FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 34
P625/22

Lord President
Lady Wise
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the petition by

REDCROFT CARE HOMES LTD

Petitioners and Reclaimers

against

CITY OF EDINBURGH COUNCIL

Respondents

Petitioners and Reclaimers: Edwards; BTO Solicitors LLP
Respondents: MacNeill KC; D Anderson; The City of Edinburgh Council

23 October 2024

Introduction

[1] The petitioners operate Redcroft House. This is a residential care facility for adults with learning difficulties and complex needs. The petitioners seek judicial review of the respondents' refusal to pay the petitioners a sum to cover a funding deficit which arose

between February 2019 and October 2020, when the facility was under investigation and the number of residents had declined. The Lord Ordinary dismissed the petition as incompetent on the basis that the respondents' decision was contractual and not amenable to the court's supervisory jurisdiction. In this reclaiming motion (appeal), the petitioners contend that the Lord Ordinary erred in reaching this conclusion. The appeal concerns the scope of the supervisory jurisdiction.

Legislation

[2] Under the Social Work (Scotland) Act 1968, local authorities have a duty to promote social welfare by various means. It provides:

> "12.— General social welfare services of local authorities.
> (1) It shall be the duty of every local authority to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf (*sic*) to make arrangements and to provide or secure the provision of such facilities … as they may consider suitable and adequate, and such assistance may … be given in kind or in cash to, or in respect of, any relevant person."

A relevant person is defined (s 12(2)) as a person who is not less than eighteen years of age and who:

> "(2) … is in need requiring assistance in kind or, in exceptional circumstances constituting an emergency, in cash …".

The Local Government (Scotland) Act 1973 provides (s 69(1)) that a local authority has power to do any thing which "is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".

Background

[3] The petitioners provide residential care services in the Edinburgh area, including at

Redcroft House. Through a partnership with NHS Lothian, the respondents are responsible for resourcing and operating a range of health and social care services (see Public Bodies (Joint Working) (Scotland) Act 2014, s 1(3)).

[4] The petitioners contracted with the respondents to provide 24 hour care services to the residents at Redcroft under a Framework Agreement dated 2014. The Agreement does not stipulate how many persons are to be in residence. It does state that the petitioners are to be paid a fixed amount per week. It was not disputed that the stipulated figure was per resident (clause 5.1 and Schedule Part 2). The amount was originally £785 per week, but it had risen to £972 by 2022. Separate charges were to be levied for additional services, where the cost had been agreed in advance (clauses 2 and 5.6). If a resident requested, the respondents could make a direct payment to the resident, instead of to the petitioners, so that the resident could purchase the required services. If the respondents made a direct payment, they would reduce any payment made to the petitioners accordingly (clause 7).

[5] In 2018, the petitioners were being paid for nine residents. In February 2019, the respondents began a "large scale investigation" into various aspects of the care being provided by the petitioners. This included overcrowding. A moratorium was put in place on any new placements; no new residents would be admitted. It was not suggested that there was anything unlawful or unreasonable about the investigation or the moratorium. The investigation continued until October 2020. During that period, two residents left Redcroft and a third died; reducing the number from nine to six. One outcome of the investigation was that the maximum number of residents at Redcroft was fixed at six.

[6] According to the petitioners, operating Redcroft with funding for only six residents rendered the business unprofitable. The petitioners requested additional payments from the respondents. The first was for £253,257 in respect of "waken" night care from January 2019

until March 2022. The second was for £284,100.78. This was said to represent the funding deficit caused by the reduction in the occupancy rate after the moratorium and until a new Framework Agreement was negotiated.

[7] Between December 2021 and June 2022 various meetings were held at which the two claims for payment were discussed. The petitioners aver that they had understood that it had been agreed that they were entitled to the sums claimed, provided that vouching was forthcoming. Correspondence was exchanged. An email dated 9 February 2022 was sent to the petitioners from the respondents' Contracts Officer. This stated:

> "Firstly, regarding the discussed statement of how the costs arose and why payment is needed … we would need onfirmation (*sic*) that this payment will be put towards the refurbishment … [T]he work is required as part of the service and whatever payment is made will definitely be used for this work will aid in receiving a positive result. I am aware you have emailed me some information of this but I feel having it in writing as part of the full statement on the 'backpayment' … will be helpful.
>
> Regarding the rate, below are the 1 to 1 and day care rates I have been able to find for 2018 until present. These are not for calculating staffing hours for the core costs but instead to help you factor in the 1 to 1 and day care figures received and separate the core costs from the total payments etc received and the total expenses where relevant.
>
> …".

[8] By letter dated 6 May 2022, the respondents' Interim Contracts Manager stated that the claim for the cost of providing waken night care had been accepted. The second claim for backdated occupancy payments was refused. The letter stated:

> "A further request was made … for backdated funding for the amount of £284,100.78 to cover for a deficit caused by a reduction in occupancy rates. I can confirm that the Executive Management Team did not support this request on the basis that the care home was subject to a Large Scale Investigation during the period of this claim, part of which saw a moratorium on placements to the care home to safeguard existing residents."

[9] The petitioners crave the court to quash the decision, which was intimated by this letter, on the grounds that it was: irrational, unreasonable, made in breach of the petitioners'

legitimate expectation; and procedurally unfair. The petitioners aver that they did not know that the investigation would be taken into account in the decision on the backdated occupancy payment. The respondents contend that the decision was a commercial one, resulting from contractual negotiations. It was not subject to the court's supervisory jurisdiction.

Procedure

[10] The petition was lodged in August 2022. RCS 58.3(4) requires a petitioner to lodge all relevant documents which are in his possession and to append a schedule to the petition specifying any documents upon which he intends to rely and which are outwith his control (see also *Practice Note No. 3 of 2017: Judicial Review* paras 32 and 33). No such schedule was appended. Permission to proceed was granted by the Lord Ordinary on 28 September 2022, with 16 December being appointed as the substantive hearing. Parties were asked to mark up any documents, upon which they intended to rely, in advance of a procedural hearing on 8 November. On 11 November the substantive hearing was discharged and the petition sisted for eight weeks and then, on 9 January 2023, for a further six weeks. On 27 April, a new date of 14 July was fixed for the substantive hearing. On 14 June 2023 the petitioners' motion, for the recovery of a copy of the Executive Management Team minutes and any prior correspondence, was refused as coming too late. On 7 July, a motion to approve a specification of the same documents was also refused. The substantive hearing proceeded as scheduled.

The Lord Ordinary's decision

[11] By interlocutor of 21 December 2023, the petition was dismissed as incompetent. The Lord Ordinary reasoned that the court's supervisory jurisdiction was only engaged when a public authority possessed a legally circumscribed jurisdiction, power or authority and the court was called upon to ensure that the authority exercised its functions within these limitations (*Crocket* v *Tantallon Golf Club* 2005 SLT 663 at para [37]). Whether a decision was one to which the supervisory jurisdiction applied depended upon the nature of the act or decision under challenge (*Gray* v *Braid Logistics (UK)* 2015 SC 222 at para [23]).

[12] The Framework Agreement governed the provision of care services. It did not provide a contractual basis for the occupancy rate claim. The respondents had to decide whether it was appropriate to make an *ex gratia* payment to compensate for the drop in occupancy. That decision was not one conferred upon them under any jurisdiction, authority or power. The Agreement did not provide for the circumstances which had arisen. The respondents had decided to hold the petitioners to the terms of the Agreement. That was a unilateral decision. The fact that the respondents might have been acting under a statutory power, if they had elected to make the payment, was insufficient to engage the supervisory jurisdiction.

[13] Had the petition been competent, it would have failed on its merits. The petitioners' argument regarding legitimate expectation fell to be rejected. The email of 9 February 2022 could not have led the petitioners to conclude that the large scale investigation was to be left out of account when the decision was made. The email did not state or imply that the large scale investigation would be ignored, or that the decision would be taken only on the basis of the vouching and information being sought by the email. The investigation had given rise to the moratorium, which had caused the petitioners' financial difficulties. It was the

trigger for the occupancy rate claim. It would have been an obvious background fact on which the claim was founded.

[14] The petitioners' arguments in relation to procedural unfairness did not go beyond legitimate expectation. There was no procedural unfairness generated by the email. It did not mislead or misdirect the petitioners. The petitioners had known that the investigation and moratorium had led to the reduction in payments and that they would require to persuade the respondents that an additional payment, going beyond their contractual entitlement, was appropriate.

[15] It was for the petitioners to demonstrate that the decision was irrational. There was no attempt to challenge the respondents' underlying reasoning. The petitioners had sought a commission and diligence to recover any documentation which disclosed the reasoning behind the letter, but this had been refused as coming too late. There was no *prima facie* inference of irrationality to be drawn by the different treatment of the overnight staffing claim and the occupancy rate claim. It was understandable that the respondents would consider it appropriate to pay for the additional overnight service, even though it was not covered by the terms of the Framework Agreement. The occupancy rate claim was different. It was not the investigation which had resulted in the reduced levels of payment; it was the fact that service users had left or died and were not replaced. The petitioners were only contractually entitled to payment for that number of users.

Submissions

Petitioners

[16] The petitioners sought: recall of the Lord Ordinary's interlocutors of 14 June 2023 (recovery of documents) and 21 December 2023 (competency); the grant of a commission

and diligence; and a remit to the Lord Ordinary to proceed as accords. The Lord Ordinary erred in refusing the petitioners' motion for a commission and diligence. He failed to have regard to the duty of candour incumbent upon a public body (*R (Police Superintendents' Assoc)* v *Police Remuneration Review Body* [2023] EWHC 1838 (Admin)). It was not, primarily, for a petitioner to ask for the relevant documents. The need to seek production of the documents should be the exception, not the rule (*Somerville* v *Scottish Ministers* 2008 SC (HL) 45 at para [150], see The Scottish Government: *Right First Time* (3rd ed) question 23). Where a motion came late, that was because of a respondent's failure and not a petitioner's delay. The lack of relevant documentation had put both the petitioners and the court at a disadvantage.

[17] The Lord Ordinary's finding, that the respondents' decision of 6 May 2022 was not subject to the court's supervisory jurisdiction, was unsustainable. The respondents had a power to make payments for residential care to, or in respect of, a relevant person (1968 Act, s 12(1)). Although in their written Note of Argument, the petitioners had maintained that they were a relevant person; this was departed from in oral submissions. The fact that a public body entered into a contract was not sufficient to exclude judicial review (*Malloch* v *Aberdeen Corporation* 1971 SC (HL) 85). The respondents were exercising their statutory discretion when deciding whether or not to make a payment (see *R (Care North East Northumberland)* v *Northumberland County Council* [2024] EWHC 1370 (Admin)). The existence of that discretion meant that the respondents were not free to make unilateral decisions as they thought fit. Public bodies required to point to statutory powers which enabled them to do that which they sought to do, or refrain from doing. Alternatively, the decision cut across the respondents' statutory powers. That sufficed to bring the decision within the supervisory jurisdiction (cf *Watt* v *Strathclyde Regional Council* 1992 SLT 324).

[18] The Lord Ordinary erred by conflating the petitioners' arguments on procedural fairness and that concerning legitimate expectation. The petitioners' legitimate expectation was not that payment in respect of the claim would be made. It concerned the information and basis on which the decision would be made. The respondents had focussed on *quantum* and sought vouching for the payment. The petitioners had been led to believe that the decision would be made by reference to the financial information. The Lord Ordinary had wrongly focussed upon statements made by the respondents. It had been those statements together with the respondents' conduct in meetings which had given rise to the expectation.

[19] The Lord Ordinary's view, that the petitioners had known about the investigation, had missed the point about the right to a fair trial. The petitioners did not know that the investigation would be decisive. The respondents had a duty of disclosure (*Anduff Holdings* v *Secretary of State for Scotland* 1992 SLT 696). The right to a fair hearing was effective only if the affected person was informed of the matters upon which the decision would be made and was given an opportunity to make representations (*R (Shoesmith)* v *Ofsted* [2011] EWCA Civ 642, at para [66]). Here, there was a denial of an opportunity to contradict (*Kanda* v *Malaya* [1962] AC 322; *Hadmor Productions* v *Hamilton* [1983] 1 AC 191 at 233).

[20] The Lord Ordinary failed to address the irrationality of the investigation being determinative in relation to the occupancy rate claim, but of no relevance to the overnight staffing claim. The investigation had been relied upon to refuse the occupancy rate claim, even insofar as it related to periods after the investigation had concluded. It was accepted that the moratorium had been rational on health and safety grounds.

Respondents

[21] The respondents accepted that they had a duty of candour, but they had produced

everything that they possessed. RCS 58.3(4)(b) required a petitioner to list any documents upon which he wished to found, but which were not in his possession. The petitioners had not done that. The petitioners had had ample time in which to recover any relevant documents. The Lord Ordinary had been entitled to refuse the motion to approve what was a vague specification because it came too late. The petitioners' arguments on duty of candour were misconceived. The duty applied in proceedings properly raised by judicial review (*R* v *Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, at 945 - 946). The respondents had complied with the duty, which was to assist the court with full and accurate explanations of all the relevant facts, including disclosure of materials which were reasonably required for the court to arrive at an accurate decision (*R (Bancoult)* v *Foreign Secretary (No 4)* [2017] AC 300 at paras [183] - [184]). The respondents had complied by way of: (a) producing the decision letter; (b) lodging answers to the petition; (c) lodging affidavits in support of the averments in answer; and (d) presenting oral submissions at the substantive hearing. The petitioners did not explain how the provision of any material may have led to a different outcome.

[22] The Lord Ordinary was correct that the decision under challenge was not one which was amenable to judicial review. The petitioners' requests for additional funding were made in the context of a contractual relationship. The respondents' statutory obligation to provide services was discharged by contracting with the petitioners for that provision at Redcroft. The beneficiaries of the duty were the service users; not the petitioners. Contractual rights and obligations were not amenable to judicial review (*West* v *Secretary of State for Scotland* 1992 SC 385, at 413) nor were operational decisions (*C* v *Advocate General* 2012 SLT 103, at para [26]). *Malloch* v *Aberdeen Corporation* had concerned the application of section 85 of the Education (Scotland) Act 1962 and whether a right to a hearing was

implied. *R (Care North East Northumberland)* v *Northumberland County Council* was about a duty to provide a care home market. Neither case assisted.

[23] The Lord Ordinary correctly determined that the petition, if competent, would have failed on its merits. For requirements of procedural fairness to arise, some procedure must have been taking place. The parties were engaged in contractual discussions. Such discussions did not constitute a procedure. The matter was in substance a commercial one. No tribunal or hearing was involved. The respondents' decision making procedure was internal. The petitioners had no right to participate in it. The requirements for procedural fairness did not arise.

[24] A legitimate expectation arose on a promise made by a public authority that a certain procedure would be followed (*Attorney General of Hong Kong* v *Ng Yuen Shiu* [1983] 2 AC 629 at 638). The petition failed to specify how any such promise arose, or what it was. The Lord Ordinary correctly determined that the correspondence, upon which the petitioners founded, contained no promise. No legitimate expectation arose. If the respondents had made a promise that, upon the provision of certain information, a payment would be authorised, judicial review proceedings would have been unnecessary. The petitioners could simply have sued for the authorised sum.

[25] There was a rational distinction between the two sums sought by the petitioners. The payment which the respondents had agreed to make was for the provision of an enhanced service. The payment which they had declined to make was for a service which they were not using. This was inherently rational. There was a connection between the moratorium, the reduced occupancy of the facility and the request for additional funding. Where relevant considerations were not specified by statute, a decision maker's view of what a relevant consideration might be could only be subject to review on the ground of

unreasonableness in the sense of perversity (*R* v *Secretary of State for Transport ex parte Richmond LBC (No. 1)* [1994] 1 WLR 74, Laws J at 95).

Decision

Remit and Commission and Diligence

[26] The procedural rules in relation to the recovery of documents in a judicial review process are easy to follow. First, the petitioners should have listed any documents upon which they wished to found, but did not possess, in a schedule to the petition (RCS 58.3(4)(b)). That was not done. In a letter dated 26 July 2022, the petitioners did ask for copies of the minutes of an undated meeting which led to the letter of 6 May 2022. That is when the decision to reject the occupancy rate claim was intimated. The petitioners also asked for "any prior correspondence"; presumably between the petitioners and the respondents. This was a very wide call. It was repeated as a narrative in the petition (STAT 5). The respondents say that they have provided the petitioners with everything that they have. This included heavily redacted minutes of an Executive Team Meeting on 24 March 2022. These do not record, at least expressly, a decision to refuse the occupancy rate claim. It might be thought that another minute, which does so at or about the time of the 6 May letter, must exist, but it has not been produced.

[27] It is not disputed that the respondents are expected to produce the documents which relate to the decision under review (*Somerville* v *Scottish Ministers* 2008 SC (HL) 45, Lord Rodger at para [150]). If a petitioner does not consider that this has been done, he should follow the normal procedure available for the recovery of documents in civil proceedings; ie an order for production of an identified document or a commission and diligence to recover a range of documents. The parties had been asked to mark up the documents upon which

they intended to rely in advance of the Procedural Hearing (initially 8 November 2022) and then by 28 June 2023. The substantive hearing was looming by then. When the petitioners' motion for a commission and diligence was heard on 7 July, it was only seven days away. Had that motion been granted, the substantive hearing would have had to have been discharged. It is not surprising that the Lord Ordinary refused it. He cannot be faulted for so doing.

[28] The petitioners did not seek to reclaim the interlocutor which refused to approve a specification of documents (ie a commission and diligence). Although RCS 38.6(1) provides that a reclaiming motion, for example against a final interlocutor, subjects all previous interlocutors to review, that will not occur in a situation in which an earlier procedural interlocutor has not been challenged and thus the parties are taken to have acquiesced in its terms (*Clark* v *Greater Glasgow Health Board* 2017 SC 297, LP (Carloway), delivering the opinion of the court, at para [40]). That is the position here. If the petitioners had wished to take issue with the prior interlocutor, they should have sought leave to reclaim against it. Even if, as would have been likely, that motion would have been refused, it would have triggered a requirement for the Lord Ordinary to provide written reasons for the refusal. As matters stand, the court has only the briefest of explanations in the Lord Ordinary's substantive opinion on the competency and merits of the petition, *viz.* that the motion for a commission was refused because "primarily … it came too late".

[29] Judicial Review is intended to be a "speedy and cheap" procedure (*Brown* v *Hamilton DC* 1983 SC (HL) 1, Lord Fraser at 49). It is not normal for the court, in a reclaiming motion, to remit a petition to the Lord Ordinary for reconsideration. If the petitioners reached the view (as they seemed to be saying on occasion in oral submission) that further documents were needed before the court could assess the legality of the decision, they could, and

should, have asked this court in the reclaiming process for an order for the recovery of a document, or a commission and diligence to recover a range of documents, well in advance of the final Summar Roll hearing. That would have enabled this court to assess the merits for itself, having considered any recovered material. This was not done. For these various reasons, the court will decline to grant a commission and diligence or remit the petition to the Lord Ordinary. The effect of that, on its own, is that the reclaiming motion must be refused.

Supervisory Jurisdiction

[30] In *Abundance Investment* v *Scottish Ministers* 2020 SLT 163, Lord Clark carried out an extensive review of the authorities on the scope of judicial review. Under reference to *dicta* in *West* v *Secretary of State for Scotland* 1992 SC 385, *Crocket* v *Tantallon Golf Club* 2005 SLT 663 and *Wightman* v *Secretary of State for Exiting the EU* 2019 SC 111, Lord Clark said (at para [42]) that:

> "… it is clear that the tripartite relationship test [in *West*] cannot stand in the way of the proper enforcement of the rule of law. In judging whether or not the supervisory jurisdiction is competently invoked, it is necessary to examine the act or decision under challenge and the basis of that act or decision …".

The court agrees with that analysis.

[31] Specifically in relation to the situation in which a decision is made in the context of a contractual relationship, Lord Clark explored the authorities (*West*, *Watt* v *Strathclyde Regional Council* 1992 SLT 324; *Blair* v *Lochaber District Council* 1995 SLT 407; and *Dryburgh* v *NHS Fife* [2016] CSOH 116) and determined (at para [46]) that:

> "There are therefore several judgments, including from the Inner House, which support the proposition that decisions made by a contracting party in relation to rights and obligations under the contract are not, as such, amenable to judicial review by the other contracting party. If the decision could also be characterised as one taken in the exercise of a statutory power or in the implement of a statutory

> duty, which, by its nature, was bound to affect all of those in respect of whom the jurisdiction conferred by the statute was to be exercised, then (as observed in *West*) that is a different matter. Similarly (as also observed in *West*) if the party whose decision is challenged was, in making the decision, performing any function independent of its position as the other contracting party, that is again a different matter. Thus, decisions made by the other contracting party on these wider grounds can be amenable to judicial review."

The court agrees with that statement. The question is how it applies in this case.

[32] Although it does not feature in the petition (cf ANS 8 ix), section 12 of the Social Work (Scotland) Act 1968 imposes a duty upon local authorities to promote social welfare, including the arranging for the provision of residential establishments. That assistance may be given in kind or cash to, or in respect of, "any relevant person". Standing the definition of "relevant person" in section 12(2), the petitioners cannot be classified as such. The duty, and relative power (see Local Government (Scotland) Act 1973, s 69(1)), is in respect of natural persons in need of such provision; not the owners or operators of care establishments. The duty was owed to the residents of Redcroft. After the moratorium, Redcroft continued to operate and to provide care to its residents. Payments were made to the petitioners in respect of each remaining resident's care. The payments reduced in line with the reduction in the number of residents. This was entirely consistent with the respondents' statutory duty. The respondents presumably continued to fund the care of the two residents who had left Redcroft.

[33] The only link between the petitioners and the respondents was that created by the Framework Agreement; ie a contract. In taking a decision about the payment of money to the petitioners, the respondents were not exercising a power relative to them which could be susceptible to the supervisory jurisdiction of the court. This contrasts with *R (Care North East Northumberland)* v *Northumberland County Council* [2024] EWHC 1370 (Admin) which was considering contractual rates in the context of a statutory duty in England and Wales to

promote an efficient market in the services, including the sustainability of those services (Care Act 2014, s 5(1) and (2)(d)). It is also quite different from *Malloch* v *Aberdeen Corporation* 1971 SC (HL) 85 in which the pursuer was able to rely on an implied right to a hearing under the Education (Scotland) Act 1962 (s 85(1)).

[34] The respondents were acting according to the rights created by the contract. Either the petitioners had a remedy under the contract or none at all. There was no contractual remedy. The petitioners do not aver that the respondents did not act in accordance with contractual terms. The respondents were essentially being asked to make an *ex gratia* payment to the petitioners. There was no statutory or contractual duty requiring them to make such a payment. Refusing to do so was an *intra vires* act. On this basis the petition is, for the reasons given by the Lord Ordinary, incompetent. The reclaiming motion also fails on this ground.

Merits

[35] There is nothing unreasonable about the respondents' decision not to meet the occupancy rate claim. The financial arrangements made by the parties were contained in the Framework Agreement. This required the respondents to pay a fixed rate for the residents in Redcroft. The petitioners do not complain about the moratorium which was put in place pending the large scale investigation. As matters transpired, the number of residents fell because of the death of one resident and the departure of two others. In the absence of a contractual provision, the respondents can hardly have been expected to pay for the care of persons who were either dead or not otherwise being cared for by the petitioners but, presumably, by someone else. The decision was whether to make an *ex gratia* payment in circumstances which, according to the petitioners, Redcroft had become unprofitable.

Especially having decided to make a substantial payment in respect of the "waken" hours, it is unremarkable that the respondents decided not to pay out on the occupancy rate claim in addition. The two claims were different in nature and there was no irrationality in accepting one and not the other.

[36] The petitioners' contention in the pleadings, in so far as it is based upon the concept of legitimate expectation, appeared to be that they had understood that the occupancy rate claim would be met, subject to vouching. In oral submissions they appeared to be complaining not that the claim would not be met but that they did not expect the investigation to have formed part, at least, of the reasoning behind refusal. Legitimate expectation in the procedural context is related to fairness. It will arise when the relevant authority has promised or undertaken to behave in a particular manner but then departs from that and acts in a different way without affording the individual an opportunity to make representations. For the expectation to arise, what was promised or undertaken must be "clear, unambiguous, and unqualified" (*Re Finucane's Application for Judicial Review* [2019] HRLR 7, Lord Kerr at paras 64-69). There is nothing of this nature averred.

[37] The petitioners' understanding that an agreement that payment would be made on the production of vouching is not sufficient in the absence of averments demonstrating how that understanding arose. The only specific basis which is pled is the reference to the email of 9 February 2022. This certainly sought vouching but that seems to have been in the context of "costs" and the need to refurbish, although it does mention "backpayment". Whatever it might have been referring to, it is not a clear, unambiguous and unqualified statement either that the claim would be met or that the investigation and moratorium would not form part of the respondents' reasons for refusing the claim. The reality is that the petitioners were afforded ample opportunity to make their claim. It was refused and a

sound reason was given for that refusal. That reason was not that an investigation had taken place but that, as a consequence to the investigation, there had been a moratorium (which is not challenged) and a resultant drop in the number of residents because one died and two left. No procedural unfairness is apparent. Even if it did, the petitioners are unable to point to any circumstance which, had the respondents been made aware of it, might have altered the decision. In short, the court agrees with the Lord Ordinary that, had the petition been competent, it would have been refused on its merits.

[38] The petition being incompetent, the interlocutor of 21 December 2023 ought to have been confined to that issue (ie sustaining the respondents' first plea-in-law). The interlocutor will be corrected accordingly.