



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 41
P571/18

Lord Justice Clerk
Lord Brodie
Lord Woolman

OPINION OF THE COURT

delivered by LORD BRODIE

in the Petition of

McCALLS LIMITED

Petitioners and Reclaimers

against

ABERDEEN CITY COUNCIL

Respondents

for

Judicial Review of a decision by Aberdeen City Council as roads authority dated 6 March
2018 in respect of Bridge Street, Aberdeen

Petitioners and Reclaimers: Cormack QC (sol adv); Pinsent Masons LLP
Respondents: Burnet; Morton Fraser LLP

10 July 2020

Introduction

[1] This is a reclaiming motion against the Lord Ordinary's refusal of a petition for judicial review. The issue it raises is the scope of the duty imposed on a roads authority by section 1(1) of the Roads (Scotland) Act 1984.

[2] The petitioner and reclaimer is a limited company. It is in the business of selling and hiring high quality Highland wear and related goods. It trades from premises made up of adjoining subjects at 11, 11A, 15, 17 and 19 Bridge Street Aberdeen, 2-4 and 6 Windmill Brae Aberdeen and 2-6 College Street, Aberdeen ("the Premises"). Part of the Premises is located within the vaults formed by the arches of the bridge structure which makes up Bridge Street, Aberdeen ("the Bridge") and carries the public road. Windmill Brae runs underneath the Bridge. Bridge Street runs uphill from the vicinity of the railway station to its junction with Union Street. It is understood that the Bridge was built by a railway company to facilitate access to the station. The petitioner is the proprietor of part of the subjects forming the Premises. The remaining parts are owned by Iain and Kathleen Hawthorne, who are averred to be the petitioner's "principals". Although the relevant titles have been examined, neither the petitioner nor the respondent has been able to identify the present owner of the arches of the Bridge.

[3] Parts of the Premises have suffered the ingress of water. The petitioner maintains that this is because the respondent, Aberdeen City Council, the roads authority, has failed duly to carry out its duty under section 1 of the 1984 Act, to maintain Bridge Street. The petitioner claims standing, as the owner and occupier of property which is being adversely affected by this failure, to seek certain remedies with a view to compelling the respondent to implement its duty.

Petitioner's averments on water ingress

[4] The petitioner avers that for a considerable period of years, the part of the Premises located within the vaults has been subjected to high levels of water ingress and that there is a considerable body of evidence that this water is coming down through the structure of the

Bridge from Bridge Street. The matter has been the subject of correspondence between the petitioner and the respondent since the late 1990s. The petitioner understands that in around 2005 works were undertaken on Bridge Street by the respondent which included the installation of a membrane under part of the surface of the road. The respondent maintains that this was done in response to a request from the petitioner. Initially these works appeared to the petitioner to have had a beneficial effect but the position has deteriorated over time, most probably because of the penetration of the membrane due to works on utilities running under the road. There was flooding of the Premises in 2015, after which the petitioner implemented a significant scheme of defensive works at a cost of £30,000 (plus reinstatement works costing £20,000). The respondent carries out inspections of the Bridge from time to time. The report of a major (or "principal" inspection in 2016 noted that there was evidence of water ingress through the arch which should be monitored on each inspection to assess its effect on the stability of the arch albeit that the Bridge was found to be in relatively good condition with no signs of structural movement or distress. The petitioner's defensive works have had some success but the petitioner has continued to experience damaging water ingress and has concluded that the defensive works were not a complete or long-term solution. The petitioner therefore commissioned a drainage impact assessment report from the Robertson Slater Partnership, Consulting Engineers ("RSP") dated August 2017. RSP were assisted by water sample analysis carried out by the James Hutton Institute. According to the RSP report, it appeared on the basis of the water sample analysis to be fairly clear that surface water from the road was entering the Premises. The author of the report stated that:

"While it is not possible to be conclusive, it seems to me to be probable that this is caused at least in substantial part by the issues I have identified in this report as regards the provision and maintenance of gullies."

The water sample analysis had concluded that the ingress of water into the Premises was likely to be from runoff from the road although the analysis could not conclusively prove that. The RSP report recommended that three additional gullies be installed on Bridge Street because of an insufficient number of gullies at present. In making that recommendation, RSP referred to the Design Manual for Roads and Bridges (DMRB), a current document providing guidance in relation to trunk roads and motorways. The report also recommended improvements in relation to the cleaning of gullies and that consideration be given to installing a waterproof membrane.

An exchange of letters and a subsequent inspection

[5] On 30 August 2017 Messrs Pinsent Masons, solicitors for the petitioner, sent a letter to the respondent enclosing a copy of the RSP report. The letter included the following:

“Accordingly, on behalf of and as instructed by our clients, we formally call upon you to implement your duty of maintenance under section 1 of the Roads (Scotland) Act 1984 by installing additional gulley provision as recommended by Robertson Slater, by cleaning and keeping clean and otherwise well maintained all gulleys serving the bridge, whether new or existing, and by installing a water proof membrane also as recommended by Robertson Slater. Should you fail to do so, then you are hereby placed on notice that our client intends to apply to the Court of Session for judicial review to compel you.”

[6] Following a site meeting a solicitor in the Legal and Democratic Services Department of the respondent provided a reasoned response to the letter from Pinsent Masons by way of a letter dated 6 March 2018. He concluded his letter with the following:

“In summary the Council’s position can be stated as follows:

1. The Council does not own the bridge. The Council does, however, have a statutory obligation to inspect the structure of the bridge to ensure that [it] is in a fit state to support the road;
2. The Council inspects the bridge biennially, more comprehensive “principal inspections” are carried out every six years. The bridge is structurally sound;

It would appear that your client does not own the arch (the underside of the bridge) above the vault. Your client does not own the bridge. The ownership position as regards the bridge (and by extension the arch) is unclear. The Council does not own the bridge nor the arch;

3. Responsibility for the maintenance of the arches of the bridge rests with the owner. The current water ingress is not detrimental to the structure of the bridge. Accordingly, it is not for the Council to remedy the water ingress; and

4. The Council considers that the bridge and the road are adequately maintained. The condition of the bridge does not render the road unsafe for road users'

In the circumstances, I consider that the Council has discharged its responsibility as a Roads Authority under the [19]84 Act.

I trust that this letter addresses the points raised in your correspondence of 30 August 2017 and confirms the Council's position in relation to the matter."

[7] On 25 April 2018 Pinsent Masons wrote again to the respondent on behalf of the petitioner communicating the basis upon which the petitioner objected to the contents of the letter of 6 March 2018 and inviting the respondent to reconsider. The petitioner avers that to date the respondent has not replied substantively to this letter. A scheduled inspection of the Bridge by the respondent took place on 11 May 2018. Although the respondent accepted the petitioner's suggestion that a representative of the petitioner and of RSP should attend part of the inspection, the respondent did not accept the petitioner's request that, in the circumstances, the inspection should not be a general inspection but should be in the form of the more comprehensive principal inspection.

The petition

[8] The petition was lodged on 5 June 2018. First orders were granted on 7 June 2018. Permission to proceed was granted on 28 August 2018.

[9] The petition is structured on the respondent's solicitor's letter of 6 March 2018. In statement 4 of the petition the letter is described as "the decision complained of in which [the respondent] refused the petitioner's request for the respondent to implement its

statutory duty as roads authority which request had been made by the petitioner's solicitors by letter dated 30 August 2017". At statement 5 of the petition there are set out the eight specific remedies which the petitioner seeks (together with such further orders as may seem to the court to be just and reasonable). Of these the first six orders are framed by reference to the letter of 6 March 2018; the seventh order is for declarator that the inspection carried out on 11 May 2018 was not carried out in compliance with the respondent's duty under section 1(1) of the 1984 Act because it was in accordance with the respondent's understandings as set out in the letter of 6 March 2018; and the eighth order is for specific implement of the respondent's statutory duty by carrying out a further inspection, thus:

- “5.1 Declarator that in making the decision complained of, dated 6 March 2018, the respondent erred in law and misconstrued the duty imposed by section 1(1) of the Act and thereby failed to take into account the actual or potential impact of the condition of the road on the Premises and on the petitioner as part owner and as occupier of the Premises as the respondent was required to do;
- 5.2 Declarator that in making the decision complained of, dated 6 March 2018, the respondent erred in law and misconstrued the duty imposed by section 1(1) of the Act by apparently deciding that such duty was inapplicable because responsibility for maintenance of the arches of the Bridge rests with the owner thereof and responsibility for maintenance of the Premises rests with the Petitioner and that in any event the respondent was not entitled on the material before it to take those matters into account;
- 5.3 Declarator that in making the decision complained of, dated 6 March 2018, the respondent erred in law and misconstrued the duty imposed by section 1(1) of the Act and thereby failed by apparently regarding the petitioner as obliged to accept water ingress into the Premises regardless of any effect of the condition of the road on such water ingress;
- 5.4 Declarator that in making the decision complained of, dated 6 March 2018, the respondent was on the material before it not entitled to disregard the evidence tendered by the petitioner about the cause of the water ingress apparently on the basis that such evidence was inconclusive and on the basis that the Design Manual for Roads and Bridges is of no relevance;
- 5.5 Declarator that in making the decision complained of, dated 6 March 2018, the respondent was on the material before it not entitled to conclude that the present water ingress is not detrimental to the structure of the Bridge;
- 5.6 Production and reduction of the decision dated 6 March 2018 and of any further decision of the respondent following on from it;

- 5.7 Declarator that the respondent's inspection of the Bridge which took place on 11 May 2018 was not conducted in compliance with the duty imposed by section 1(1) of the Act because such inspection followed and was in accordance with the decision complained of dated 6 March 2018;
- 5.8 An order for specific implement, under section 45(b) of the Court of Session Act 1988, requiring the respondent to implement the duty imposed by section 1(1) of the Act by carrying out a further inspection of the Bridge, at least to the level of a principal inspection, to determine what measures should be taken by the respondent to address water ingress into the structure of the Bridge and into the Premises and to communicate the outcome of such inspection to the petitioner along with a fresh response to the letter from the petitioner's solicitors dated 30 August 2017, within 28 days or such other period as shall seem reasonable to the Court;"

[10] At statement 24 of the petition there are averments in support of the petitioner's application for permission to proceed. There it is explained that the decision in *Transco plc v Glasgow City Council* 2005 SLT 958 was authority that the appropriate remedy for a party in the position of the petitioner was to apply to the court by means of judicial review seeking specific implement. The petitioner goes on to aver that the circumstances disclose a refusal or failure to perform the duty under section 1(1) of the 1984 Act which is amenable to judicial review, reference being made to *West v Secretary of State for Scotland* 1992 SC 385 at 413. Moreover, it is averred that the respondent has failed to understand the law, taken into account matters which it ought not to have taken into account and failed to take into account matters which it ought to have taken into account. The decision making of the respondent has been unreasonable to an extent which amounts to irrationality. There have been errors of reasoning which deprive the decision (that is the letter of 6 March 2018) of logic.

Relevant provisions of the Roads (Scotland) Act 1984

[11] Section 1(1)

"Subject to subsection (10) below, a local roads authority shall manage and maintain all such roads in their area as are for the time being entered in a list (in this Act referred to as their 'list of public roads') prepared and kept by them under this section; and for the purposes of such management and maintenance (and without

prejudice to this subsection's generality) they shall, subject to the provisions of this Act, have power to reconstruct, alter, widen, improve or renew any such road or to determine the means by which the public right of passage over it, or over any part of it, may be exercised."

[12] Section 31(1)

"The roads authority may, for the purpose of draining a public road or proposed public road or of otherwise preventing surface water from flowing onto it—

- (a) construct or lay, in it or in land adjoining or lying near to it, such drains as they consider necessary;
- (b) erect and maintain barriers in it or in such land as aforesaid to divert surface water into or through any existing drain;
- (c) scour, cleanse and keep open all drains in it or in such land as aforesaid;
- (d) drain surface water from it into any inland waters (whether natural or artificial) or tidal waters."

[13] Section 66

"(1) As regards any road, the following things shall be kept in good condition and repair by their owners or occupiers or by occupiers of the premises to which the things belong—

- (a) every vault, arch, cellar and tunnel under the road;
- (b) every opening into any such vault, arch, cellar or tunnel from the surface of the road;
- (c) every door or cover (whether fixed or removable) to any such opening;
- (d) every pavement light in the surface of the road; and
- (e) every wall or other structure supporting any such vault, arch, cellar, tunnel, door or cover.

(2) Where an owner or occupier is in contravention of subsection (1) above the roads authority may by notice to him require him within 28 days of the date of service of the notice to replace, repair or put into good condition the thing in respect of which the contravention arises.

(3) A person upon whom a notice has been served under subsection (2) above may, within the 28 days mentioned in that subsection, refer the matter by summary application to the sheriff; and the decision of the sheriff on the matter shall be final.

(4) A local roads authority may, if they think fit, pay the whole or any part of any expenditure incurred by a person in complying with subsection (1) or (2) above."

[14] Section 79(1):

“Without prejudice to section 14(1) of this Act, the roads authority may agree with the owner of a bridge—

- (a) for the payment by the authority of contributions towards the cost of the maintenance, improvement or reconstruction of the bridge, or the road carried thereby, or the approaches thereto;
- (b) for the transfer to the authority of the responsibility for the maintenance and improvement of the road carried by the bridge or the approaches thereto;
- (c) that the bridge, or the road carried thereby, or the approaches to the bridge, shall heritably vest in the authority;

and it shall be lawful for the owner of the bridge, notwithstanding that the bridge was constructed under statutory powers, to enter into and carry into effect any such agreement.”

[15] Section 151(1):

“In this Act, unless the context otherwise requires—

...

‘improvement’, in relation to a road, means the doing of anything for the benefit of road users, or any class of road users, beyond that which is essential to placing the road in a proper state of repair, and includes the improvement of the amenity —

- (a) of the road; and
- (b) of land abutting on, or adjacent to, the road;”

...

‘road’ means ..., any way (other than a waterway) over which there is a public right of passage (by whatever means) and whether subject to a toll or not and includes the road's verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof;”

The Lord Ordinary’s decision

[16] The Lord Ordinary understood the petitioner to have characterised the principal issue in the case as being whether the duty imposed by section 1(1) of the 1984 Act required the respondent to have regard to the actual or potential impact of the condition of a road on premises in the vicinity of the road and on the owners and occupiers of such premises as a relevant matter; it being the petitioner’s position that the respondent had failed in its duty because it had failed to understand that and accordingly have regard to that impact. The

duty incumbent on the respondent was to manage and maintain the roads. The issue therefore came to be the scope of that duty. The question was whether the authority had to do anything other than what was necessary to keep the road itself in a proper state of repair so that it might safely be used as a road. In the Lord Ordinary's view, it did not. The petitioner had criticised the respondent for restricting consideration to "safety issues" and "risk to members of the public using the road". That criticism was not well-founded. The purpose of maintaining a road by keeping it in a proper state of repair must be to try to secure that it can be used safely as a road (see *Macdonald v Aberdeenshire Council* 2014 SC 114 Lord Drummond Young at para 65). Where something requires to be done to keep a road in a proper state of repair so that it may safely be used as a road, there may be a number of different ways in which the duty can be complied with. The authority will then have a discretion as to the means it employs. It has the power, for example, when complying with the duty, to go further, and carry out improvements to the road. It may even improve the amenity of land abutting a road. The effect on neighbouring proprietors may in some cases be a relevant consideration as to how a discretion ought to be exercised but those questions do not arise unless it is established that something requires to be done to put the road in a proper state of repair. The petitioner had not sought the declarator set out in statement 5.5 that the respondents had not been entitled to conclude that the present water ingress was not detrimental to the structure of the bridge. It had not sought to establish that particular work needed to be done to put the road, including the structure of the bridge, in a proper state of repair. It followed that the petitioner had failed to establish any material error of law on the part of the respondent. The Lord Ordinary accordingly refused the petition.

Submissions

Petitioner and reclaimer

[17] The petitioner and reclaimer advanced twelve grounds of appeal, each related to an aspect of the Lord Ordinary's reasoning in respect of which it was submitted that she had fallen into error. The petitioner developed its argument in a written submission and in oral argument as follows.

[18] Roads authorities are under a public law duty to maintain the roads under their care (*MacDonald v Aberdeenshire Council* at paragraph 65). That duty is found in section 1(1) of the Roads (Scotland) Act 1984. The issue between the parties turned on the scope of that duty. In the submission of the petitioner and reclaimer the Lord Ordinary had erred in upholding the respondent's interpretation of the scope of its duty, that being to the effect that it only had to have regard to the safety of road users. On a correct interpretation of the statute, the duty required the roads authority to have regard to the actual or potential impact of the condition of the road on premises in the vicinity of the road and on the owners and occupiers of such premises, as a relevant matter in the circumstances addressed by the petitioner's request as contained in its solicitors' letter of 30 August 2017. In particular the impact of the condition of the road upon the condition of the vaults and cellars under the road was a relevant matter to which the roads authority must have regard in carrying out its duty of maintenance. A road cannot sensibly be said to be in good order and repair if the manner in which it is drained is damaging to neighbouring properties because the drainage arrangements are insufficient to handle and contain the volume of water. Whether the road, including the drains serving the road surface, is not in good order and repair and if so, what is to be done about it, are matters for the respondent in the first instance, but only provided that it approaches consideration of them in the proper way. Here it had not done so.

[19] An interpretation of section 1 which extends the scope of the duty beyond simply a consideration of the road surface from the perspective of the safety of road users passing over it, is supported by the width of the language of the statute. In England and Wales the duty of maintenance under section 41 of the Highways Act 1980 has been held to extend to the drains beneath and beyond the traffic surface and to include providing an adequate system of drainage for the road (*Mott MacDonald Limited v Department for Transport* [2006] 1 WLR 3356 at paras [26], [46] and [54]).

[20] Section 3(1) of the Human Rights Act 1998 Act provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the guarantees provided by the European Convention on Human Rights (cf *Marcic v Thames Water Utilities Limited* [2004] 2 AC 42 at paras [37], [41-43], [71] and [87]). A construction of the duty to manage and maintain which had regard to the interest of neighbouring proprietors to the peaceful enjoyment of their property was consistent with Article 1, Protocol 1 of the Convention. An interpretation which excluded their interest from consideration by the roads authority when maintaining the road should and can be avoided.

[21] The Lord Ordinary had failed to address the wording of section 1(1) within the context provided by the statute as a whole (cf Bennion *on Statutory Interpretation* para 21.1). The Lord Ordinary had read the duty of management and maintenance in isolation from the context provided by the powers conferred by the Act for “the purposes of such management and maintenance.” She had been wrong to do so. A duty may be inferred from a grant of powers in a matter of the public interest (*Gray v St Andrews District Committee* 1911 SC 266 per Lord Ardwall at 274). Section 151 of the 1984 Act conferred a power of improvement which went beyond what was strictly required to manage and maintain the road. It

included improvement of the amenity (a) of the road; and (b) of land abutting on, or adjacent to the road. Maintenance was not therefore limited to carrying out repairs. An expression beginning with “and includes” is intended to enlarge the meaning of the preceding words (*Dilworth v Commissions of Stamps* [1899] AC 99 per Lord Watson at 105-106). The interpretation adopted by the Lord Ordinary stripped the words beginning with “and includes” of any real content. The inclusion in the definition of “improvement” of land abutting on or adjacent to the road indicates that the intention was to address such improvements which do not also improve the amenity of the road, as well as those which do.

[22] Section 31 of the 1984 Act provides *inter alia* that the roads authority may construct or lay, in it or on land adjoining or near to it, such drains as they consider necessary for the purpose of draining a public road. They may also scour, cleanse and keep open the drains. The relevance of section 31 was that it addresses the condition of land adjoining or lying near to the road in addition to the condition of the road itself. The powers in section 31, which apply to the road and to land adjoining or near to it, are conferred for the purpose of draining the road or of otherwise preventing surface water from flowing onto it. However, they do not only address the condition of the road but also the condition of land adjoining it in consequence of water being drained from the road. The Lord Ordinary had erred in not understanding that.

[23] Section 66 places a duty on the owners and occupiers of, among other things, vaults, arches and cellars under the road, to keep them in good condition and repair. The section also empowers the roads authority by notice to require the execution of certain works and to pay or contribute to the costs of same. The Lord Ordinary relied on the imposition of the duty on the owners and occupiers as being against the petitioner’s proposed construction.

However, it is unlikely to have been the intention of the legislature on the one hand to impose a duty on persons as owners or occupiers of structures “as regards” the road and, on the other hand, to enable the roads authority to disregard the possibility that the condition of the road might increase the burden of that duty. Such would be an unfair and unlikely approach. Similarly, the terms of section 79, enabling a roads authority *inter alia* to make agreements with the owner of a bridge in relation to the maintenance of the bridge, point to the condition of a bridge being a matter with which a roads authority is capable of being concerned. It therefore does not make sense, as a matter of statutory interpretation, to exclude all consideration of the effects of the condition of the road on the condition of a bridge owned by another from matters which the roads authority requires to address under the duty imposed by section 1(1).

[24] Although the relevant reasoning in *Transco plc v Glasgow City Council* is not binding, it was submitted that it was correct and should have been followed by the Lord Ordinary in holding that a petition to enforce the statutory duty under section 45(b) of the Court of Session Act 1988 is available even although the use of a road and therefore the safety of road users are not in issue.

[25] The respondent’s position was that any liability of the respondent to a neighbouring proprietor must be found in the general law of negligence or nuisance. At the same time, it maintained that the percolation of water is simply something which a lower proprietor must accept (see *Logan v Wang (UK) Ltd* 1991 SLT 580) and any remedy as the petitioner may have lies against the proprietor of the arches of the bridge. The petitioner reserved its position on this, having raised proceedings against the respondent based on nuisance and negligence but the respondent’s public law duty was independent of its liability at common law (*MacDonald v Aberdeenshire Council* at para 65).

[26] The respondent had therefore erred in law in making the decision complained of because it had misunderstood the extent of its duty of management and maintenance, as identified in the declarator sought at statement 5.1 of the petition. This error had led the respondent further into the errors identified in the declarators sought at statements 5.2 and 5.3 of the petition. The decision complained of ought to have been reduced by the Lord Ordinary, declarator granted in relation to the May 2018 inspection and specific implement ordered, all as sought in statements 5.6 to 5.8 of the petition. In the alternative, the Lord Ordinary should have granted such other order or orders as she thought fit to address the error of law which underpinned the decision complained of.

[27] In the event that the reclaiming motion succeeded on the issue of statutory interpretation, the court should find that the Lord Ordinary had erred in her conclusions in relation to the relevance of the RSP report and the DMRB to the decision complained of. She had held that the respondent had been entitled to leave the RSP report out of account on the basis that it included a statement to the effect that it was not possible to be conclusive as to the source of the ingress of water. However, a report which identified the road as the probable source of the excess water was plainly highly relevant and should have been considered by the respondent. The respondent did not identify any other potential source for the water. A similar point was made in relation to the DMRB. It had been relied on by the petitioner as a source of guidance not as a source of mandatory requirements. The respondent's decision had entirely failed to address whether it was or was not of assistance.

Respondent

[28] The respondent invited the Court to refuse the reclaiming motion and to adhere to the decision of the Lord Ordinary. The respondent submitted that the petitioner's case was based on a fundamental misunderstanding of the statutory duty imposed by section 1(1) of

the 1984 Act. The petitioner was seeking the public law remedy of judicial review on the basis of a misunderstanding of, and purported breach of, statutory duty when any remedy (if it can be justified) properly lies with a private action based on common law negligence or nuisance (the petitioner has in fact raised an action based on nuisance in Aberdeen Sheriff Court which has been sisted pending the outcome of these proceedings). The respondent has properly interpreted, and carried out, its statutory duties in terms of the Act. The Lord Ordinary made no error of law in her decision. The reclaimer is not entitled to any of the remedies it seeks.

[29] That the petitioner had not insisted on the declarator sought at statement 5.5 of the petition was significant. It emphasised that the petitioner accepted that the respondent's conclusions on the state of the road for use as a road were not wholly unreasonable. The order for specific implement sought at statement 5.8 of the petition was in terms which were different from what had been requested in the letter of 6 March 2018

[30] In terms of sections 1 and 151 of the Act a bridge over which a road passes is part of the road for the purposes of the Act. The respondent accordingly accepts that it has a duty in terms of section 1(1) of the Act to manage and maintain the road including the Bridge but it is not the owner of the structure or the arches and it is not under a duty in terms of section 1(1) to ensure that a road is maintained for the benefit of occupiers of vaults beneath the arches of the Bridge. The respondent's duty is a duty *qua* roads authority. It does not extend beyond requiring the respondent to maintain the road in a proper state of repair as a road for the benefit of road users. It is a duty to exercise reasonable care in the maintenance and management of roads as roads, so as to make them reasonably safe for use by the public. It is accepted that in implement of that duty it is for the respondent to maintain the drains under the surface of the road so that a hazard to road users is not

created by the discharge of water onto the road. Powers are conferred to achieve that end. However, they do not have the effect of extending the section 1(1) duty to one requiring the respondent to maintain the road for other purposes, such as to benefit the owners of the vaults underneath the arches of a bridge which is not owned by the roads authority.

[31] The respondent accepted that legislation must be read in a way which is compatible with Article 1 of Protocol 1 of the European Convention but no such incompatibility arose from the construction of the Act contended for by the respondent. Nothing in the decision of the House of Lords in *Marcic v Thames Water Utilities Limited* indicated that it did.

[32] The respondent did not dispute that in some cases the extent of the powers granted by a statute may provide a contextual aid in interpreting the extent of a duty imposed.

However, that is not of assistance to the petitioner here. It was clear that when read as a whole, the powers conferred on the roads authority by the 1984 Act are more than are required to comply with the duty imposed by section 1, but that does not have the effect of extending the duty. The definition of "improvement" in section 151 made it clear that anything that is to be done in terms of an improvement is to be done for the benefit of road users. The phrase "and includes" does not disassociate what may be done on land next to the road from that requirement.

[33] The respondent accepted that a statute may be construed by viewing it as a whole. It was submitted that the Lord Ordinary did so and correctly took into account the other sections of the Act when construing the scope of the section 1(1) duty. The Lord Ordinary did not err in her construction of section 31 or section 66(1). The powers in section 31 which apply to the road and the land adjoining or near it are conferred for the purpose of draining the public road or otherwise preventing surface water flowing onto it (and therefore making it safe for road users). No duty is imposed in relation to maintaining the condition of the

adjoining land in respect of water being drained from the road. The powers under section 66 of the Act are granted to the roads authority to allow it to take action if the state of repair of the vaults, arches, cellars and tunnels might have an adverse effect on the state of repair of the road. They do not imply that there is a duty on the roads authority to maintain the road for the benefit of the occupiers of the vaults, arches, cellars or tunnels. The section makes it clear that the duty to maintain vaults arches and cellars lies with the owners and not with the roads authority. The Lord Ordinary was correct to state that section 66 is, again, an example of a provision seeking to provide a range of powers to enable the roads authority to manage and maintain roads. It does not assist in identifying the scope of that duty. The Lord Ordinary was similarly correct in her construction of section 79. Section 79 relates to bridges. It is similar to section 66 in that it empowers the roads authorities to make financial outlays in respect of structures which they do not own. Vaults, arches, cellars, tunnels and bridges under a road may be necessary for the support of a road. If their condition deteriorates, that might compromise the condition of the road. The roads authority is given the powers provided in sections 66 and 79 to ensure that if another party owns structures of these types, steps can be taken to require him to keep them in good condition. These powers are not there for the benefit of the proprietors of the structures in question. Their existence does not mean that the roads authority must exercise them for the benefit of the proprietors where there is no need to do so to keep the road in a proper state of repair for use as a road. As the Lord Ordinary correctly held, there is nothing in Lord Hodge's decision in *Transco v Glasgow City Council* to contrary effect.

[34] While the petitioner accepted that this only arose for consideration if it was correct on its interpretation of section 1(1), again, the Lord Ordinary had made no error of law in relation to the respondent's consideration of the RSP report. The RSP report was

inconclusive as to whether there was any concern about the safety of the bridge. In relation to the DMRB the respondent had not acted unreasonably. The DMRB provides standards for trunk roads and motorways. The respondent is not required to update roads within the city of Aberdeen to the standards set out in the DMRB. The respondent is not required to apply modern standards retrospectively to a structure on a road such as a bridge (*Edwards v Sutton LBC* [2016] EWCA Civ 1005). The respondent requires to use public funds to maintain *inter alia* the entirety of the road network within its area. It requires to allocate those resources according to the urgency of any perceived repair or maintenance work. The respondent has inspected the arches and considered whether it required to take any action as result of the reported water ingress from the arches of the Bridge for the benefit of the road. It decided that there were no concerns about the safety of the structure of the bridge justifying any action to be taken other than to continue with its programme of inspections to monitor the situation. It acted reasonably in so deciding.

Analysis and decision

[35] The petitioner complains that the respondent has failed and is failing to carry out its statutory duty to maintain the Bridge. If it can make out that proposition the petitioner has a remedy. Section 45 of the Court of Session Act 1988 provides, *inter alia*:

“The Court may, on application by summary petition—

...

(b) order the specific performance of any statutory duty, under such conditions and penalties (including fine and imprisonment, where consistent with the enactment concerned) in the event of the order not being implemented, as to the Court seem proper.”

As is the case with some, but not all, of the orders which may be granted by the Court of Session on an application by way of petition, the procedure to be followed in order to obtain

such an order is regulated by the provisions of a specific chapter of the Rules of Court (cf *Drika BVBA v Giles* 2018 SLT 823 para [44] *et seq*). The relevant chapter in the case of an application for an order for specific performance is Chapter 58: Applications for Judicial Review. RCS 58.3(1) addresses the point specifically:

“...an application to the supervisory jurisdiction of the court, including an application under section 45(b) of the Act of 1988 (specific performance of statutory duty) shall be made by petition for judicial review.”

Thus, when Lord Hodge observed, in *Transco v Glasgow City Council* at para [15], that:

“...it is clear that the pursuers could have applied for judicial review seeking implement under s45(b) of the Court of Session Act 1988 and that, if the bridge were a road as the pursuers aver, the defenders could be compelled to maintain it”,

he was doing no more than accurately identifying the appropriate remedy and the appropriate procedure for obtaining that remedy where a party complains that a roads authority is failing to maintain a road.

[36] It follows that the petitioner has adopted the correct procedure to compel a roads authority to perform its statutory duty and, at statement 5.8 of the petition, it has correctly identified a remedy which the court has power to grant in the event of the petitioner making out the proposition that the respondent is failing to perform its duty. However, we cannot avoid concluding that, having correctly identified judicial review as the correct procedure, the petitioner has felt obliged, simply because this is an application to the supervisory jurisdiction, to structure its case in such a way as to make it appear to conform to the familiar analysis in *West v Secretary of State for Scotland*. In particular, the petitioner has engineered a “decision” by the respondent through the exchange of correspondence, it has then attacked that decision as vitiated by error of law and then sought to have it reduced; all, we would suppose, to bring the application within what are seen to be the parameters of

West. We see this as the wrong approach. It is certainly unnecessary and, while not of itself fatal to the petitioner's case, it has rather distorted its proper focus.

[37] In *West* at 413 Lord President Hope, delivering the opinion of the court, explains that the "sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires." "Jurisdiction", Lord Hope goes on to say, means "power to decide", as applicable to "the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals". Now, the power to decide in the sense of making a determination recognising, conferring or withholding a right or privilege, is an important function of many administrative (and other) bodies but, as Lord Hope makes clear, it is not the only sort of power which may be held by such a body and it is not the only sort of power the lawful exercise of which is subject to the supervisory jurisdiction of the Court of Session. Thus, while very often an application to the supervisory jurisdiction will be for the purpose of challenging the legality of a decision, which if found to be unlawful may be reduced, other sorts of acts or omissions in exercise of a power may also be the subject of an application to the supervisory jurisdiction and in such cases remedies other than reduction may be appropriate (see eg *Wightman v Secretary of State for Exiting the European Union* 2019 SC 111; *Elmford Ltd v City of Glasgow Council (No 2)* 2001 SC 267). What will be in issue in such cases is the legality of the act or omission under scrutiny (actual or proposed). It will be unnecessary, and indeed superfluous, to consider any preceding decision.

[38] This is the situation here. The respondent is under a statutory duty to manage and maintain the roads in its area. Bridge Street, Aberdeen, is one of these roads and the Bridge is part of Bridge Street. The petitioner complains that the respondent is failing to maintain

the Bridge in a particular respect, in other words unlawfully omitting to carry out an act which it is under a statutory duty to carry out. It therefore seeks an order requiring the respondent to implement that duty by carrying out an inspection to determine what measures should be taken by the respondent to address water ingress into the structure of the Bridge and into the petitioner's Premises. The order is sought under section 45(b) of the 1988 Act. As far as entitlement to bring the application and the procedure to be followed the case is on all fours with *T Docherty Ltd v Monifieth Town Council* 1970 SC 200. In *Docherty* the petitioner presented a summary petition under section 91 of the Court of Session Act 1868 (the predecessor provision to section 45(b) of the 1988 Act) to ordain the local authority to lay sewers. The Lord President (Clyde) (page 205) considered that it was section 91 of the 1868 Act which had conferred authority on the court to order specific performance of the statutory duty, whereas Lord Cameron was of the view that the section simply provided "the procedure by which the undoubted power of the Court of Session to correct excesses of power or to compel performance of duty on the part of administrative authorities could be invoked" (page 208). Our preference is for Lord Cameron's formulation, but for present purposes the only points we wish to make are that it is not only decisions which are subject to review in exercise of the supervisory jurisdiction, and that the illegality founded upon may be better focused in terms of a failure to act rather than in terms of a decision to fail to act. In *Docherty* there were averments that the petitioner had written to the council calling upon it to cause sewers to be laid before the petitioner commenced its development, and that the council had replied stating that it had decided that the petitioner should lay the sewers instead, but what the petition complained of was the council's refusal to carry out its statutory duty not the council's decision to refuse to carry out its duty, in other words not acting rather than deciding not to act.

[39] When pressed by the court, Mr Cormack QC, on behalf of the petitioner, indicated that the remedy of reduction, as expressed at statement 5.6 of the petition, had only been included in an abundance of caution. He accepted that it was not essential to his case that the letter of 6 March 2018 should be reduced. We think that is right. The letter of 6 March 2018 can be regarded as a refusal to do what the petitioner had called upon the respondent to do, but it is not a decision in the sense of a determination having an impact on any party's rights or duties. It is simply an item of correspondence. There is therefore no need to reduce it, if only because there is nothing of legal significance to reduce. If there is any illegality it is because the respondent has failed to maintain the road, not because it has written a letter. For the same reason the declarators in statements 5.1 to 5.4 and 5.7 fall out of consideration. Declarator 5.5 was not insisted in before the Lord Ordinary or before this court. That leaves the order for specific implement set out in statement 5.8.

[40] As we have indicated, if the petitioner has a remedy it is for specific implement of a statutory duty. There is however a question as to whether there is a basis for what is sought here, even taking the petitioner's case on its own terms. The petitioner seeks an order for the respondent to carry out an inspection of the Bridge "to determine what measures should be taken by the respondent to address water ingress into the structure and into the Premises", and to communicate the outcome of that inspection to the petitioner with a fresh response to the letter from the petitioner's solicitors dated 30 August 2017. As Mr Burnet on the behalf of the respondent pointed out, that formulation seems to assume that the duty to maintain (in the sense of necessarily taking action as if the Premises were a road) extends to the Premises. However, that is not the position taken by the petitioner in its averments in the petition and in argument. That position is more modest. What the petitioner avers at

statement 15 of the petition and substantially repeats in paragraph 18 of the written submission is that:

“On a proper construction of that provision, the actual or potential impact of the condition of a road on premises in the vicinity of the road, such as the Premises, and the proprietors and occupiers of such premises, such as the petitioner, is a relevant matter to which the respondent as roads authority must have regard. Further and in any event, in a situation such as this which concerns the vaults and cellars under a road, the actual or potential impact of the condition of the road upon the condition of the vaults and cellars is a relevant matter to which the respondent as roads authority must have regard.”

By way of elucidation, at paragraph 19 of the written submission the petitioner has this:

“The petitioner is not saying that the objective of the duty is other than to manage and maintain adopted roads in such a way that they are safe for road users. The petitioner is saying that in implementing that duty in order to achieve that objective the respondent is required to take into account the effect of the condition of the road on neighbouring properties in relation to matters such as road drainage”

[41] On one view, an answer to the petitioner seeking an order in terms of statement 5.8 might be that the respondent has already done everything that the petitioner requires. The respondent has carried out inspections, in 2016 and in 2018, and concluded that nothing need be done. Given that it is conceded by the petitioner that whether the road, including the drains serving the road surface, is not in good order and repair and, if so, what is to be done about it, are matters for the respondent, we found it somewhat difficult to understand how it could be said that the respondent was in breach of its duty, even if the way in which the petitioner formulates the duty is accepted. However, that was not the basis upon which parties joined issue. Before the Lord Ordinary and before us the argument was whether the duty imposed by section 1 of the 1984 Act to manage and maintain roads extended, in any

respect whatsoever, to property which was not a road. The Lord Ordinary concluded that it did not. In our opinion she was right to do so, for the reasons she gave.

[42] Bridge Street is entered in the list of public roads. In terms of section 1(9) of the 1984 Act every road which is entered in the list of public roads shall vest in the roads authority for the purposes of their functions as roads authority, but such vesting shall not confer on an authority any heritable right in relation to the road. We have not been provided with very detailed information about the physical relationship between Bridge Street and the Premises, no doubt because parties have not considered that to be necessary. We understand however that the Bridge lies below Bridge Street and above the Premises. The ownership of the Bridge is stated to be unknown. For present purposes we take as accurate the petitioner's averments to the effect that water which originates from Bridge Street is entering the Premises and that there are measures that the respondent could take to prevent or reduce that. As the respondent points out, if that constitutes a wrong then the petitioner has a remedy, presumably in an action based on nuisance or negligence. What the petitioner seeks in this petition is a remedy, irrespective of whether the ingress of water is the result of any wrong on the part of the respondent

[43] Parties are agreed that the Premises are not a road and are not part of a road. Rather, they constitute or are part of property which is in the vicinity of a road which is on the respondent's list of public roads and therefore which the respondent is under a duty to maintain, in terms of section 1(1) of the 1984 Act. A "road" is defined by section 151(1) of the Act as "any way ...over which there is a public right of passage". Accordingly, as a matter of the ordinary use of language, when section 1(1) provides that a roads authority shall "maintain" all roads, that means doing what is necessary to keep the way in such a physical condition as to be suitable to afford passage to the public. By "suitable" we have in

mind the road being free from any hazard, as discussed by Lord Drummond Young in *MacDonald v Aberdeenshire Council* at paras {55} to [65], but also being in such a condition as to enable its reasonably convenient use. What requires to be maintained is not limited to the road surface, but anything done as part of the maintenance of the road must be for the purpose of keeping the means of passage reasonably safe and convenient for members of the public using it. We accordingly agree with the Lord Ordinary that what is envisaged by the duty to maintain imposed by section 1(1) is to do what is necessary to secure that the road can be used safely as a road.

[44] Like the Lord Ordinary, we see the construction of “maintain” as reinforced by the definition of “improvement” in section 151(1) of the Act. As is plain from section 1(1), but also from sections 31(1), 66(4) and 79(1), which were referred to in the course of submissions, the powers of a road authority are more extensive than what it requires in order to carry out its duty to maintain roads. Among other things it has power to improve a road. That power is conferred by section 1(1). Section 151(1) provides that “improvement” in relation to a road, means “the doing of anything for the benefit of road users, or any class of road users, beyond that which is essential to placing the road in a proper state of repair”. Two points arise from this definition. First, that it was necessary to confer a specific power to improve because the other powers conferred by section 1(1) do not go further than permitting the roads authority to do work which is essential to placing the road in a proper state of repair. Second, even the more extensive work which may be involved in improvement is empowered only to the extent that it is “for the benefit of road users”.

[45] The petitioner submitted that the Lord Ordinary had erred in not recognising that in *Transco plc v Glasgow City Council* Lord Hodge plainly thought that a petition to enforce the duty under section 1(1) would have been available even although the safety of road users

and the use of the road by road users were not in issue. This is not the basis upon which *Transco* proceeded. Lord Hodge was not concerned with an exploration of the extent of the section 1(1) duty. Rather, what was in issue was the relevancy of claim to reverse unjustified enrichment at the instance of a gas company which, in order to mitigate a risk to public safety, had carried works out on a bridge which carried two pipelines. The pursuers sought recompense on the basis that they had carried out an obligation which properly was incumbent on the defender roads authority by virtue of section 1(1) of the 1984 Act. Lord Hodge dismissed the action on the basis that the principle of subsidiarity applied to claims for recompense; a claim for recompense could only be made in circumstances where no alternative remedy was available. On the pursuers' averments, the pursuers had had an alternative remedy in the form of an application in terms of section 45(b) of the 1988 Act had they chosen to pursue it. Their claim for recompense was therefore irrelevant. Mr Cormack pointed to para [2] of Lord Hodge's opinion as indicating that the bridge had ceased to be used by motor vehicles by the time the pursuers had carried out the works. Therefore, Mr Cormack suggested, Lord Hodge was contemplating there being a duty to maintain the bridge even when such maintenance could not be for the benefit of road users. This is not the conclusion that we draw. Lord Hodge was simply taking the pursuers' case on its own terms. They averred that the bridge remained a public road (over which therefore there was a public right of passage). On these averments it followed that the defender had a duty to maintain the bridge. Just what, if anything, that duty might involve would depend on the defender's operational assessment of what was required having regard to the scope of the defender's obligation (see *Transco* at para [17]). The Lord Ordinary considered that there was nothing in Lord Hodge's decision in *Transco* that illuminated the question of what does

and does not fall within the duty of a roads authority to manage and maintain a road. We agree.

[46] The petitioner seeks to introduce, as a component within the section 1(1) duty to maintain roads, a duty to have regard to or to take into account the possibility of doing works for the benefit of neighbouring properties. We immediately accept that a road authority has *powers* to carry out works which may have the result of benefiting neighbouring properties. But that is very different from the authority having a *duty* to keep the possibility in mind whenever maintenance of the road is under consideration (which is what the posited duty seems to come to). Mr Cormack resisted the characterisation of that as a benefit. Rather, it was the avoiding of a detriment. We disagree. We understand why the petitioner should consider that it is suffering detriment as a result of inaction on the part of the respondent, but we return to the hypothesis upon which the petition is presented. That is that the petitioner is entitled to a remedy irrespective of whether or not the respondent's inaction and its consequences are wrongful at common law. If they do not amount to a wrong then what the petitioner is seeking is to be placed in a better position than it is entitled to be in as a matter of right. That is a benefit.

[47] The petitioner argues that there is nothing in the Act which is inconsistent with the duty it proposes. That might be so, but that is an inadequate basis upon which to impose a duty upon a local authority. We accept as a matter of generality that there are circumstances in which conferring a statutory power will imply the imposition of a duty to exercise that power, but we do see that to be the situation here and we did not understand it to be really argued that it was. In our opinion there is nothing in the statute which supports the petitioner's construction. The supposed duty simply does not exist. Any question as to

what the respondent should have done when presented with the RSB report and the DMRB guidance does not arise.

[48] The Lord Ordinary was correct to dismiss the petition. We shall refuse the reclaiming motion.