**OUTER HOUSE, COURT OF SESSION**

**[2015] CSOH 61**

**P420/14**

OPINION OF LORD BURNS

In the petition

FRIENDS OF LOCH ETIVE, a registered Scottish Charitable Incorporated Organisation Charity Number SC043986 having its offices at Muckairn House, Taynult, PA351JA

Petitioner;

For Judicial Review of a decision of the Argyll and Bute Council dated 21 March 2014 under the Town and Country Planning (Scotland) Act 1997 granting planning permission for the development of a 10-cage rainbow trout farm on Loch Etive in Argyll, at the site known as "Etive 6"

ARGYLL AND BUTE COUNCIL, a local authority having its offices at Kilmory, Lochgilphead, Argyll, PA31 8RT

Respondents:

DAWNFRESH FARMING LIMITED, a company incorporated under the Companies Act (company number SC344049) and having its registered office at Bothwell Park Industrial Estate, Uddingston, Lanarkshire, G71 6LS

Interested Party:

**Petitioner: Agnew of Lochnaw QC, MacDougall; Davidson Chalmers LLP**
**Respondents: Mackay; Brodies LLP**
**Interested Party: Findlay; DLA Piper Scotland LLP**

27 May 2015

**Background**

[1] Because of the quality of its waters, Loch Etive is ideally suited to the farming of rainbow trout and shellfish. For some time there have been a number of fish and shellfish

farms there. In particular, Dawnfresh Farming Ltd (Dawnfresh) has operated five farms on the loch including Etive 1 and Etive 5. Dawnfresh do not hold the lease of the sea bed in respect of these farms which is a necessary element for such an operation. In the case of each, the Crown Estate, which owns the rights to the sea bed, have granted a lease to Lorne Fisheries Ltd (in respect of Etive 1) and to Mrs Sarah Troughton (in respect of Etive 5). Dawnfresh operate those farms under management agreements with each of the leaseholders using equipment owned by Dawnfresh. As explained below, until amendment to the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) in 2007, the operation and establishment of fish farms did not require planning permission. That changed by virtue of certain amendments to the 1997 Act. Existing fish farms, including Etive 1 and 5, were given planning permission by the Scottish Government by virtue of a permitted development order of 2011.

[2] In 2012 Dawnfresh submitted a planning application for the establishment of a new fish farm at a site called Etive 6. There was significant opposition to that application in response to which it was withdrawn and a revised application submitted which proposed smaller and fewer cages than the original application. A public meeting of the Planning, Protective Services and Licensing Committee of Argyll and Bute Council (the council) took place in Oban on 29 January 2014 in order to determine the application. The recommendation of the planning officer was to grant the application subject to concluding an agreement under section 75 of the 1997 Act. That recommendation was accepted unanimously by the committee. The Heads of Terms of the section 75 Agreement are set out in the minutes of the meeting. The agreement was to provide for the:

> "permanent removal of the applicants' existing fish farm equipment from Etive 1 upon the first stocking of the site at Etive 6"

and:

> "the removal of the existing fish farm equipment from the site at Etive 5 on or before 31 December 2017 following the expiry of the applicants' existing site leasing obligations".

This was in order to achieve the necessary degree of consolidation and rationalisation of farming activity on the loch to ensure, in the view of the committee, compliance with the development plan and other material considerations. On 21 March 2014, a section 75 Agreement having been entered into, the council granted permission.

[3] The petitioner is a charitable organisation the primary purpose of which is to preserve and protect Loch Etive. It has raised this petition against the council and seeks declarator that the decisions to grant the permission and to enter into the section 75 Agreement were unlawful and/or *ultra vires* and/or unreasonable and for reduction of those decisions. The petition was served upon Dawnfresh as an interested party and upon Lorne Fisheries Ltd and Robert Campbell-Preston for any interest they might have. Dawnfresh lodged answers to the petition. The petition called before me for a first hearing. The petitioner was represented by Sir Crispin Agnew QC and Mr MacDougall. The council were represented by Mr Mackay who appeared on the first day with Ms Wilson QC. She fell ill and Mr Mackay proceeded alone. Mr Findlay appeared for Dawnfresh the interested party. The court is grateful to counsel for their assistance but particularly to Mr Mackay for minimising the delay occasioned. Written submissions were helpfully provided by the parties supplemented by oral submissions over a period of three days.

**The Arguments**

[4] The arguments for the petitioner which emerged during the course of the debate can, I think, be summarised as follows:

1. The recommendation in the report to committee, in the event of approval for a new fish farm at Etive 6, required the permanent removal of the existing fish farms at Etive 1 and 5 operated by Dawnfresh. Permission was granted by the council on that basis but the recommendation proceeded on an error of law. The section 75 agreement entered into cannot achieve that purpose. Permanent planning permission exists for the operation of fish farms at Etive 1 and 5 which could be used by parties other than Dawnfresh holding the necessary leases of the seabed from the Crown Estate and other consents. Thus when Dawnfresh's equipment at those sites is removed, replacement equipment could be installed by or on behalf of those parties and the operation of fish farms could legitimately continue. The required rationalisation of fish farming at Loch Etive would therefore not be achieved and the rationale behind the grant of permission fatally undermined.

2. The section 75 agreement is not, in any event, habile to achieve the permanent removal of Etive 1 and 5. That is because, first, the agreement is personal to Dawnfresh. It does not attach to or bind the land or bind current or future tenants of the Crown Estate at Etive 1 and 5 from establishing fish farms there. Second, the Crown Estate is not a party to it and it does not prevent the Crown Estate granting leases for Etive 1 and 5 in the future. Nor does it prevent the leaseholder (or someone acting on their behalf) from obtaining the necessary consents and placing their own equipment at these sites.

3. The decision is unlawful, *ultra vires* and unreasonable since to achieve the council's objectives in granting permission for Etive 6, any future application for permission to establish a fish farm at Etive 1 and 5 would have to be refused. The

council are not permitted to tie its hands in that way and have an obligation to consider any such application on its merits.

4. The section 75 agreement seeks to use a condition in the agreement to restrain the transfer of Controlled Activities Regulations licences granted under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (the CAR Regulations) in respect of Etive 1 and 5. That is not a proper planning function.

5. The decision is unlawful, *ultra vires* and unreasonable since the section 75 agreement purports unilaterally to take away valuable rights of third parties in Etive 1 and 5 when the council had no power to do so without compensation.

[5] The statutory scheme which provides the framework in which these issues fall be to decided is as follows:

**The Town and Country Planning (Scotland) Act 1997**

[6] The relevant provisions of the 1997 Act are contained in sections 26, 26AA and 31A as amended by the Planning etc. (Scotland) 2006. In so far as material for the present purposes, section 26 provides as follows:

> "(1) Subject to the following provisions of this section in this Act, except where the context otherwise requires, 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land, or the operation of a marine fish farm in the circumstances specified in section 26 AA.
>
> (6) Where the placing of the assembly of any equipment in any part of any waters which:
>
> (b) not being inland waters, are landward of the baselines from which the breadth of the territorial sea adjacent to Scotland is measured, or
>
> (c) are seaward of those baselines up to a distance of 12 nautical miles, for the purpose of fish farming there would not, apart from this

subsection, involve development of the land below, this Act shall have effect as if the equipment resulted from carrying out engineering operations over that land; and in this section;

'Equipment' includes any tank, cage other structure or long- line for use in fish farming.

'Fish farming' means the breeding, rearing or keeping of fish…

(6)AA Where the making of material change in the use of equipment so placed or assembled for that purpose would not, apart from this subsection, involve development of the land below, this Act shall have effect as if the making of such material change was development of that land"

Section 26AA provides as follows:

"(1) The circumstances to which section 26(1) refers are-

(a) that the marine fish farm is being operated after-

(i) the date which is the appropriate date in respect of that fish farm, or

(ii) if earlier than that date, the date on which planning permission is granted, or an application for planning permission is refused, under section 31A, and

(b) that the operation involves the use of equipment which was placed or assembled in waters at a time when that placing or assembly did not constitute development under this Act.

(2) For the purposes of subsection (1)(a) the appropriate date in respect of a fish farm is whichever is the latest of-

(a) a date prescribed by the Scottish Ministers for the purposes of this subsection, and

(b) the date upon which any authorisation which-

(i) relates to the operation of that fish farm, and

(ii) is in effect at the date of commencement of section 4 of the Planning etc. (Scotland) Act 2006, ceases to have effect.

(3) In this section and in section 31-

'Authorisation' means-

(a) a consent for fish farming issued by the Crown Estate Commissioners,

'Equipment' has the same meaning as in section 26(6)
'marine fish farm' means a fish farm situated in any part of any waters referred to in paragraphs (b) and (c) of section 26(6)."

[7] Section 26(1) and 26AA of the 2007 Act, as amended and when read together, provide that the operation of a fish farm after the appropriate date (and I will take 1 April 2007 as the appropriate date for these purposes since I understand that that was the first such date) where that operation involves the use of equipment placed or assembled in waters at a time when that placing or assembly did not constitute development under the Act (that is before 1 April 2007), constitutes development in terms of section 26(1).

[8] Accordingly, planning permission became a requirement for such operation thereafter. In order to provide for the necessary permission to be granted for such an operation section 31A gave power to the Scottish Ministers to do so either by order or on application to them in accordance with regulations to be made.

[9] Section 31A so far as material provides as follows:

"(1) This section applies to planning permission for the operation of a marine fish farm which involves the use of such equipment as is referred to in section 26AA(1)(b).

(2) Any planning permission is to be granted by the Scottish Ministers.

(2A) Subject to subsection (4), any planning permission may be granted by the Scottish Ministers–

(a) by order or

(b) on application to them in accordance with regulations under subsection (8)."

[10] Further provision is made to allow planning permission to be granted as respects a class of development.

**The 2011 Order**

[11] The power granted to Scottish Ministers under section 31A was exercised by the Town and Country Planning (Marine Fish Farms Permitted Development) (Scotland) Order 2011/114 which came into force on 21 February 2011 (the 2011 Order). The Scottish Ministers made that order in exercise of the powers conferred upon them by section 31(A) of the 1997 Act.

[12] By article 3 of the 2011 Order, permission was granted for the operation of fish farms in *inter alia* Loch Etive, involving the use of equipment referred to in section 26AA(1)(b) of the 1997 Act for the purpose of breeding, rearing or keeping of fish. By article 3(4) permission for development was not granted unless the equipment referred to in the above subsection was in use on 23 February 2011 or had been used between 1 January 2008 and 23 February 2011 for the purposes of fish farming.

[13] By article 3(5) the permission granted by the order was subject to the condition that:

> "In the event of any equipment falling into disrepair or becoming damaged, adrift, stranded, abandoned or sunk in such a manner as to cause an obstruction or danger to navigation, the developer shall carry out such works (including lighting, buoying, raising, repairing, moving or destroying the whole or any part of that equipment) so as to remove the obstruction or danger to the navigation."

[14] It was common ground between the parties that permission for the operation of the marine fish farms at Etive 1 and 5 was granted by article 3 of the 2011 Order. Accordingly, in February 2011, Etive 1 and 5 received permission for the operation of the fish farms at those locations involving the use of equipment which had been placed there prior to 1 April 2007. Since the operation of these farms, with equipment in place prior to 1 April 2007, was granted by the 2011 Order, no development in terms of section 26(6) of the 1997 Act was

involved. That subsection only renders the placing or assembly of fish farm equipment "engineering operations" and thus development if that equipment is placed or assembled after 1 April 2007. The equipment at Etive 1 and 5 had been placed or assembled prior to that date.

[15] It is to be noted at this stage that article 3(5) imposes a condition on all such fish farms obliging the operator in the event of the events listed *inter alia* to raise or repair any part of the equipment of the fish farm which might fall into disrepair so as to cause an obstruction or a danger to navigation" so as "to remove the obstruction or danger to navigation". That represents, in my view, a limited method by which works on the equipment as defined in section 26AA(1)(b) could be undertaken so as to fulfil the obligation imposed by that condition. Accordingly, if any part of the equipment becomes such as to represent a danger to navigation the developer is obliged to carry out works to remove that danger. The obligation is one limited to carry out works to remove the danger or obstruction. Subject to that, the permission granted by the 2011 Order extends only to a use of the equipment which had been in place prior to 1 April 2007.

**The 2012 Order**

[16] By article 2 of the Town and Country Planning (General Permitted Development) (Fish Farming) (Scotland) Amendment Order 2012 (the 2012 Order), planning permission was granted for new classes of development specified in Part 6a of Schedule 1 to the Town and Country Planning ( General Permitted Development) Order 1992 (the 1992 Order). Class 21A granted permission for:

> "(1) the placing or assembly of equipment within the area of an existing fish farm for the purpose of–

(a) Replacing an existing finfish pen, in the same or a different location, with a finfish pen of –

(i) The same size, colour and design:

or

(ii) a different size, colour or design:

(b) relocation of an existing finfish pen:

or

(c) installing additional finfish pen."

[17] However, certain restrictions were placed on development of this sort if the dimensions of the tank or cage concerned was of a greater area than specified therein or would result in the overall surface area comprising the fish farm being more than a thousand square metres greater or 10% greater "than the surface area of the water is covered by the original equipment". By article 5 of class 21A, a "finfish pen" means a tank or cage used for the purposes of fish farming. In the interpretation article, "original equipment" is defined so as to include the equipment for which authorisation was given by the Crown Estate pursuant to an application made prior to 1 April 2007.

[18] Subsequent classes for which development is granted by the 2012 Order include 21B (the replacing of an existing feed barge) and 21C (the replacing of an existing top net or support for a top net). In 21D the placing or assembly of equipment within the area of an existing fish farm required temporarily in connection with the operation of the fish farms is permitted.

**Issues 1 and 2: the effect of the section 75 agreement**

*The petitioner's submissions*

[19] The first issue with which I require to deal is a fundamental one upon which the first two propositions set out above largely depend. It was argued on behalf of the petitioner that the permanent removal of the fish farms at Etive 1 and 5 was an essential condition on which planning permission for Etive 6 was granted. The need for rationalisation of existing fish farm activity in Loch Etive, as set out in the relevant plans and policies, required that both Etive 1 and 5 be permanently removed in the event of Etive 6 being established. Only then would conformity with those plans and policies be achieved.

[20] The terms of the section 75 agreement did not, however, achieve permanent removal. It obliged Dawnfresh to remove their equipment from the locations of Etive 1 and 5 but planning permission had been granted in perpetuity for the operation of fish farms at Etive 1 and 5 under the 2011 Order. So a party other than Dawnfresh, such as a leaseholder from the Crown Estate of the seabed at the location of Etive 1 and 5, who had obtained the necessary additional consents, would be entitled to continue the operation and, in any event, in terms of the 2012 Order, had permission to replace the equipment removed by Dawnfresh under the section 75 agreement and to operate fish farms at those locations. Each of the current leaseholders from the Crown Estate at Etive 1 and 5 had intimated their intention to do so and were entitled to do so under the existing planning permission. Accordingly, the whole rationale of the grant of the permission for Etive 6 was fatally undermined.

[21] Sir Crispin accepted that the existing permission was limited to the use of the equipment placed there prior to April 2007 but until terminated or until there was a material change of use (section 26(6AA)), that permission persisted and enured for the benefit of the land (section 44(1)). He argued that it was permissible to replace that equipment under the 2011 Order and that could be done by anyone who obtained the necessary licences from SEPA and Marine Scotland and a lease from the Crown Estate, provided that no material

change of use was involved. If the position were otherwise, the operators of the old equipment on sites consented by the 2011 Order, would be able to continue the operation of the farms with ageing and potentially dangerous equipment and that would not be a sensible construction of the provisions concerned. Regulation 3(5) of the 2011 Order indicated that it was the intention of the legislative scheme to allow replacement.

[22] Even if he was wrong about that, Sir Crispin went on to argue that the terms of the 2012 Order permitted the replacement of "an existing finfish pen" in the same location. By virtue of the 2012 Order, even although Dawnfresh were obliged under the section 75 agreement to remove their equipment, another operator would be entitled to replace that equipment with new equipment and continue to operate the fish farm under the terms of permission granted under the 2011 Order on obtaining the necessary consents.

[23] Permission had been granted by the 2011 Order permanently and the 2012 Order gave permission for replacement of that equipment. Accordingly, the provision in the section 75 agreement at 4.1 to the effect that the "existing equipment at Etive 1 is removed by Dawnfresh" and at 4.2 that "Upon the expiry of the Etive 5 lease on 31 December 2017 Dawnfresh shall remove the existing equipment at Etive 5" did not satisfy or fulfil the council's fundamental requirement in granting permission that the agreement should provide for "the permanent removal of the equipment from Etive 1 and the removal of existing farm equipment from Etive 5 on or before 31 December 2017" at page 25 of the minutes of meeting of Planning, Protective Services & Licensing Committee of the respondents dated 29 January 2014. The section 75 agreement and the planning permission granted were therefore invalid.

[24] My attention was drawn to the definition of "finfish pen" in paragraph (5) of Class 21A as meaning a tank or cage "used for the purposes of fish farming". It did not say

"in use" for that purpose at the time of replacement and envisaged the old equipment being removed some time prior to the replacement. The fact that the equipment had been removed or was to be removed did not mean that the fish farm no longer existed (*Schwerzerhof v Wilkins* 1898 QB 640).

**The respondent's submissions**

[25] The respondents did not dispute the factual background described above. Nor was there any suggestion that different or additional statutory provisions were relevant to this matter. The position of the council was that the section 75 agreement was effective in controlling the operation of fish farms at Etive 1 and 5 in the future in circumstances where Etive 6 had consent. That was because the existing permission for Etive 1 and 5 only extended to the use of equipment referred to in section 26AA(1)(b) of the Act. Since Dawnfresh are obliged by the section 75 agreement to remove the whole of that equipment, anyone intending to place or assemble any replacement equipment at those sites would require planning permission to do so because such placing or assembling would constitute development by virtue of section 26(6) of the Act. The permission granted by the 2012 Order would not give authority for such works. Upon the removal of all of Dawnfresh's equipment at those sites, no fish farms would exist there and thus the placing or assembly of a fishpen would not "replace" an existing finfish pen in the area of an existing fish farm as permitted by that Order. While the Crown Estate's participation in the section 75 agreement would have put the matter beyond any doubt, it was not necessary that they were a party to it. The requirement on Dawnfresh to remove their equipment permanently provided the necessary mechanism to trigger the need for an application for permission to operate a fish farm at either site by any person after that removal. Mr Mackay also

submitted that if "wholesale" replacement of fishpens was intended, that would give rise to significant environmental effects and a screening process would be required under article 3(1) and (8) of the 1992 Order. Mr Findlay advanced similar submissions on behalf of Dawnfresh.

**Discussion**

[26] In my opinion, the submissions of the council and Dawnfresh are to be preferred. While it is no doubt correct to say that the fish farms at Etive 1 and 5 have the benefit of permission granted by the 2011 Order, that permission is limited by section 26AA(1)(b) to the operation of the fish farms there using equipment placed prior to April 2007 (the original equipment) owned by Dawnfresh. Further, Dawnfresh can replace the equipment described in Part 6A of the 2012 Order, namely finfish pens (Class 21A), feed barges (Class 21B), top net and supports (Class 21C).

[27] The section 75 agreement provides for the removal of all that equipment. Therefore, once Dawnfresh comply with the terms of paragraphs 4.1 and 4.2 of the agreement, no fish farm equipment will exist at the two sites. In my opinion, that will bring the deemed permission under the 2011 and 2012 Orders to an end. The operation of the fish farms using the original equipment authorised by sections 26(1) and 26AA(1) and by the 2011 Order will no longer be taking place. Further, it will no longer be possible to replace any of the equipment described in the 2012 Order since there will be no "existing fish farm" upon the removal of all of the original equipment (see paragraph 1(1) of Class 21A and 21B of the 2012 Order). The placing or assembly of equipment at those sites, once paragraphs 4.1 and 4.2 have been implemented, would constitute development under section 26(6) of the Act requiring the grant of planning permission. Article 3(5) of the 2011 Order only provides

for the carrying out of works on the original equipment as are necessary to remove the danger or obstruction thereby constituted. It does not permit replacement of equipment.

[28] In these circumstances, I do not consider it to be necessary that the Crown Estate is a party to the section 75 agreement to provide that no lease should be granted by it of the sea bed at those sites. After the removal of the existing equipment, it will be necessary for anyone proposing to place fish farming equipment at Etive 1 or 5 to obtain planning permission to do so and without such permission no lease from the Crown Estate would allow such activity.

[29] Sir Crispin cited *Schwerzerhof* v *Wilkins* 1898 QB 640 as illustrating the correct approach to deciding whether the fish farms could be said to exist at the time of replacement of the equipment. In that case an underground part of a building had been used as a bakehouse for many years prior to the commencement of the Factory and Workshop Act 1895 on 1 January 1896. By section 27 of that Act it became a criminal offence to operate an underground bakehouse unless it was so used on that date. The landlord had been convicted under the section. The tenant had vacated the premises in October 1895. Work by the owner to put them into repair thereafter was completed at Christmas that year while they were advertised to be let as a bakehouse and a new tenant started using them in February 1896 and continued to do so down to October 1897. It was held that the premises were being used as a bakehouse at the commencement of the Act. That was so even though at that time they were not actually being so used. Mr Justice Wright appears to have had some doubt about the matter but relied on the fact that there was no interruption of use as a bakehouse. Mr Justice Darling, looking at the matter from the point of view of the landlord (who was trying to let the premises as baker's premises at the relevant date) considered that he was as much using it as a bakehouse as if he had been in actual occupation of it.

[30] The circumstances of the case are far removed from the present and it is not easy to draw any guiding principles from it which are applicable to the present case. It is concerned with the use of a part of a building at a given time not whether it existed. As Mr Mackay asked, what would the position have been, if at the relevant date, the bakehouse had not existed at all? I think in that situation, there would have been no question of its being used as a bakehouse or anything else and no question of a prosecution could have arisen. In this case, the equipment of Etive 1 has already been removed by Dawnfresh with the intention of quitting that site to start another. The equipment of Etive 5 will be removed by Dawnfresh at the expiry of Mrs Troughton's lease from the Crown Estate on 31 December 2017, again with the intention of quitting that site. I do not consider that, on removal of the original equipment, it can be said that either fish farm will exist. There is or will be nothing on the water, no farming of fish is or will be being carried out and there is or will be nothing at those sites to replace.

[31] There is a further aspect to this matter. The petitioner argued that the leaseholders would be able to replace the fish farm under the 2012 Order since the 2011 Order granted permission in perpetuity to operate a fish farm at both sites and the 2012 Order allowed the replacement of the equipment. I consider that the 2012 Order only permits the replacement of certain items of fish farm equipment namely the fin fish pens, the feed barges and top nets and supports. It permits no other items of equipment necessary for the operation of a fish farm to be replaced. I note from the terms of the joint minute that parties could not agree as to whether anchors on the sea bed constituted "equipment" for the purposes of section 26(6) of the Act or the 2012 Order. I was not addressed on this issue and thus cannot express a concluded view upon it. But it seems to me that the meaning of equipment must include items such as chain and anchors which are necessary to fix the fish pens in the position on

the sea bed for which consent is granted and which is in compliance with the lease of the sea bed from the Crown Estate.

[32] So, even if a fish farm could be said to exist after removal of all the equipment in place, another operator would not be permitted, under the 2012 Order, to replace the anchors and chains which secure the fish pens or barges to the sea bed. The 2012 Order is limited in its scope as to what items can be replaced in an existing fish farm. The placing of other items such as anchors and chain would constitute development under section 26(6).

[33] Further, although Sir Crispin argued that the council had required the permanent removal of the equipment at both sites, that is not exactly what was done. What the council are recorded as having required of the section 75 agreement is one which achieved "the permanent removal of the *Applicant's* existing fish farm equipment" at Etive 1 and "the removal of *existing* fish farm equipment from the site of Etive 5" (page 25 of the minutes of the meeting of 29 January 2014 emphasis mine). It was therefore the existing equipment belonging to Dawnfresh that was to be permanently removed. The council did not require that no fish farm equipment should be placed at those sites in perpetuity.

[34] Mr Mackay submitted that the 2012 Order did not give permission to wholesale replacement of finfish cages. Article 3(8) of the 1992 Order provides that Schedule 1 and 2 development within the meaning of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (the EIA Regulations) is not permitted unless certain screening procedures are carried out. While it may be the replacement of multiple pens or feed barges would trigger the requirements of article 3(8), no information was provided which would allow me to conclude that the thresholds or criteria set out in Schedule 2 columns 1 or 2 of the EIA Regulations would be exceeded.

[35] I therefore reject the petitioner's arguments that the council's decision to grant the application on completion of the section 75 agreement was based on an error of law. The removal of the original equipment from Etive 1 and 5 brings the planning permission under the 2011 Order for the operation of fish farms there to an end. No replacement of fish farming equipment would be authorised without the grant of permission from the council.

**Issue 3: the future of the sites at Etive 1 and 5**

[36] Sir Crispin argued that, because a leaseholder from the Crown Estate could apply for planning permission for a fish farm in the future at Etive 1 and 5 and the council cannot tie its hands to refuse any such application, the section 75 agreement is not effective in guaranteeing that no permission to operate those sites in the future could be granted. He cited *Stringer* v *The Minister of Housing* 1971 WLR 1281 at page 1289 where Mr Justice Cooke found an agreement *ultra vires* because the planning authority had bound itself to disregard considerations to which they were required to have regard when considering planning applications.

[37] The respondents argued that the council had not tied its hands and accepted that any such application would have to be considered on its merits. Mr Mackay accepted that while Etive 6 is in operation along with the other fish and mussel farms in the Loch, the addition of Etive 1 and 5 would not comply with the development plan. But there was no "sterilisation" of Etive 1 or 5 in perpetuity. The requirement of the council related to the permanent removal of Dawnfresh's equipment only. The case of *Stringer* could be distinguished since the council had not entered into any agreement to disregard material considerations.

**Discussion**

[38] First, I do not consider that the council meant to achieve a situation whereby no permission could ever be granted for fish farms on those sites. Nor does their decision have that effect. As stated above that is not what the minutes record. The council cannot bind itself not to grant permission and a term to that effect in a section 75 agreement would be *ultra vires* as set out in *Stringer*. But there is no such indication in the section 75 agreement here. It should be borne in mind that in *Stringer* it was accepted on behalf of the planning authority that the agreement it entered into meant that "development at Brereton Heath and at other places was to be resisted" (see page 1289).

[39] Second, it is necessary to look at the policy context which the grant of permission for Etive 6 was made and the terms of the decision to grant permission. Local Plan Policy LP AQUA 1 gives general support for fin fish farming as long as there is no significant adverse effect directly, indirectly or cumulatively on the 12 considerations there set out. These include the "landscape, character, scenic quality and visual amenity", protected sites and species and navigational and recreational interests. Any coastal framework plan is a material consideration. The Loch Etive Integrated Coastal Zone Management Plan (ICZMP) provides under Future Development at 6.1.8 that:

> "Due to the amount of existing sites in Loch Etive, the loch is either at or approaching landscape capacity in many places, therefore little capacity for new development has been identified".

[40] It is considered that there is existing unused capacity in the Loch and that there will be opportunities to "maximise the production of both trout and mussels in the loch through rationalisation of existing sites". Accordingly, Policy LE AQ1 provides support for the consolidation and reorganisation of existing sites.

[41] It was against that policy background that the planning officer assessed the application for Etive 6. On page 29 and 30 of his report he stated that the addition of the new finfish farm of the scale proposed at Etive 6 would impinge on the landscape character and visual amenity and increase certain environmental risks. Without measures to consolidate and rationalise existing sites, the proposal would not conform to the development plan or ICZMP. The surrender of some of their existing sites, however, would bring the proposal into conformity with the development plan. Thus the planning officer contended that, if Etive 1 and 5 were removed, the application for Etive 6 would become acceptable. Not only would the sites at Etive 1 and 5 be cleared but the existing mussel farm at Etive 6 would also be removed. So there would be a concentration of farming at Etive 6 in return for the removal of Etive 1 and 5 and the mussel farm at Etive 6.

[42] As was pointed out for the council, the decision contained in minutes of the meeting of 29 January 2014 provides that "the Applicant's existing fish farm equipment" at Etive 1 will be permanently removed and that at Etive 5 will be removed following the expiry of the existing site leasing obligations in order to achieve the rationalisation "of fin fish farming operations conducted by the Applicants at Loch Etive". It was not decided that there would be no fish farm at Etive 1 and 5 in the future. Any application for a new fish farm at those sites, assuming the continued operation of Etive 6, would have to be assessed against the existing policy framework and the planning history of these sites. It might be very difficult to conclude, in the current state of affairs, that any proposal to re-establish fish farms at Etive 1 or 5 could be said to conform to the development plan or other material considerations when the ICZMP specifically found "little capacity for new development" and the rationalisation involved in the establishment of Etive 6 had been carried out. If at

the time of any new application at Etive 1 or 5 Etive 6 did not exist, the position would of course be different.

[43] The petitioner is reading into the council's decision a requirement that no fish farms are ever to be located at the sites of Etive 1 and 5 in the future. That is not what was decided. What cannot happen is that Dawnfresh operate all three sites. If, for example, Dawnfresh or its successors were to cease operations at Etive 6, there would be no reason why an application to re-establish a farm at Etive 1 or 5 could not be made and considered on its merits. Of course, if someone applied for planning permission at Etive 1 and/or 5 while 6 was in operation at its current capacity, as they would be entitled to do, the council would also have to consider such an application on its merits but against the background, first, that the ICZMP of March 2011 found that "the loch is either at or approaching landscape capacity in many places, therefore little capacity for new development has been identified" and secondly, that the current permission has achieved a degree of rationalisation or consolidation as envisaged and encouraged by the ICZMP. It might be therefore that refusal would be justified. Applications for additional farms in other parts of Loch Etive would have to be viewed independently and on their own merits also, having regard to all these factors.

**Issue 4: the CAR consents**

[44] Clause 4.5 of the section 75 agreement provides as follows:

> "Dawnfresh shall, subject to the regulatory requirements of SEPA, maintain and fully comply with the terms of the CAR consents and shall not surrender or transfer the CAR consents nor seek or consent to such transfer or surrender of them without the prior written consent of the Council"

[45] In their answers to the petition, the council contended that clause 4.5 of the section 75 agreement did not seek to duplicate the statutory regime under the CAR regulations. It was stated that *esto* clause 4.5 was invalid or unenforceable, the legality of the remaining parts of section 75 agreement were unaffected (clause 5.2). In their written submissions at paragraph 9 it is accepted that there may be circumstances where the licence holder may be obliged to surrender the licence granted by SEPA regardless of the consent or otherwise of the council. To that extent, it is accepted that the provisions of this clause could not be relied upon.

[46] The council rely, however, on the terms of clause 5.2 which is to the following effect:

> "If any provision of this Instrument shall be held to be invalid, illegal or unenforceable the validity, legality and enforceability of the remaining provisions shall not in any way be deemed thereby to be affected or impaired"

It is argued that the remaining provisions and in particular clauses 4.1 and 4.2 are sufficient to ensure that any future operator of Etive 1 or 5 would require to apply for planning permission.

[47] In the light of my conclusions above and the effect of the removal of the existing equipment at Etive 1 and 5, I agree that the unenforceability of clause 4.5 does not affect the validity of remainder of the section 75 agreement.

**Issue 5: the effect of the section 75 agreement on third parties' rights**

[48] The petitioner argued that the section 75 agreement purported to interfere with the rights of third parties which were of value. In particular, statement 13 of the petition avers that in lieu of the Crown Estate or Lorne Fisheries being parties to the section 75 agreement, clause 4.4 attempted to restrain the future use of Etive 1 by "unlawfully interfering with the

Etive 1 agreement" and to "place obligations on both Lorne Fisheries and Mr Campbell-Preston without consent". That agreement is one between Dawnfresh (the assignees of the original party Kaimes Fish Farming Ltd), Robert Campbell-Preston and Lorne Fisheries dated April 2010 and concerns the management of the Inverawe sea bed site and the provision of specific quantities of trout from Dawnfresh up to a certain tonnage to a smokehouse run by Lorne Fisheries Ltd. It subsists until 30 June 2018. Clause 4.4 of the section 75 Agreement provides as follows:

> "Dawnfresh shall comply fully with, and not breach, their obligations under the Etive 1 agreement and shall not terminate the Etive 1 agreement prior to Thirtieth June Two Thousand and Eighteen. Dawnfresh shall not enter into any variation of the Etive 1 agreement without first having obtained the Council's consent to the proposed variation".

That provision, it was argued, represented an unacceptable and unwarranted interference in a private commercial agreement to which the council were trying to make themselves a party without the consent of those involved in it.

[49] The council argued that no interference was involved nor was it the case that any obligations were placed on Lorne Fisheries or Mr Campbell-Preston. In any event, even if clause 4.4 was illegal or unenforceable, that did not invalidate the rest of the section 75 agreement.

**Discussion**

[50] Clause 4.4 seeks to ensure that Dawnfresh will comply with the terms of the Etive 1 agreement and will not terminate it prior to its stated expiry date. As such it is difficult to regard it as in any way objectionable to any of the signatories. Insofar as it seeks to prevent variation without the council's prior consent, even if unenforceable, it would not invalidate the remaining provisions and in particular, clauses 4.1 and 4.2 which are the operative and

crucial ones. In any event, while the petitioner asserts that this provision involves some interference in the private contractual rights of third parties, it is notable that no objection is raised by those third parties in the context of these proceedings although the petition was intimated on Lorne Fisheries and Mr Campbell-Preston. Nor, so far as I am aware, have any of those parties attempted to challenge the section 75 agreement in any way. If a proposed variation of the Etive 1 agreement was prevented by clause 4.4 the section 75 agreement to the detriment of one of the parties, they could seek redress against Dawnfresh. As Mr Findlay pointed out, the obligation upon Dawnfresh to supply fish to Lorne Fisheries can be fulfilled from their site at Etive 6.

[51] Sir Crispin expanded his submissions in this area by arguing that the leaseholders from the Crown Estate own a valuable asset in form of their lease which the section 75 agreement destroys. It is correct to say that on removal of the existing equipment, planning permission will lapse and thus any value of the lease of the sea bed to the lease holder will disappear. However, the Etive 5 lease expires on 31 December 2017 and clause 4.2 does not require the removal of the existing equipment until that date. The section 75 agreement respect of Etive 1 provides that the Etive 1 agreement will not terminate prior to the termination date specified therein.

[52] The council have not decided never to granted permission at Etive 1 or 5. Neither leaseholder is precluded from applying for planning permission in the future. But I do not consider that a current leaseholder has any "right" to renewal of a lease from the Crown Estate to which the council required to have regard in deciding Dawnfresh's application for planning permission at Etive 6. The grant of a lease is a matter for the Crown Estate which applies certain criteria in the assessment of applications. In an email from the Aquaculture Operations Manager of the Crown Estate dated 16 January 2014 those criteria are set out.

Any renewal of a lease is dependent on planning permission being in place. It also appears that the applicant must intend to operate the farm.

[53] But even if the lapse of planning permission in respect of the sites at Etive 1 and 5 could be said to have adverse consequences on third parties in relation, for example, to the prospects of obtaining renewal of a lease from the Crown Estate, that does not in my view render the grant of planning permission for another site or the operative terms of any section 75 agreement open to review in this court. That consequence is one which flows from what I consider to be a proper exercise of the discretionary powers of the planning authority under the planning regime. The local plan encourages fish farming in Policy LP AQUA 1 and provides that the coastal framework plan is a material consideration. The Loch Etive ICZMP identifies the consolidation and rationalisation of existing fish farms as offering the greatest opportunity to maximise the production of trout farming in the loch (paragraph 6.1.8). Dawnfresh, as the applicants for permission at Etive 6, were willing to undertake the obligations in the section 75 agreement required by the council in order to achieve that rationalisation. The council have decided to rationalise fish farming activity by the grant of planning permission for Etive 6 and the terms of the section 75 agreement. I am unable to conclude that those decisions are illegal, *ultra vires* or in any way unreasonable. It is not for this court to interfere in the exercise of the planning authority's discretion in this regard.

**Disposal**

[54] I will therefore repel the petitioner's pleas in law and sustain the respondents' third and fourth pleas in law and the third, fourth and fifth pleas in law for the interested party and will dismiss the petition. I will reserve meantime all question of expenses.