate works on and around such roads, resulting in inevitable inconvenience to road users and potential risks to staff members involved in carrying out the works in question. Although Mr Armitage's affidavit identifies some areas of practice in relation to which he feels that relevant agencies could more effectively co-ordinate their efforts in order to facilitate the carrying out of litter clearing and

other routine maintenance activities on the trunk road network, he does not in fact express any particular view or opinion as to the extent to which the defenders have complied with their statutory duties in terms of section 89(1) and (2) of the 1990 Act with regard to this stretch of road. He notes that the defenders have endeavoured to more effectively co-ordinate litter clearing and road maintenance services by bringing both functions within the remit of a single head of service (in this case, Mr McKay).

Submissions

[55] I heard legal submissions on 19 September 2018. Both parties lodged written submissions, which were adopted and expanded upon at the hearing. The written submissions have been retained in process.

Submissions for the pursuer

[56] For the pursuer, Mr Whittle asked me to make a litter abatement order covering the entirety of the road, in terms of the pursuer's first crave, requiring compliance by the defenders within a period of four weeks. In the event that the pursuer's crave for a litter abatement order was refused, Mr Whittle sought an order in terms of section 91(12) of the 1990 Act ordering the defenders to pay the pursuer's full expenses as taxed on the basis that, when the action was raised, the road and land to which it relates was defaced by litter or refuse and wanting in cleanliness and there were reasonable grounds for raising the action.

[57] The requirements on the defenders in terms of section 89(1) and (2) of the 1990 Act to "ensure" that the relevant land is, so far as practicable, kept clear of litter and refuse and to ensure that the road is, so far as practicable, kept clean, amount to duties to "make certain" that those results are achieved. In practical terms, compliance with those duties is governed

by the COPLAR codes of practice. Although the action was raised prior to the introduction of COPLAR 2018 in June 2018, nevertheless that was the relevant version of the code for the purposes of section 91(6) of the 1990 Act, the terms of which require the court to consider the condition of the land or road in question in the present tense and not at the time when the proceedings were raised. On the other hand, the 2006 version of COPLAR, being the version in force at the time when the proceedings were raised, is relevant to the court's consideration for the purposes of section 91(12) of the 1990 Act of the question of whether, in the event that the pursuer's crave for a litter abatement order is refused, there were nevertheless reasonable grounds for bringing the action at the time when it was raised.

[58] Compliance by the defenders with their duties in terms of section 89(1) and (2) of the 1990 Act should thus be assessed via the provisions of COPLAR 2018. Other indicators, such as LEAMS and the reputation tracker, are irrelevant.

[59] Mr Whittle submitted that the word "practicable," in relation to the defenders' duties under section 89(1) and (2) of the 1990 Act, means "possible to be accomplished with no means or resources", or "possible in light of current knowledge and invention at the time" (*Adsett v K & L Steel Founders and Engineers Limited* [1953] 1 WLR 137 per Parker LJ at p. 141), an approach which eliminates all questions of cost and resources. The term "practicable" implies a stricter duty than would have been implied by the use of the less exacting term "reasonably practicable" (*Adsett v K & L Steel Founders and Engineers Limited* and *Marshall v Gotham Co Ltd* [1954] AC 360). The duty imposed on the defenders is significant and guidance in relation to circumstances which may render strict compliance with the time limits imposed by COPLAR impracticable is given in COPLAR 2018, subject to the overriding requirement that, even where compliance with the recommended time limits is impracticable, the issue must still be dealt with at the earliest opportunity. The response

times recommended in COPLAR 2018 in any event build in sufficient time to address issues such as the prioritisation of work, the need to organise resources and, where necessary, the need to work in conjunction with other agencies to organise any necessary traffic management measures. Section 89(3) of the 1990 Act does not open the way for different standards to be imposed for different descriptions of land or road, in terms of compliance with the duties under section 89(1) and (2). The significance of such differences is taken into account and reflected in the COPLAR guidance. If anything, the nature of the road to which the present action relates called for extra attention by the defenders.

[60] The assertion that the pursuer is a person “aggrieved” by the defacement of land by litter or refuse or by the want of cleanliness of a road, for the purposes of section 91(1) and (2) of the 1990 Act, implies nothing about the merit of his complaint. A person is “aggrieved” for the purposes of section 91(1) and (2) if he is sufficiently concerned to make a complaint, the making of a complaint being constituted by the raising of proceedings rather than by the issuing of a notice under section 91(5) of the Act, which merely gives notice of an intention to raise a complaint in the form of summary application proceedings.

[61] Mr Whittle commended the pursuer’s evidence. The pursuer acted reasonably in raising this action, which he had only done as a last resort after attempting for a period of eight years or so to persuade the defenders to comply with his understanding of their duties in relation to the cleanliness of roads and land within their local authority area. He carried out a number of inspections of the relevant stretch of road and took photographs showing the condition of a representative sample of locations along the road at different dates. The defenders’ production 6/6/1, being their response to the notice served by him under section 91(5) of the 1990 Act, was not received by him or his solicitors because it was wrongly addressed by the defenders. Neither the pursuer nor his solicitors had notice of

this response until it was lodged as a production by the defenders after the raising of this action. Accordingly, the case of *Hemming MP v Birmingham City Council* [2015] EWHC 1472 (Admin) could be distinguished.

[62] There was no need for the photographs lodged by the pursuer to identify every location photographed. The photographs were intended to be representative of the condition of the entire stretch of road, which must have been within the knowledge of the defenders and their employees. The defenders were responsible for keeping the whole of the road clean. There was no room for the distinction which Mr Sheridan sought to draw between the “running surface” and other parts of the roadway (Roads (Scotland) Act 1984, section 151).

[63] The pursuer’s ultimate concern was that the defenders, in his view, have no proper system for dealing with the issue of land and street cleanliness and for ensuring compliance with their statutory duties under section 89(1) and (2) of the 1990 Act. Despite the evidence of Mr Sheridan, the pursuer’s position was that the approach of the defenders is reactive and subjective. Although they purport to exercise judgment in the allocation of resources to deal with particular issues concerning land and street cleanliness, such matters are in fact built in to COPLAR 2018. The section of the A96 with which these proceedings are concerned, despite being the busiest section of road within the defenders’ local authority area, is apparently only swept twice a year. I asked Mr Whittle how often the pursuer considered that the road should be swept. Mr Whittle was unable to respond in detail, beyond referring generally to the guidance set out in COPLAR 2018.

[64] Mr Whittle submitted that the onus of establishing the defence set out in section 91(7) of the 1990 Act rests on the defenders.

Submissions for the defenders

[65] On behalf of the defenders, Mr Ingram accepted that they are subject to the relevant duties in terms of section 89(1) and (2) of the 1990 Act with regard to the road. They had complied with the duties incumbent upon them to ensure that the relevant land has, so far as practicable, been kept clear of litter and refuse and that the road has, so far as practicable, been kept clean.

[66] Mr Ingram raised a subsidiary issue with regard to the scope of the pursuer's complaint, which Mr Ingram submitted should be limited to the matters raised in the section 91(5) notice served on the defenders on 23 February 2018, (production 5/1/8), in respect of which an extension was allowed for compliance until 6 March 2018 (production 5/1/9). The section 91(5) notice had been accompanied by copies of the 24 photographs taken by the pursuer on 29 January 2018, none of which specified the location shown, although it was understood that they showed locations along the 6.8-mile stretch of road to which the action relates. No further photographs were provided to the defenders by the pursuer until they were lodged as productions following the raising of proceedings. Mr Ingram submitted that the section 91(5) notice was therefore lacking in specification. Mr Ingram had considered raising this issue by way of a preliminary plea, but after discussion with the pursuer's agent had decided not to do so, in the interests of expediting the proceedings. Given the pursuer's stated objective to compel the defenders to act upon his concerns, it would have been appropriate for the pursuer to provide the defenders with any and all photographic and video evidence in his possession at the earliest possible stage, rather than restricting disclosure prior to the raising of the action to the 24 photographs taken on 29 January 2018 and withholding all of his other photographic and video evidence until it was lodged following the raising of proceedings. Photographs postdating the pursuer's section 91(5)

notice were relevant only insofar as they confirm or contradict his position with regard to the condition of the affected road and adjacent land as at the date of his section 91(5) notice.

[67] Mr Ingram also relied upon the case of *Hemming MP v Birmingham City Council* as authority for the proposition that, in order to merit a litter abatement order, a complaint such as that made by the pursuer must be sufficiently specific to enable such an order to be framed by the court. The pursuer's complaint bears to relate to the entirety of a 6.8-mile stretch of dual carriageway. In *Hemming*, the District Judge at first instance dismissed a complaint under section 91 of the 1990 Act, which had originally related to the entirety of the parliamentary constituency of which the appellant was the MP, even after he had narrowed the scope of his complaint so that it related to only five sites within the constituency. Mr Ingram submitted that the pursuer's complaint in the present case was so wide-ranging and lacking in specification with regard to the location at which the defenders could be ordered to undertake work in order to comply with the terms of a litter abatement order that the court would be entitled to dismiss it on that ground alone.

[68] Another consequence of the defenders' position with regard to the "crystallising" effect of the pursuer's section 91(5) notice was that the COPLAR 2018 should have no role in the proceedings, because it only came into force in June 2018 and therefore it did not apply as at the date of the raising of proceedings. The use of the present tense in section 91(6) of the 1990 Act should be read as referring to the point in time when the section 91(5) notice was served. Although the statutory scheme builds in time for the defender to respond to a section 91(5) notice, by virtue of the mandatory requirement for the party serving the notice to wait at least five days before instituting proceedings, the court was not entitled to take into account evidence of matters subsequent to the date of the section 91(5) notice in determining whether, for the purposes of an application for expenses in terms of

section 91(12), there were reasonable grounds for bringing the complaint (*Hemming MP v Birmingham City Council*) and the same principle should apply to the issue of whether the complaint is well founded in terms of section 91(6).

[69] COPLAR is pre-eminent in relation to compliance with the duties under section 89(1) and (2) of the 1990 Act. However, the results of LEAMS surveys are significant as they reflect the assessment of street cleanliness by auditors under reference to COPLAR. Thus the results of LEAMS surveys give some indication of the extent to which the defenders achieve the overriding objectives of the duties under section 89 of the 1990 Act and the associated COPLAR guidance. The positive LEAMS survey results are confirmed by the reputation tracker survey results.

[70] Section 91(7) of the 1990 Act simply provides the defenders in an action such as this with an opportunity to produce evidence of compliance with their section 89 duties, but without imposing any burden of proof on the defenders. In other words, section 91(7) imposes an evidential burden, but not a legal or persuasive burden, on the defenders. Thus, failure by the defenders to produce written policies in relation to street cleanliness does not equate to a failure to discharge any onus under section 91(7). Mr Ingram did not cite any authority for this proposition.

[71] Despite the absence of written policies, the evidence provided by Mr McKay and Mr Sheridan for the defenders made it clear not only that the defenders are well aware of their duties under section 89(1) and (2) of the 1990 Act but that they have proactive procedures in place whereby regular inspections of the road are carried out by supervisors, who assess the need for litter-picking and road cleaning, the frequency of which is not prescribed by COPLAR (see production 1/5/4 COPLAR 2006, page 1). There is also an appropriate reactive

element to the defenders' approach to street cleaning, in that they react to reports from members of the public of litter accumulation at particular locations.

[72] Notwithstanding these submissions, the defenders' position was that they had taken action during March 2018 in response to the section 91(5) notice served by the pursuer. Although the notice, and the photographs enclosed with it, were not specific as to the particular points along the road which were of concern to the pursuer and to which his photographs related, the defenders had responded as best they could, in the manner set out in their production 6/1/1, which the defenders accepted had in fact not been received by the pursuer's solicitor. That document specified the measures which the defenders considered it appropriate to take in response to the pursuer's section 91(5) notice. The defenders had also lodged their production 6/2/2, described as "A96 complete log 2018", showing the condition of the roadway and adjacent land at various points along this stretch of road on stated dates during 2018. I expressed doubt as to whether the latter document had been introduced in evidence. Mr Ingram thought that it had been introduced during the evidence of Mr Sheridan. However I have no note of this production having been introduced during Mr Sheridan's evidence and so I have left it out of account.

[73] The defenders accepted that, for the purposes of section 89(3) of the 1990 Act, the significance of differences between particular areas or types of land or roads is addressed in the relevant COPLAR guidance.

[74] The defenders' position, in contrast to that of the pursuer, was that issues of finance and the prioritisation of resources according to need are entirely relevant to the issue of practicability, as are the general issues of staff safety, risk management and the consequent need to put traffic management measures in place in order to enable cleaning and litter-picking to be carried out safely at some locations on or close to this busy trunk road.

Although the defenders as the local authority have the primary responsibility to keep this road and its adjacent land clean and clear of litter, in terms of section 89(1) and (2) of the 1990 Act, responsibility for road maintenance and road safety issues lies ultimately with the Scottish Ministers and is discharged via their executive agency, Transport Scotland, and Transport Scotland's contractor BEAR Scotland.

[75] Mr Ingram made reference to sections 118 and 119 of the New Roads and Street Works Act 1991. Section 118 imposes a duty on roadworks authorities to use their best endeavours to co-ordinate the execution of works of all kinds in the roads for which they are responsible. In relation to the section of road with which this action is concerned, the roadworks authority is BEAR Scotland. Section 119 of the 1991 Act imposes a duty on 'undertakers' to use their best endeavours to co-operate with roadworks authorities and with other undertakers with regard to the execution of roadworks. The defenders are an undertaker for these purposes in relation to the stretch of road with which this action is concerned. According to Mr Ingram, the conjunction of these duties means that BEAR Scotland has a duty to co-ordinate the execution of works of all kinds in relation to this stretch of road and the defenders have a duty to co-operate with BEAR Scotland. These provisions should provide opportunities for the defenders to take advantage of planned roadworks in order to carry out litter picking and road cleaning operations, if given sufficient notice of those works by BEAR Scotland. However BEAR Scotland generally do not provide sufficient notice of planned roadworks to enable the defenders to take advantage of any consequent opportunities to carry out litter-picking and road cleaning work on the relevant sections of the road.

[76] Insofar as the pursuer sought to suggest that issues concerning the cleanliness of the road surface had implications for road safety, the defenders' position was that the primary

duty holder in relation to road safety matters, as in relation to road maintenance, is BEAR Scotland on behalf of the Scottish Ministers. The defenders understand that BEAR Scotland carry out weekly inspections of the road in order to assess any road safety hazards. These are in addition to the weekly inspections which, according to Mr Sheridan, are carried out by supervisors within his department in order to assess issues with regard to litter. It was reasonable for the defenders to rely upon BEAR Scotland to notify them of any road cleanliness issues noted by them which they considered to have implications for road safety (*Foster v Dundee City Council and Scottish Water*, unreported, Dundee Sheriff Court).

[77] The pursuer had failed to establish a breach by the defenders of their statutory duties in terms of either section 89(1) or (2) of the 1990 Act on the basis that he had failed to prove the existence of a lack of cleanliness affecting the road or a level of contamination with litter and refuse affecting the road or adjacent land such as to indicate contravention of either of those subsections. Alternatively, the defenders had proved that they had complied with their duties for the purposes of section 91(7) of the Act because it was not practicable for them to comply with those duties at all times in relation to this entire stretch of road having regard to the budgetary constraints under which the defenders (like all public authorities) operate, the steps they already take to address their duties under section 89(1) and (2) of the 1990 Act, the obvious risks to the safety of the defenders' staff in carrying out litter-picking and road cleaning operations on or adjacent to this busy trunk road without appropriate traffic management measures being put in place, the fact that the defenders do not have the power to insist upon the implementation of the necessary traffic management measures but depend upon another agency, namely the Scottish Ministers' contractor BEAR Scotland, to agree to and facilitate those measures and the indications given by the LEAMS and

reputation tracker results that the defenders already address the objectives of the section 89(1) and (2) duties to an acceptable standard.

[78] Mr Ingram accordingly invited me to decline to make a litter abatement order in terms of section 91(6) of the 1990 Act and also to agree with the defenders that no order in the pursuer's favour for expenses in terms of section 91(12) of the Act should be made on the basis that it was unreasonable for the pursuer to have raised these proceedings in relation to the entire 6.8-mile stretch of this road, having restricted the notice given to the defenders of the subject matter of his complaint only to the areas shown in the 24 photographs provided to the defenders with the pursuer's section 91(5) notice, not all of which made the location photographed clear to the defenders.

Assessment of evidence

[79] I have no difficulty accepting as generally credible and reliable all of the evidence led and introduced during the proof. In particular I accepted the evidence from Mr McKay and Mr Sheridan about the issues which impact on the defenders' decision making with regard to street cleaning, their response to the pursuer's section 91 notice and the measures which the defenders have in place, whether or not they are committed to writing, to address their duties under section 89 of the 1990 Act with regard to the road. I preferred that evidence where it was in conflict with the pursuer's evidence of his impression with regard to these issues, which are inevitably within the knowledge of the defenders. Although I accept that the pursuer's beliefs with regard to the condition of the road are sincerely held, it is of course for the court to determine the condition of the road at the relevant dates and the legal consequences thereof in the context of these proceedings.

[80] The issue here turns not upon an assessment of whether one witness is more or less credible or reliable than another but rather on the significance of the evidence in the context of a statutory scheme which is not entirely straightforward, particularly when applied to the factual matrix of this case.

Discussion

General issues

[81] There is no dispute that the duties which arise in relation to the stretch of road and adjacent land with which this action is concerned in terms of section 89(1) and (2) of the 1990 Act fall upon the defenders. Accordingly, if either or both of those duties have been breached, the defenders are the party in breach.

[82] The pursuer is not a random member of the public who has elected to make use of the statutory enforcement procedures set forth in section 91 of the 1990 Act in order to address an issue with regard to litter contamination or road cleanliness which has impacted negatively on his quality of life. He is a retired local government chief officer whose professional background has given him a particular focus on street cleanliness. He clearly retains a particular and wide-ranging interest in that issue and his decision to raise these proceedings stems from that interest.

[83] The pursuer made it clear in his evidence that his criticisms of the defenders with regard to their compliance with their statutory duties in relation to the stretch of road to which this action relates really apply to the Aberdeenshire Council local authority area as a whole. It appears that the pursuer chose this particular stretch of road, running between his home town of Inverurie and the northern border of the adjacent Aberdeen City Council local authority area, to represent the entire Aberdeenshire Council area for these purposes and

that the concerns expressed in his evidence about the defenders' compliance with their statutory duties in relation to this stretch of road are representative of his wider concerns regarding their compliance with the same duties in relation to the Aberdeenshire Council local authority area as a whole. Whatever the pursuer's motivation, it seems to me that I can only consider, and deal with, the specific complaint focussed in these proceedings, and not with any wider concerns which he may hold.

The Statutory Scheme

[84] Parties were agreed that there are no reported cases in which the meaning or application of the relevant substantive provisions has been considered in any detail. The case of *Hemming MP v Birmingham City Council*, although the report provides some information about the handling by the District Judge at first instance of the complaint instituted in that case, is primarily concerned with the application of section 91(12), which relates to the issue of expenses.

[85] The statutory enforcement scheme set out in section 91 of the 1990 Act is applied to Scottish summary application procedure by section 91(13) of the Act. As applied to the circumstances of this case, section 89(1) imposes a duty upon the defenders to ensure that the road and the adjacent land are "so far as is practicable, kept clear of litter and refuse". Section 89(2) of the Act imposes a duty on the defenders to ensure that the road is "so far as is practicable, kept clean".

[86] In terms of section 89(3) of the Act, in determining what standard is required, as respects any description of land, highway or road, for compliance with the duties imposed by subsections (1) and (2), "regard shall be had to the character and use of the land, highway or road as well as the measures which are practicable in the circumstances". Parties were

agreed that differences between the character and use of different categories of land and roads are reflected in the relevant COPLAR guidance.

[87] In terms of section 89(7) of the Act, the Secretary of State is required to prepare and issue a code of practice for the purpose of providing practical guidance on the discharge of the duties imposed by subsections (1) and (2). The COPLAR 2006 and COPLAR 2018 guidance to which reference was made during the evidence is issued in terms of this subsection. In terms of section 89(10), any person subject to any duty imposed by subsection (1) or (2) “shall have regard to the code of practice in force under subsection (7) ... in discharging that duty” (emphasis added).

[88] Having dealt with the relevant duties, the 1990 Act then moves on, in section 91, to set out the framework for enforcement of those duties. As modified by subsection (13), Section 91(1) entitles the court to act upon a summary application made by any person on the ground that he is “aggrieved by the defacement, by litter or refuse, of ... any relevant land of a principal litter authority”. Section 91(2) entitles the court to act upon a summary application made by any person on the ground that he is aggrieved by “the want of cleanliness of any relevant highway or any trunk road which is a special road”. The pursuer’s position was that he was “aggrieved” for these purposes by virtue of being sufficiently concerned as to raise these proceedings, which he accepted implied nothing about the merits of his complaint.

[89] In terms of section 91(4), proceedings under section 91 require to be brought against the person (in this case the defenders) who has the duty to keep the land clear under section 89(1) or to keep the road clean under section 89(2), as the case may be.

[90] In terms of section 91(5), before instituting proceedings under section 91, the applicant is required to give the duty holder not less than five days written notice of his

intention to raise a summary application and the notice “shall specify the matter complained of”.

[91] In terms of section 91(6) of the Act, “If the ... court is satisfied that the highway or land in question is defaced by litter or refuse or, in the case of a highway, is wanting in cleanliness, the court may, subject to subsections (7) and (8) below, make an order (“a litter abatement order”) requiring the [defender] to clear the litter or refuse away or, as the case may be, clean the highway within a time specified in the order”. Section 91(6) requires the court to specify the period of time within which a defender must comply with a litter abatement order. In this case, the pursuer asked me to specify a period of four weeks.

[92] It seems to me that no technical meaning attaches to the expressions “...defaced by litter or refuse...” or “...wanting in cleanliness...” where they appear in section 91(6) of the Act. None was suggested to me during submissions. Although these expressions do not appear in section 89(1) or (2) it seems to me that, on the basis that section 91 lays out the mechanism for enforcing compliance with the duties imposed by section 89, it must follow that, for the purposes of section 91(6), the assertion that land is “defaced by litter” must imply the assertion that the condition of the land infers a breach of the duty set out in section 89(1) and the assertion that a road is “wanting in cleanliness” must imply that the condition of the road infers a breach of the duty set out in section 89(2).

[93] Although neither side raised this issue before me, it is worth noting that section 91(6) of the 1990 Act appears not to oblige the court to make a litter abatement order, even if the conditions necessary for the making of such an order are established. To this extent, the statutory scheme which applies to the making of a litter abatement order in terms of section 91(6) differs significantly from the broadly analogous scheme which applies to the making of an order in terms of section 82(2) of the same Act requiring the abatement of a

statutory nuisance as defined by section 79 of the Act, established by summary application brought by a person in terms of section 82(1) of the Act on the ground that he is “aggrieved by the existence of a statutory nuisance”. In terms of section 82(2) of the Act, if the court is satisfied that the alleged statutory nuisance exists, or that although abated it is likely to recur, the court “shall” make an order for the abatement of the nuisance.

[94] Given that section 82(2) and section 91(6) belong to the same statute, it seems to me to be of some significance that the Act provides that, whereas the court is obliged to make an abatement order under section 82(2) of the 1990 Act when the conditions which are necessary in order for the court to make such an order are established, the court is not obliged to make a litter abatement order under section 91(6) of the Act even where the conditions necessary for the making of such an order are established. The terms of section 91(6) appear to suggest that the fulfilment of the conditions set out in subsections (7) and (8) are not the only circumstances which might entitle the court to decline to make a litter abatement order, even if the conditions set out in subsection (6) are complied with. If the intention of Parliament was to oblige the court, on the fulfilment of the requirements of section 91(6), to make a litter abatement order unless either subsection (7) or subsection (8) applied, it still seems to me that the word “shall” would have been used instead of “may” in subsection (6). Against this background, it appears that Parliament intended that the court would have a discretion to either make or refuse to make a litter abatement order, even if the conditions necessary for the making of such an order are established. No doubt that discretion requires to be exercised on reasonable grounds.

[95] In terms of section 91(7) of the 1990 Act, even if the requirements of section 91(6) are met, the court “shall not make a litter abatement order if the [defender] proves that he has complied, as respects the highway or land in question, with his duty under section 89(1)

and (2) ...". During submissions an issue arose as to whether this provision imposes any legal or persuasive burden on the defenders or whether it imposes only an evidential burden, i.e. to introduce material from which it would be open to the court to conclude that the requirements of section 91(7) are met. In the absence of any express statutory provision, it seems to me that this particular issue is left to interpretation. Reading subsections (6) and (7) together it appears that, even if the court is satisfied (in terms of subsection (6)) that the road or land in question is defaced by litter or refuse or, in the case of a road, is wanting in cleanliness, such that the court would be entitled, in the absence of any further evidence, to make a litter abatement order, subsection (7) prevents the court from making a litter abatement order if the defender proves that he has complied with his duties under section 89(1) and (2) of the Act in relation to the land or road in question. This restriction on the court's power to grant a litter abatement order would therefore appear to apply in situations in which the duty holder is able to "prove" that, notwithstanding the fact that the relevant land is defaced by litter or refuse or that the relevant road is wanting in cleanliness, that state of affairs has arisen despite the duty holder's compliance with the relevant duties in terms of section 89(1) and (2) rather than because of his failure to comply with those duties. Subsection (7) therefore clearly contemplates that the court would be entitled to consider making a litter abatement order but for the fact that the defender "proves" that he has complied with his duties in terms of section 89(1) and (2). It appears to me to be of some significance that subsection (7) proceeds on the basis that the defenders are required to "prove" that they have complied with their duties in terms of section 89(1) and (2) of the Act, rather than that the court must simply be "satisfied" that they have done so. It also appears to me, from the evidence led in this case, that proof of compliance with the relevant statutory duties will generally require the production of evidence which is only readily

known by and available to the defender. Bearing in mind these factors, and the guidance given in Walker and Walker, *The Law of Evidence in Scotland*, 3rd Ed., section 2.2, it appears to me to be likely that section 91(7) does impose a persuasive or legal burden of proof upon the defenders. I have approached the matter on that basis.

[96] Criminal sanctions arise from section 91(9) of the 1990 Act in the event of breach of a litter abatement order, which appears to me to indicate that such an order requires to be framed with care and that its terms must be proportionate and no wider than is necessary to address the underlying issue.

[97] In terms of section 91(12) of the 1990 Act, where the court is satisfied on the hearing of a summary application: (a) that, when the summary application was raised, the road or land in question was defaced by litter or refuse or, as the case may be, was wanting in cleanliness, and (b) that there were reasonable grounds for bringing the action, the court “... shall order the [defender] to pay such reasonable sum to the [pursuer] as the court may determine in respect of the expenses incurred by the [pursuer] in bringing the [summary application] before the court”. This provision appears to be designed to compensate a pursuer who reasonably brings proceedings under section 91 of the Act in relation to a road or land which, at the time when the proceedings were raised, was defaced by litter or refuse or, as the case may be, was wanting in cleanliness, whether or not he succeeds in persuading the court to make a litter abatement order. This provision is presumably intended to ensure that a pursuer whose application for a litter abatement order fails because, whether as a result of his action or otherwise, the duty holder has cleared the relevant land of litter or refuse or has cleaned the relevant road by the time the court has to decide the matter, will benefit from an appropriate award of expenses so long as the court is satisfied that there were reasonable grounds for bringing the summary application at the time when it was

raised. I note in passing that section 91(12) imposes a duty on the court to make an order for expenses if the court is satisfied that the conditions required for the making of such an order are satisfied. The only discretion left to the court appears to relate to the determination of what would constitute a “reasonable sum” by way of expenses. The pursuer relied upon this provision in asking the court, even if a litter abatement order was not made, to order the defenders to pay his taxed expenses.

[98] The only reported example of the consideration of any of these statutory provisions by a court, namely the case of *Hemming MP v Birmingham City Council*, concerned the application of section 91(12) of the 1990 Act. In that case the administrative court of the Queen’s Bench Division held (per Wilkie J at paragraphs 52, 53 and 54), that section 91(12) of the Act focusses upon the time when the action is raised and that a court considering an application for an order under section 91(12) from a pursuer who has failed to persuade the court to make a litter abatement order is not entitled to consider matters which occurred after the raising of the proceedings when considering whether there were reasonable grounds for bringing the action, unless there were exceptional circumstances, such as evidence of a lack of good faith in relation to something which had happened prior to the raising of proceedings. I respectfully agree with that interpretation of section 91(12) and proceed accordingly.

Which is the applicable version of COPLAR – 2006 or 2018?

[99] The parties were in dispute as to which version of the COPLAR code of practice the court should have regard to in determining whether or not the pursuer had proved his case. The version which was in force at the time when the pursuer served his notice under section 91(5) of the 1990 Act on 23 February 2018, and at the time when he raised these proceedings

on 11 April 2018, was COPLAR 2006 (production 1/5/4). That version of the code was replaced by the COPLAR 2018, which came into force in late June 2018 (production 5/3/25). There was some evidence from the defenders' witnesses that COPLAR 2018 imposes more demanding standards than COPLAR 2006, although they are both concerned with the same statutory provisions.

[100] The pursuer's position was that, because section 91(6) of the Act is expressed in the present tense, in the sense that the court may make a litter abatement order if satisfied "that the highway or land in question is defaced by litter or refuse or, in the case of a highway, is wanting in cleanliness," the court should have regard to COPLAR 2018 in determining whether to make a litter abatement order and should only have regard to COPLAR 2006 in determining, for the purposes of the pursuer's application for an award of expenses in terms of section 91(12) of the Act, whether the proceedings were raised on reasonable grounds.

The defenders' position was that, as illustrated by the approach of the court in *Hemming MP v Birmingham City Council*, the pursuer's 'complaint' should be regarded as having crystallised at the time when the proceedings were raised and therefore that the court should only have regard to COPLAR 2006 in determining not only whether, for the purposes of section 91(12) of the Act, the proceedings were raised on reasonable grounds but also in determining whether to make a litter abatement order.

[101] I prefer the approach of the defenders to this issue and proceed accordingly.

Although neither party referred to section 89(10) of the 1990 Act in this context, that provision appears to me to be of some significance, since it provides that "Any person subject to any duty imposed by subsection (1) or (2) above shall have regard to the code of practice in force under subsection (7) above in discharging that duty" (emphasis added).

The pursuer's 'complaint' was set out in his initial writ, which was warranted for service on

11 April 2018. The task of the court is to decide whether the pursuer has substantiated his complaint on the evidence led. The version of COPLAR which was in force at that time when his complaint was made (i.e. when these proceedings were raised) was COPLAR 2006. It seems to me that it would be unusual for compliance with statutory obligations to be assessed by reference to a statutory code of practice (COPLAR 2018) which was not in force at the date of raising of the relevant proceedings.

[102] It seems to me that this interpretation is not inconsistent with the terms of section 91 of the 1990 Act, as applied to Scotland with the modifications set out in section 91(13).

Attempting to interpret the relevant provisions of section 91 according to their ordinary meaning, subsection (5) requires a person considering bringing a summary application for a litter abatement order to give the relevant duty holder not less than five days written notice of his intention to bring proceedings by summary application. The notice is required to specify “the matter complained of.” The ‘complaint’ in this context is the summary application in terms of which the proceedings are raised. Subsection (6) entitles the court to make a litter abatement order if the court is satisfied “... that the highway or land in question is defaced by litter or refuse or, in the case of a highway, is wanting in cleanliness ...”. It seems to me that the use of the present tense in subsection (6) is readily understandable if the statutory scheme contemplates the raising of proceedings under section 91 of the Act to address a static accumulation of litter or contamination of a road surface at a particular location. In a hypothetical case of that kind, the court which ultimately hears the summary application would determine whether the state of affairs averred to have existed at the time when the proceedings were raised (and hence when the ‘complaint’ under section 91(1) of the 1990 Act was made) still exists. If so, and if that state of affairs entitles the court to make a litter abatement order, the court may, subject to subsection (7), make such an order. If not

the court would presumably not make a litter abatement order but would, if asked to do so, consider whether to make an order for expenses in favour of the pursuer in terms of section 91(12), assessing the reasonableness of the grounds upon which the proceedings were raised according to circumstances which existed at that time (*Hemming MP v Birmingham City Council*). Thus evidence of the condition of the relevant land or road on dates subsequent to the raising of proceedings is relevant to the question of whether the state of the land or road which, ex hypothesi, justified the raising of the proceedings is still the same so as to justify the making of a litter abatement order. However the court's assessment of the allegation of breach of duty requires to be assessed according to the version of COPLAR which was in force at the time when the proceedings were raised.

[103] It seems to me that an analysis along these lines would account for the use of the present tense in section 91(6) whilst confirming that the appropriate version of COPLAR by which the complaint of breach of the statutory duties in terms of section 89(1) and (2) should be assessed in this case is COPLAR 2006 rather than COPLAR 2018.

[104] This analysis seems to me to lend itself most readily to situations in which the complaint of breach of duty concerns an essentially static accumulation of litter or contamination of the surface of a road at a particular identified location, as was the case in *Hemming MP v Birmingham City Council*. It is less well suited to the factual matrix of the present case, in which, as I understood it, the pursuer accepts that the situation faced by the defenders is dynamic or "cyclical", in the sense that this road is inevitably subject to new deposits of litter, dirt or detritus which replace prior deposits which the defenders may have removed. I do not consider that the court is obliged to devise an all-encompassing analysis of the way in which the scheme was intended to operate in all circumstances. However it may be that, in choosing this particular road as the focus for his more wide-ranging

complaints, the pursuer chose a location which was not ideally suited to the application of the statutory scheme which he seeks to invoke.

COPLAR 2006

[105] A copy of COPLAR 2006 is produced as production 5/1/4 for the pursuer. Its guidance is divided into three parts. Part 1 is the code of practice issued by Ministers under section 89(7) of the 1990 Act and, according to the introduction, the code of practice “defines standards of cleanliness which are achievable in different locations and under different circumstances. It is concerned with how clean land is, rather than how often it is swept. The code of practice does not, therefore, suggest cleaning frequencies. Rather, it sets out how quickly different types of land should be returned to a set cleanliness standard”.

[106] Part 2 of the document provides guidance in relation to issues concerning litter management. Part 3 of the guidance is described as a “supporting web based good practice guide”. Neither Part 2 nor Part 3 were referred to in evidence before me.

[107] According to page 1 of the document, the objective of the code of practice is to provide “practical guidance on the discharge of the duties under section 89 of the Environmental Protection Act 1990 by establishing reasonable and generally acceptable standards of cleanliness which those under the duty should be capable of meeting.” The code of practice is said to be based on two principles, firstly that areas which are habitually more heavily trafficked should have accumulations of litter cleared away more quickly than less heavily trafficked areas and, secondly, that larger accumulations of litter and refuse should be cleared more quickly than smaller accumulations.

[108] I note in passing that the emphasis on ‘accumulations’ of litter and refuse appears to be consistent with the analysis suggested above, to the effect that the statutory scheme is

better suited to static accumulations of litter and static cleanliness issues rather than dynamic, cyclical issues of the kind raised in this case.

[109] According to page 1 of part 1 of the document, the code of practice “offers considerable scope for local authorities ... to target resources to areas most in need of them, rather than sweeping a street because of the dictates of an arbitrary rota. Expressed in its simplest terms, “If it isn’t dirty, don’t clean it””.

[110] According to page 3 of the document, the Code of Practice is based on four conceptual standards, or grades of cleanliness, namely:

GRADE A: No litter or refuse;

GRADE B: Predominantly free of litter and refuse, apart from a few small items;

GRADE C: Consistent distribution of litter and refuse with minor accumulations;

and

GRADE D: Heavily littered with significant accumulations.

[111] Each of these conceptual grades is illustrated by photographs contained in Appendix 3 the code, which are intended to assist in the task of grading, according to apparent similarity to one or other of the photographic examples produced in Appendix 3, the cleanliness of particular locations.

[112] Page 3 of the code states that:

“It is for the courts to decide the size of areas to be considered for the purposes of assessing defacement by litter and refuse, where relevant by comparing photographic evidence with the photographic examples in [Appendix 3], and considering any directions by the Scottish Ministers. However, it is suggested that for streets, a realistic area to be considered should be in the order of 50 metres in length ...”.

No relevant directions by Scottish Ministers were referred to in evidence before me. In addition, the code does not appear to suggest the length or distance which might be

considered to be “realistic” for the purposes of grading a 6.8-mile stretch of trunk road, as opposed to a street, for these purposes.

[113] The code divides types of land into 12 broad categories or zones according to land usage and, in the case of roads, volume of traffic. As I understood parties, it was common ground that the stretch of road with which this action is concerned, being a strategic route, falls within zone 6.

[114] Appendix 4 to the code suggests, in relation to land falling within each of the 12 zones identified, the “maximum response time” for cleaning an area which has become littered or which otherwise requires cleaning. For zones which have hard surfaces, such as roads, pavements and the like, the table suggests the maximum period which duty holders should take to return the land from cleanliness grade B, C, or D to grade A. For zones which do not have hard surfaces, such as beaches or grassed areas adjacent to a motorway or strategic route, the table recognises that it may be impossible to return the land to grade A and therefore the maximum response times suggested are intended to relate to the time taken to return the land from cleanliness grade C or D to grade B.

[115] The sections of the table in Appendix 4 which are of direct relevance in this case are those relating to land falling within zone 6a, which includes the hard surface areas of motorways and strategic routes, and 6b, which includes the grassed areas of or adjacent to such roads. In relation to hard surface areas the table suggests a maximum response time of four weeks to return the area from grade B or C to grade A and one week to return the area from grade D to grade A. In relation to grassed areas of or adjacent to such roads, the table suggests a maximum response time of four weeks to return the area from grade C to grade B and one week to return the area from grade D to grade B.

[116] Under the heading “Practical Issues”, page 6 of the code deals with the issue of “practicability”, which arises from the terms of both section 89(1) and (2). In that section, the code provides that:

“It is for the courts to decide whether or not it was impracticable for a person under the duty to discharge it”.

[117] However, the same section of the code provides as follows:

“Examples where it may be considered impracticable to comply with duty timescales for all duty bodies include:

- When there are severe weather conditions;
- When special events prevent access to the duty land;
- To avoid damage to sensitive habitats.

It may also not be considered practicable to expect bodies to meet the duty on Christmas Day and/or New Year’s Day. However, every effort must be made to clear the land at the earliest opportunity”.

[118] Thus, section 89(10) of the 1990 Act requires any person subject to a duty imposed by section 89(1) or (2) of the Act to have regard to the version of COPLAR which is in force at the time in discharging that duty, and COPLAR provides guidance to duty holders in relation to the discharge of those duties. However COPLAR, whilst providing examples of situations which may make it impracticable for the duty holder to comply with the duty timescales suggested in Appendix 4 to the code, does not suggest that the examples given are exhaustive and expressly recognises that it is for the courts to decide whether or not it was impracticable for the duty to be complied with, and therefore presumably also whether or not it was impracticable for the relevant duty to be complied with within the corresponding duty timescale suggested in Appendix 4 to the code.

The requirements of “practicability”

[119] Section 89(1) and (2) of the 1990 Act impose duties on local authorities such as the defenders to keep relevant land clear of litter and refuse and to keep public roads clean “so far as is practicable”. Once again, the parties were at odds in relation to the matters which might be capable of impacting upon any assessment of practicability. The pursuer took a rather absolute view, namely that the issue must be interpreted strictly in accordance with the examples given in COPLAR and that there is no room for any consideration of resource allocation, staff safety, risk management or the need to co-ordinate with other agencies, for example in relation to traffic management, because all such matters are taken into account in the setting of the COPLAR response times. The defenders’ position, on the other hand, was that the issue of practicability is for the court to determine having regard to all potentially relevant circumstances, including those listed above.

[120] Although neither side made reference to the dictionary definition of “practicable”, I note that the version given in the Oxford English Dictionary is “able to be put into practice; able to be effected, accomplished or done; feasible.” According to the OED, the definition of “feasible” is “practical, possible; manageable; convenient, serviceable.” Thus it appears to me that there is room for the view that even the dictionary definition of ‘practicable’ leaves rather more room for interpretation than the absolute position taken by the pursuer would allow.

[121] Only the pursuer cited any authority in relation to the meaning of “practicable”, as a matter of statutory interpretation. However it seems to me that context is potentially important when attempting to interpret the meaning of statutory provisions and the authorities cited by the pursuer were from contexts far removed from the circumstances of the present case and the legislation which applies to it. In *Adsett v K & L Steel Founders &*

Engineers Limited, the Queen's Bench Division considered the meaning of "practicable" in the context of an action for damages arising from alleged breach by the defendants of a duty under section 47(1) of the Factories Act 1937 to take "all practicable measures" to protect employees against the inhalation of potentially harmful dust. In *Marshall v Gotham Co Ltd*, the House of Lords considered the meaning of the expression "reasonably practicable" in the context of an action for damages resulting from the death of an employee due to a roof collapse within a mine, alleging breach of a duty to observe, "so far as may be reasonably practicable," rules under the Metalliferous Mines General Regulations 1938 intended to ensure the security of working areas within mines. Mr Whittle submitted that these decisions supported the proposition that "practicable" implies a more onerous standard than "reasonably practicable". The test of what is "reasonably practicable" may involve consideration of issues such as allocation of resources and cost, balanced against the objective which is sought to be achieved. However, the stricter standard implied by the use of "practicable" demanded that such considerations should be eliminated.

[122] Taking the approach suggested by the pursuer to its logical conclusion, it must be practicable for the defenders to maintain compliance with the relevant COPLAR duty response times in relation to this entire 6.8-mile stretch of road because it is within their power to focus as many of their resources as may be necessary, whatever the cost to their other responsibilities and priorities, on this section of road in order to maintain it and, when necessary, return it to the condition which the pursuer desires.

[123] That appears to me to be a somewhat unrealistic approach. As already indicated, the COPLAR guidance appears to encourage local authorities to exercise their judgment in the allocation of resources according to assessed need. The uncontested evidence led on behalf of the defenders indicated that, although Aberdeenshire Council's overall budget is subject

to the same pressures which no doubt apply across the public sector, they have managed to slightly increase the budget devoted to street cleaning over the last four years or so. This does not appear to be consistent with any suggestion that the defenders are dismissive or neglectful of their duties. However, in carrying out those duties the defenders, in common with all other local authorities and public bodies, will require to make decisions about the allocation of resources, according to their assessment of need, as encouraged by the COPLAR guidance.

[124] A further factor which is, in my view, of critical importance in considering the issues raised in these proceedings is that, as already noted, the pursuer did not bring these proceedings in order to address a static accumulation of litter, or contamination of the road surface, at a particular location. By bringing these proceedings the pursuer seeks to establish that the defenders are in breach of their duties, and with the associated COPLAR guidance, not in relation to any particular location but in relation to this entire 6.8-mile stretch of a busy dual carriageway. It seems clear to me that the question of practicability must be considered in that context. In essence, the question is whether it is practicable for the defenders to constantly maintain compliance with the letter of their duties under section 89(1) and (2) of the 1990 Act in relation to this whole 6.8-mile stretch of dual carriageway. When the issue is considered in that light and regard is had to the recognition in the COPLAR guidance that "it is for the court to decide whether or not it was impracticable for a person under the duty to discharge it", in my view it is legitimate for the court to take account of issues of cost, resource allocation, staff safety, risk management, the significance of other agencies in relation to issues such as traffic management, the impact of such traffic management on the efficiency of the road and the measures already taken by the

defenders in order to comply with their duties in relation to this road in considering the issue of practicability.

The pursuer's complaint and the evidence of the condition of the road and adjacent land

[125] The notice given by the pursuer to the defenders in terms of section 91(5) of the 1990 Act took the form of a letter from his solicitors to the Chief Executive of the defenders dated 23 February 2018 (production 5/1/8). The relevant paragraphs read as follows:

“Our client is aggrieved by the defacement by litter and refuse as well as the want of cleanliness of the section of the A96 trunk road (including its central reservation, verges and adjacent footpaths) between the Blackburn junction and the Port Elphinstone junction near Inverurie, which section is shown delineated in blue on the plan annexed to this notice.

We also enclose copies of some photographs taken by our client illustrating the extent of the problem and the substance of this complaint. It is our client's intention to lodge these photographs, together with a fuller set of photographs and videos evidencing the condition of the A96 in this section, in the intended complaint to the Sheriff Court”.

The notice was accompanied by the 24 photographs taken by the pursuer in late January 2018. The terms of the pursuer's first crave, which seeks the making of a litter abatement order, are consistent with the terms of the section 91(5) notice. Neither provides any specification of the location of any particular accumulations of litter or road surface contamination. The action which the pursuer craves the court to order the defenders to take, in terms of his first crave, is “to remove and dispose of litter and refuse and to clean the road at the location in accordance with the standards of the Scottish Government Code of Practice on litter and refuse issued in terms of section 89(7) of the Environmental Protection Act 1990, and that within such period as the court sees fit,” which the pursuer suggests should be four weeks.

[126] I understood it to be a matter of agreement that at least some of the photographs sent to the defenders along with the pursuer's section 91(5) notice showed the presence of litter which would correspond to grade C in COPLAR 2006, namely "consistent distribution of litter and refuse with minor accumulations". Only some of the photographs taken by the pursuer were referred to in evidence. Other photographs, and video footage, lodged by the pursuer were not introduced in evidence. It was a matter of agreement that the photographs which were introduced were representative of those which were not. I proceed on that basis and I have not had regard to photographs or video footage not introduced as evidence at proof.

[127] I was not provided with any comparative evidence by the pursuer to indicate how the condition of this stretch of road, as depicted in his photographs, might have compared to the condition of other similar roads, either in the Aberdeenshire Council area or in other parts of Scotland. The evidence did not suggest that there is any unusual feature peculiar to this stretch of road which may have indicated that litter, or indeed contamination of the road surface, was present to any greater degree than would be the case on any similar stretch of road elsewhere.

[128] Nor, given the apparent strategy of the pursuer to designate this stretch of road as representative of the level of litter and road surface contamination throughout the Aberdeenshire Council area, was I provided by the pursuer with any comparative evidence to indicate that litter and road surface contamination is present within the Aberdeenshire Council area to any greater degree than in any other parts of the country.

[129] I note that, although the report of the appeal proceedings in *Hemming MP v Birmingham City Council* focusses on the application of section 91(12) of the 1990 Act in relation to the complainer's unsuccessful attempt in that case to secure a litter abatement

order, at paragraphs 34 and 35 of his opinion Wilkie J confirms that the District Judge at first instance dismissed the application for a litter abatement order because, as originally framed, it related to the entirety of the appellant's parliamentary constituency, whereas the district Judge who heard the action at first instance accepted the defendant's submission that breach of the statutory duty in terms of section 89(1) of the 1990 Act could only be proved by evidence of litter deposited at a particular place, with an order correspondingly limited to the affected site.

[130] Although the reasoning of the District Judge in dismissing the appellant's application for a litter abatement order at first instance is not set out in any detail in the report of the appeal, the terms of which appear to imply that the dismissal of the appellant's application by the District Judge was not the subject of any appeal, the apparent approach of the District Judge in that case is worth noting bearing in mind the pursuer's attempt in the present case to secure a litter abatement order covering the entirety of a 6.8-mile stretch of dual carriageway and the land adjacent thereto. The defenders founded upon *Hemming MP v Birmingham City Council* as authority for their submission that the pursuer's first crave in the present action is similarly too wide and that the court could not make a litter abatement order to specify in any meaningful sense the steps to be taken in order to comply with the order, by reference to any particular sites or locations along the relevant stretch of road.

[131] It is unfortunate that the report of the appeal proceedings in *Hemming MP v Birmingham City Council* does not consider in any detail the reasoning of the District Judge who dismissed the complaint at first instance. That decision is not in any event binding on me.

[132] It seems to me that there is no reason in principle why an application for a litter abatement order should inevitably be incompetent simply because the geographical area in

respect of which it is sought is comparatively large. To consider a hypothetical example, it may be that in an appropriate case a crave for a litter abatement order could competently focus upon a large open space which has been left in a consistently heavily littered state, and not cleared by the relevant duty-holder, after a music festival or some other large-scale public event. So long as the site in relation to which the order is sought is clearly specified, a relevant case is pled that that site is in a condition which infers breach of the relevant duty under section 89(1) of the 1990 Act and a notice under section 91(5) of the Act has been timeously given to the duty-holder in terms which can fairly be said to “specify the matter complained of,” I can see nothing in the legislation which would render such a crave incompetent as a matter of principle.

[133] In this case the section 91(5) notice issued by the pursuer (production 5/1/8) does, in my view, “specify the matter complained of,” albeit in sparse terms. The notice complains of the “defacement by litter and refuse as well as the want of cleanliness of the section of the A96 trunk road (including its central reservation, verges and adjacent footpaths) between the Blackburn Junction [at the northern border of the Aberdeen City Council local authority area] and the Port Elphinstone Junction near Inverurie.” The terms of the notice indicate that the section of road to which the notice relates was shown on a plan attached to the notice. Thus, whilst accepting the force of Mr Ingram’s complaint that the 24 photographs sent to the defenders with the notice, not all of which made the exact position of the location photographed apparent, were of limited assistance in enabling the defenders to address any issues arising from the photographs, there appears to be no statutory requirement to provide photographs to illustrate the contents of a section 91(5) notice. I find no fault with the terms of the notice or the pursuer’s related crave for a litter abatement order such as to give rise to any issue of competency.

[134] The real issue arising from the terms of the section 91(5) notice, and the pursuer's ensuing crave for a litter abatement order, is that they put in issue not the condition of specific, identified sites or locations along the stretch of road to which the pursuer's complaint relates, but rather the condition of the entire 6.8-mile stretch of road. The pursuer had no 'fallback' position restricting the scope of his complaint to one or more specific sites along the road, such as those shown in particular photographs. It seems clear to me from the fact that criminal sanctions arise in terms of section 91(9) of the 1990 Act in the event of a breach of a litter abatement order that such an order requires to be framed with care and that its terms must be proportionate and no wider than is necessary to address the underlying issue. In my view it would not be appropriate for the court to make a litter abatement order in terms which are so wide as to cover land, or parts of a road, in respect of which the requirements of section 91(6) of the 1990 Act have not been satisfied.

[135] Thus, although I do not agree with Mr Ingram that any issue of competency arises from the terms of the pursuer's section 91(5) notice, the effect of the notice and of the ensuing crave which is in similarly wide terms is in my view to require the pursuer, if he is to succeed, to establish that the requirements of section 91(6) of the 1990 Act can fairly be said to have been satisfied, on the evidence, not in relation to particular sites or locations along this stretch of road but in a consistent manner in relation to the entire 6.8-mile stretch.

Road safety issues

[136] Although it was submitted on behalf of the pursuer that the presence of litter, dirt and other detritus on the surface of the carriageway at points along this stretch of road posed a road safety issue, no evidence was led of any particular road safety risk other than the pursuer's suggestion that a number of metal components, apparently from vehicles,

which he had retrieved from the surface of the carriageway may have posed a danger to road users and that accumulations of grit and detritus on the road surface may have been capable of obscuring road markings or causing a loss of traction. The pursuer's analysis was contradicted by the defenders' witness Mr Sheridan, who gave evidence that the issues founded on by the pursuer did not relate to the 'running surface' of the carriageway but rather to more marginal areas which were unlikely to be driven over in normal use. No evidence of a scientific or specialist nature was led on the issue.

[137] In this context it seems to be worth noting that, although road safety is clearly extremely important, it does not appear to me that the duties imposed by section 89(1) and (2) of the 1990 Act are focused directly upon that issue. Further, the evidence led at proof indicated that the agency with primary responsibility for road safety issues affecting this road is not the defenders but BEAR Scotland as the Scottish Ministers' contractors in relation to the management of the trunk road network, who appear to have a contractual duty to notify the local authority in the event that they become aware that the standard of cleanliness of the road falls below that required by COPLAR (production 6/1/12, paragraph 4.34.8).

The significance of LEAMS and the reputation tracker

[138] Some reference was made by the defenders to the LEAMS (Local Environmental Audit and Management System) results for the Aberdeenshire Council area, which are set out in the Keep Scotland Beautiful ('KSB') National Cleanliness Benchmarking Report for 2016/2017 (production 6/1/10). Although the defenders accepted that COPLAR is the pre-eminent guidance in relation to the implementation of the relevant duties under section 89(1) and (2) of the 1990 Act, they relied upon the LEAMS report as indicating a high level of

performance by them in relation to the ultimate objective of the section 89 duties, namely the maintenance of high standards of street cleanliness. The pursuer, on the other hand, submitted that the LEAMS report is of no relevance to the issues raised in this action.

[139] As I understand it, KSB is a charitable body which campaigns on a range of environmental issues. According to page 4 of the LEAMS report for the Aberdeenshire Council area for 2017/2018 (production 6/1/7), LEAMS has been the national performance indicator for street cleanliness since 2003/2004. According to the same page of the report, LEAMS uses a combination of self and independent monitoring. Each local authority conducts two audits in its own area to assess the cleanliness of a minimum random sample of 5% of streets and roads. In addition, staff from KSB conduct a further annual validation audit in each local authority area, also assessing a 5% sample of streets within the local authority, in order to ensure independent evaluation of the local authority's own results. All of the assessors who carry out these audits receive training from KSB to ensure that monitoring is consistent across the country. The audits assess the cleanliness grade of each road or street included in the survey, using the same categories as COPLAR, the availability and servicing of public litter bins, types and sources of litter and local environment quality, including the prevalence of vandalism, graffiti, weed growth, detritus, staining, fly tipping and fly posting. At the end of the process a performance indicator is allocated to the local authority, expressed as a percentage of the sites surveyed which are assessed as being of an acceptable standard according to the criteria used by LEAMS.

[140] Using this methodology, Aberdeenshire Council's street cleanliness score for the audits carried out in the financial year 2016/2017 was 96.6%, which appears to have been one of the highest in Scotland that year. The KSB LEAMS report for Aberdeenshire Council for the financial year 2017/2018 (production 6/1/7) indicates that, although Aberdeenshire

Council's score fell to 92.8% in the audits carried out that year, that was still above the national average.

[141] Thus, although both sides accepted that the relevant COPLAR guidance is pre-eminent in relation to compliance with the duties imposed by section 89(1) and (2) of the 1990 Act, it seems to me that the defenders' LEAMS survey results, given that the LEAMS methodology is informed by COPLAR, are of some relevance in indicating the general performance of the defenders in relation to the street cleanliness issues which are the ultimate focus of those statutory duties. On that basis the available LEAMS data appears to suggest that the defenders perform to an acceptable standard in relation to general street cleanliness and that their performance compares well with the national average. It must be borne in mind however that the LEAMS survey methodology does not appear to take account of response times for dealing with accumulations of litter or road surface contamination, which are addressed in the COPLAR guidance.

[142] The generally positive impression created by the defenders' LEAMS performance scores appears to be supported by the available evidence concerning the results of the defenders' reputation tracker surveys, which suggest that the public perception of street cleanliness within the Aberdeenshire Council area is similarly positive.

Decision and reasons

[143] I refuse the pursuer's crave for a litter abatement order in this case.

[144] By virtue of the terms of his section 91(5) notice and of his related first crave, the pursuer set himself the challenge of establishing that the requirements of section 91(6) of the 1990 Act were satisfied not simply with regard to some locations or sites along the stretch of road to which the case relates, such as those locations shown in his photographs, but that

those requirements could fairly be said to have been established in a consistent manner with regard to this entire 6.8-mile stretch of road. In my view he has failed to prove his case.

[145] At most it appears to me that the pursuer has established that there were, at the dates of various photographs taken by him, some locations along the road at which items of litter were present on or adjacent to the road or dirt or detritus was present on the road surface. However he has not, in my view, established that the requirements of section 91(6) could fairly be said to have been met in a consistent manner with regard to this stretch of road as a whole. For example, a number of the photographs relied upon by him which show the presence of litter at particular locations along the road also appear to show, where the angle permits, that such litter is localised rather than being, in any true sense, a consistent feature of this entire stretch of road. The same issue applies in relation to the evidence of the presence of dirt or detritus on the carriageway.

[146] Even if I was persuaded that the requirements of section 91(6) of the 1990 Act were satisfied in relation to particular locations along this stretch of road, it would not follow that those conditions were satisfied in relation to the entire 6.8-mile stretch of road, which is the challenge the pursuer set himself. Even if the pursuer was correct in asserting that some of the locations shown in his photographs were contaminated with litter to the level of grade C in COPLAR 2006, I do not accept that it follows that the entire 6.8-mile stretch of road is thereby deemed to be contaminated to the same grade. The pursuer's approach goes beyond the definition of grade C contamination which appears in COPLAR 2006, namely "consistent distribution of litter and refuse with minor accumulations" (emphasis added). I prefer the approach taken by the defenders' witness Mr Sheridan to this issue. Since the issue of grade C litter contamination at points along the road was raised by the pursuer (although this is not the test in terms of section 91(6) of the 1990 Act), I do not accept that the evidence led

supports any assertion that this entire stretch of road could, or can, fairly be said to be contaminated by litter to the level of grade C in terms of COPLAR 2006.

[147] In addition, bearing in mind the pursuer's acceptance of the cyclical nature of litter on a road of this nature and the evidence, which I accept, of the measures which the defenders have in place to address the issue of litter on this stretch of road, the pursuer has not established that the litter shown in any of his photographs is the same, or substantially the same, as is shown in photographs taken by him on different dates.

[148] Thus I am not satisfied that the pursuer has proved his case with regard to the area to which his complaint relates, namely this entire stretch of road. On that basis I refuse his crave for a litter abatement order.

[149] If I am wrong in my view that the pursuer has failed to prove that the requirements of section 91(6) of the 1990 Act are satisfied in relation to this stretch of road, I would refuse his crave for a litter abatement order on the basis that, even if some of the photographs produced by the defender show that, when the photographs were taken, some points along the road could be said to be defaced by litter or refuse or in the case of the road surface, wanting in cleanliness within the meaning of section 91(6) of the Act, the defenders have in my judgment proved, for the purposes of section 91(7) of the Act, that they complied with their duties in terms of section 89(1) and (2) of the Act and therefore that the condition of the locations shown in the pursuer's photographs was not the result of breach of those duties on their part.

[150] The COPLAR 2006 guidance accepts that it is for the court to determine the issue of practicability in relation to compliance with the duties imposed by section 89(1) and (2) of the Act. The approach of COPLAR 2006 appears to encourage local authorities to exercise their judgment in the allocation of resources according to need. I accept that the defenders

had, and have, in place systems which ensure the regular inspection of this stretch of road for litter contamination, that they act upon any issues noted by their supervisors during those inspections and that they undertake litter-picking of sections of the land adjoining the road on a regular basis. In addition, I accept that the defenders react to reports from third parties of litter accumulation at particular locations along the road.

[151] In my view the issue of risk assessment, both in relation to the safety of the defenders' staff and the safety of road users during litter retrieval and road cleaning operations, is significant and it is legitimate for the defenders to take account of such issues, and the consequent need for traffic management measures arranged with the co-operation of the Scottish Ministers' road maintenance contractor, BEAR Scotland, in addressing their duties under section 89(1) and (2).

[152] I accept that the defenders are fully cognisant of their duties under section 89(1) and (2) of the 1990 Act, that they take those duties seriously, that they have due regard to those duties in the allocation of resources and that they generally perform those duties to an acceptable standard.

[153] I also have regard to the cyclical nature of the littering and road cleanliness issues affecting this stretch of road. So far as litter is concerned, these issues were illustrated by the evidence, which I accept, that the defenders responded swiftly to the pursuer's section 91(5) notice by addressing any litter and road cleanliness issues which they were able to locate and safely deal with based on the section 95(1) notice and its accompanying photographs but that, notwithstanding that response, photographs taken subsequently by the pursuer also showed the presence of litter, dirt and detritus at locations along the road.

[154] Having regard to the matters referred to above concerning the factors which it is legitimate for the defenders to take into account in allocating resources to address their

duties under section 89(1) and (2) of the Act, the measures which the defenders have in place in order to address those duties in relation to this stretch of road, the information available about the defenders' general prioritisation of, and performance in relation to, the issue of street cleanliness and the admittedly cyclical nature of the littering issues affecting this road, I am satisfied that the defenders have proved that they have complied with their duties under section 89(1) and (2) of the Act, so far as is practicable, and therefore that any such issues affecting particular sites along this stretch of road are not the result of breach by the defenders of these duties. In other words, the defenders have proved that it is not practicable for them to comply with their duties under section 89(1) and (2) of the 1990 Act with regard to the entirety of this stretch of road at all times.

[155] For all of these reasons I am satisfied that it is not appropriate to make the litter abatement order sought in the pursuer's first crave. I refuse the pursuer's first and second craves and repel his first and third pleas in law. I sustain the defenders' first plea in law.

[156] Having said all of this it seems to me that if, as suggested by the pursuer in his evidence, there is any issue with regard to the presence of animal carcasses on the carriageway of this road, the defenders should liaise with the Scottish Ministers' road maintenance contractors BEAR Scotland as a matter of urgency so that appropriate arrangements can be made by the relevant agency for their safe removal. This appears to be a matter of contractual obligation for the contractors (production 6/1/12, section 4.35) as well as being a requirement on the defenders under COPLAR 2018 (production 5/3/25, pages 4 and 15).

[157] Further, it was suggested on behalf of the defenders that, despite the duties of co-ordination and co-operation which are imposed upon BEAR Scotland and the defenders by virtue of sections 118 and 119 of the New Roads and Street Works Act 1991, BEAR Scotland

typically do not give the defenders sufficient notice of planned road works to enable the defenders to take advantage of any resulting opportunities to undertake litter retrieval and road cleaning operations on the affected sections of the road. I recognise that BEAR Scotland were not represented during these proceedings and that the court therefore did not have the benefit of their response to the defenders' perspective in relation to this issue, but it seems clear to me that if the defenders perceive there to be a problem with the notice given to them by BEAR Scotland of planned road works, they should pursue dialogue with BEAR Scotland with a view to ensuring that BEAR Scotland are made fully aware of their concerns and that any issues are addressed by both agencies so far as possible.

Expenses

[158] I am not prepared to make an order for expenses in favour of the pursuer in terms of section 91(12) of the 1990 Act at this stage. Mr Ingram invited me to refuse the pursuer's motion for expenses on the basis that it was unreasonable for him to have raised these proceedings in relation to the entire 6.8-mile stretch of this road on the basis of the restricted specification given in his section 91(5) notice and the accompanying photographs. Although it seems clear to me that the pursuer's choice of such a lengthy stretch of road as the focus of his application was problematic in terms of the challenge which he thereby set himself in seeking to prove his case, on the other hand I have found that no issue of competency arose from the pursuer's approach to the case and, as I understood the evidence, the defenders accepted that at least some of the locations shown in the photographs which accompanied the notice did require some attention, although they maintain that those locations received appropriate attention from them prior to the raising of these proceedings.

[159] In my view the appropriate course is to assign a hearing to give further consideration to this issue, and to the wider question of liability for the expenses of the action, giving parties an opportunity to reflect on any implications which the reasons given for my decision on the merits of the pursuer's application for a litter abatement order might have for his motion for an award of expenses under section 91(12) of the Act. I shall continue consideration of the pursuer's third crave and second plea in law and the defenders' second plea in law to that hearing.