



OFFICIAL REPORT
AITHISG OIFIGEIL

Pow of Inchaffray Drainage Commission (Scotland) Bill Committee

Wednesday 24 January 2018

Session 5



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**POW OF INCHAFFRAY DRAINAGE COMMISSION (SCOTLAND) BILL COMMITTEE
1st Meeting 2018, Session 5**

CONVENER

*Tom Arthur (Renfrewshire South) (SNP)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)

*Alison Harris (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Shirley Davidson (McCash & Hunter)

Hugh Grierson (Pow of Inchaffray Drainage Commission)

Jo Guest (Pow of Inchaffray Drainage Commission)

Alastair McKie (Anderson Strathern)

David Nash

Jonny Willett (Savills)

CLERK TO THE COMMITTEE

Nick Hawthorne

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Pow of Inchaffray Drainage Commission (Scotland) Bill Committee

Wednesday 24 January 2018

[The Convener opened the meeting at 10:53]

Pow of Inchaffray Drainage Commission (Scotland) Bill: Consideration Stage

The Convener (Tom Arthur): Good morning and welcome to the first meeting in 2018 of the Pow of Inchaffray Drainage Commission (Scotland) Bill Committee. Due to the late start, I thank our guests for their patience.

The first item on our agenda is further evidence from the promoters of the bill and their agents. I welcome the witnesses who are before us.

Since the committee last met, on 13 December 2017, it has received several additional written submissions about the Pow of Inchaffray Drainage Commission (Scotland) Bill. They include submissions and sketches from an individual, Peter Symon, who has concluded that the land plans that the promoters submitted when the bill was introduced are not accurate. The plans fundamentally underpin the bill by showing the benefited land and, therefore, who should pay towards the upkeep of the pow, so it is critical that they be as accurate as possible.

This evidence-taking session has been arranged to give the promoters the opportunity to respond to the issues that Mr Symon has raised and to give the committee the opportunity to ask questions. There will also be an opportunity for questions to be asked regarding other new issues that are raised in the other submissions that have been received since the previous meeting, including a submission signed by 61 residents of the Balgowan estate.

Would the promoters like to make an opening statement?

Alastair McKie (Anderson Strathern): Yes, convener. Good morning to you, the committee members, the clerk and others. You should have before you documents that I have presented this morning. I think that there is an opinion of counsel, of which you were sent a copy earlier this week.

I plan to refer to five documents: the opinion of Mr Robert Sutherland, an advocate, which is dated 19 January 2018; a copy of the Pow of Inchaffray

Drainage Act 1846; a copy of the 1848 plan; a copy of the book of reference and estimate of expense, which is dated 1847; and a copy of the estimate of increased value, which is dated 1851. Those are all in the pack that you have, so I will not go into the documents in too much detail; I will just summarise the promoters' understanding.

If you have those documents before you, I start with a sincere apology on behalf of the promoters and their advisers for the inconvenience to all concerned in there now being a requirement for the promoters to provide replacement parliamentary plans to identify properly and robustly the benefited land for the purposes of the bill. As there will be new heritors as a consequence of new parliamentary plans, they will need to be notified and there will be a requirement for an objection period.

It is necessary for me to explain how the error occurred and the promoters' proposals for remedying the situation. The promoters' witnesses have provided evidence to the committee that the benefited land—I will, for convenience, refer to the red-line boundary, because we can think in terms of that—that is shown on the existing bill plan matches exactly that set out for the 1846 plan, a copy of which I provided to the committee at its meetings on 24 May and 13 December last year. I have also provided such evidence on the basis of the commissioners' instructions. The promoters require to clarify that, although the existing bill plans were based on the 1846 plan in their preparation, the exact boundaries were finalised using the experience and knowledge of Mr Guest as a qualified surveyor and experienced commissioner.

On 11 December 2017, your clerk drew my attention to an archival website called ScotlandsPlaces, where copies of the documents that you have before you can be viewed. That was the first time that the promoters were aware of those documents and that they were available and could be examined. Those documents are: a copy of the 1848 plan; a copy of the book of reference and expense, which is dated 1847; and a copy of the estimate of increased value, which is dated 1851. Those are the three documents that the promoters were unaware were available.

The 1848 plan having been checked against the 1846 plan, it was noted that they were substantially the same, although the 1848 plan is certified as having been adjusted from the 1846 act. That may be the one that we should use, but I will return to that point when I consider Mr Symon's latest submission, which I read just earlier this morning.

After the promoters gave evidence on 13 December 2017, your clerk drew my attention to a submission by Mr Symon that is dated 12

December 2017, which provides for an assessment of benefited land having regard to all three documents that I just mentioned. A copy of Mr Symon's submission was subject to a preliminary examination, Mr Guest arranged to meet Mr Symon and a meeting duly took place between them on 20 December 2017. At that meeting, the potential for an amendment of the existing bill plans became clear in the light of those newly available documents. I then called your clerk on 20 December 2017 to advise him of the matter. In fact, I spoke with him on 21 December and summarised the outcome of the meeting between Mr Symon and Mr Guest.

It is, of course, vital that the replacement plans be as accurate as they can be. The commissioners have, therefore, sought an opinion of counsel on the correct interpretation of the 1846 act, which has been circulated today and was sent to your clerk on Monday this week. In particular, the commissioners asked counsel to provide advice as to how the 1846 act defines land in respect of which assessments are made in order that the commissioners can provide detailed instructions to their surveyors for drawing up replacement plans to identify benefited land for the purposes of the bill.

11:00

As you will know, counsel examined the 1848 plan, a copy of the book of reference and estimate of expense and a copy of the estimate of increased value, copies of which members have before them. Counsel's opinion describes the broad purposes of the 1846 act, which include the provision of powers to the commissioners to undertake works to the pow and to appoint surveyors to undertake an accurate survey of the lands adjacent to the pow.

A plan and book of reference were to be made once the works were completed, and the commissioners were to complete a second survey in order to establish the extent to which the land had increased in value as a consequence of those works. All the expense of the works was to be recovered

"by way of an assessment raised and levied on the owners of the land".

That is, in summary, the way in which the 1846 act operates.

Counsel's opinion indicates limitations inherent in the work that was done under the 1846 act. Although the schedules of land and valuations would allow one to know the extent of the land, no precise boundary lines are given in the sense of a red line. Counsel states:

"There is no consistent clear 'red line' identification of the boundaries of the land that has benefited from the works".

Professional judgment is, therefore, required to establish precisely the red line.

Counsel notes that some buildings appear on the 1848 plan and that it is "a reasonable inference" that they would not benefit as they would not have been built on a site that was affected by drainage problems. It is, therefore, the promoters' intention to exclude such buildings. Further, counsel notes that

"the penultimate page of the Report accompanying the Book of Reference states that"

the works to Dollerie farm should be excluded because of an agreement made between the then owner and the commissioners. For that reason, the promoters wish to adhere to that approach.

Counsel is clear that, in drawing up replacement plans to identify the benefited land, the promoters' surveyors must have regard to the 1848 plan, a copy of the book of reference and estimate of expense, a copy of the estimate of increased value and the buildings that existed in 1846. Counsel is also clear that the Dollerie lands ought to be excluded.

Counsel advises that

"Where there are ambiguities ... it would be reasonable ... to resolve the ambiguity by reference to what can be ascertained on the ground."

Counsel has further identified three residential properties at Nethermains of Gorthy that require to be included in the replacement plans together with a house at Millhill. Notification will be required for those new heritors.

It is important to make it clear that, although the 1846 act identifies land that has been improved as a result of works to the pow and provides for valuations on what I will describe as a plot-by-plot basis, the bill uses the land that was improved under the 1846 act as a proxy to identify the red line for the benefited land in the bill. The bill does not provide individual assessments on a plot-by-plot basis but uses valuations that are based on the categories of land, such as agricultural, commercial, woodland, residential and amenity.

If the committee is content with that methodology, it is the promoters' intention to instruct Mr Willett, in particular, to draw up the replacement plans in line with the methodology endorsed by counsel. Mr Guest will also be involved in that exercise.

From a preliminary assessment, four residential properties require to be included and notified: the three houses at Nethermains of Gorthy and the house at Millhill. Further agricultural land, including land at Nethermains of Gorthy, will require to be included and its owners to be notified. Some agricultural land will now be excluded.

There will be no change to the residential benefited land at Balgowan. The plans having been looked at again, it is also considered that there will be an additional requirement to notify the owners of amenity land at Balgowan, but no such assessment is made against amenity land—it is a nil assessment.

We have been given a copy of Mr Symon's latest submission only this morning, so we have not had time to fully digest it, but my broad take on what he is saying about counsel's opinion is that he broadly endorses it. The last sentence of his comments is of some significance, because he refers to a further plan of 1851, which he says is currently unavailable. The promoters were not aware of that plan, and nor was I until we saw that submission this morning. To deal with that issue, it is important that the promoters urgently contact the National Records of Scotland to see whether that plan throws up a different situation. It is expected that it will follow the 1848 plan, perhaps with some minor adjustments, but beyond that, without having seen it, we cannot comment.

I finish by repeating the promoters' and my own sincere apologies. We await your questions.

The Convener: Thank you, Mr McKie. Your apology is duly noted and accepted. There has clearly been a significant oversight—an omission—in the process.

I want to clarify something that you said, and perhaps Mr Guest would be best to answer this question. You stated that the promoters were unaware that plans were available. Was it the case that they knew that there had been other plans in existence but believed that those plans were no longer available? I want to clarify whether it was a known unknown or an unknown unknown.

Alastair McKie: The 1846 act makes reference to those documents, so it is clear from that act that those plans were prepared. That is the first thing that I would say about it—I defer to Mr Guest. As far as I know, the promoters' position is that we did not know that those documents were available.

The Convener: However, it was known that there were other plans.

Jo Guest (Pow of Inchaffray Drainage Commission): I had seen copies of the 1846 plan but I had not seen any of the other documents. If I had, I would obviously have taken them into account.

The Convener: Were you aware of their existence or potential existence?

Jo Guest: Only in the sense that they were referred to in the 1846 act. I have never seen them.

The Convener: To clarify, you were aware that there were other land plans in existence.

Jo Guest: I am aware only of the words in the 1846 act, which was drafted 170 years ago. I have never seen those plans.

The Convener: All that I wish to clarify, Mr Guest, is whether you were aware that other plans had been prepared or could have been prepared to be consistent with the act. You did not see those plans. Did you make any attempts to find out whether those plans were in existence or were accessible?

Jo Guest: I had seen the plan that Mr Murray, who used to own Dollerie farm, had. I had seen a photocopy of that plan, but that was the extent of the plans that I had seen.

The Convener: What about the plans that have subsequently been brought to light? Can you clarify that you were aware of their existence but had not studied them in any detail?

Jo Guest: The plan that I had seen was the one that Mr Murray, who used to own Dollerie farm, had. That is the only original plan from 1846 that I had seen or was aware of.

The Convener: You were unaware of the existence of the plans that have been brought to light by Mr Symon.

Jo Guest: I was unaware that they still existed.

The Convener: You say "still existed". Were you aware of their ever having existed?

Jo Guest: To the extent that they are referred to in the 1846 act, I was aware of them.

The Convener: You were aware that there were plans in addition to what had been used in the preparation of the bill, but you did not bring that to the committee's attention.

Jo Guest: I suppose, to be honest, I have learned quite a bit from going through this process. I was not fully aware at that time of the different versions of the plan that were produced in 1846. I suppose that I thought that there was one plan.

The Convener: As one of the promoters, you were aware that there were documents that could have an impact on who was eligible for assessment. You were aware of their existence but you did not bring that information to the committee. Is that correct?

Jo Guest: I was not aware at that time that there were different versions of the plan dating from 1846. I thought that there was one plan. There were different copies of the plan, but they were all essentially the same. I was not aware that the plans had been adjusted at that time, so my

understanding was that there was one plan and that there were schedules that defined the areas on that plan that benefited. I was not aware that there were different versions of that plan.

The Convener: You were aware that there were multiple plans but believed that they did not differ from each other.

Jo Guest: They did not have photocopiers in 1846, so somebody would have produced the original survey plan, showing all the fields that might benefit from the improvements that were going to be carried out, and further copies would have been produced by tracing over it. It is quite possible that there would have been more copies, because somebody would have traced over the plan and produced them, but I was not aware that any such copies would be any different from the original.

The Convener: What do you mean when you refer to being aware of plans that are mentioned in the act in addition to the plan that was submitted originally?

Jo Guest: I mean that the act refers to plans that were produced on different dates.

The Convener: How many plans does the act refer to?

Jo Guest: I do not have the act in front of me, but I know that it refers to the 1846 plan. My understanding was that a plan was produced before the works were carried out. There was another, adjusted, plan, which would have been the same plan but would have been used after the works were carried out.

The Convener: Which plan have the promoters based the bill on?

Jo Guest: The one that Tony Murray of Dollerie farm has.

The Convener: Which plan is that?

Jo Guest: It dates from before the works were carried out.

The Convener: You were aware that there was a plan dating from after the works were carried out, which has been cited as changing the definition—

Jo Guest: My understanding was that the post-works plan was simply the first plan modified by the schedules, which identify which fields on the 1846 plan benefited from the work that was carried out.

The Convener: It was not simply a tracing exercise.

Jo Guest: The plans that I have seen all show basically the same fields. You have to read the plans and the schedule together. As Alastair

McKie has told you, the plans do not have a red line showing the benefited area. The 1846 plan shows the fields in which there was the potential for improvement and a schedule shows the fields in which there was an actual improvement, according to the surveyor's inspection, after the works were carried out.

The Convener: So, the two plans are complementary and should be considered together.

Jo Guest: They must be read with the schedule.

The Convener: Does the bill refer to both of those plans?

Jo Guest: Our bill?

The Convener: Yes.

Jo Guest: I do not think that it does.

The Convener: There are two plans that are to be understood as complementary, but the bill refers to only one plan. Do I understand you correctly?

Jo Guest: In a sense, this bill is a fresh start. It refers to a plan but I do not think that it specifies where that plan comes from; it simply talks about "the land plans".

The Convener: It would not be unfair to say that there seems to be some ambiguity. Are you aware of any other land plans?

Jo Guest: For the current bill?

The Convener: That are pertinent to the current bill.

Jo Guest: I do not think so, no.

The Convener: Other than a subsequent plan—

Jo Guest: Other than the plans that we have produced, which we have been working on up until now, I am not aware of any other plans.

Alastair McKie: If I may interrupt, Mr Symon referred to an 1851 plan.

The Convener: So there is an 1851 plan. We now know that there is an additional plan that could impact on the definition of benefited land. Is that correct?

Alastair McKie: That is correct.

Jo Guest: I suspect that the 1851 plan will be a fair copy. The 1848 plan, which you have seen online, is essentially the 1846 plan, referenced to the schedules that were produced after the works were carried out. It is the same plan; it just has a docket in the top-left corner. I suspect that the 1851 plan will be that plan, but excluding the fields that did not benefit, if you see what I mean.

11:15

The Convener: Are you aware of any other plans, in addition to the 1851 plan?

Jo Guest: Not unless another rabbit comes out of the hat.

The Convener: Given that rabbits have been coming out of the hat with alarming regularity, have you undertaken any work to establish whether there are any further plans?

Alastair McKie: Following today's meeting, the promoters will make urgent contact with the National Records of Scotland to obtain a copy of the 1851 plan. Mr Symon seems to be very knowledgeable about these matters, and the promoters would like to liaise with him in future on methodology. I do not know how he became aware of that plan. He could have mentioned it in his most recent two or three submissions, or drawn it to our attention last week, but he has mentioned it at the last minute today. You might ask why we are relying on Mr Symon. We are not necessarily relying on him, but he seems to have not inconsiderable local knowledge.

The promoters need to make a serious effort to make sure, once we have looked at the 1851 plan, that there is nothing out there that could contradict it.

The Convener: That seems eminently sensible, but I imagine that it would have been the correct course of action to take before introducing the bill. Why was that work not undertaken?

Jo Guest: We were simply not aware of the need for it.

The Convener: Is there anything else that you are not aware of?

Jo Guest: How do I know? It comes down to the known unknowns and the unknown unknowns.

The Convener: If you were aware that there were things that you might not have been aware of, why was work not undertaken prior to the introduction of the bill to establish what those things were? Why was contact not made with the National Records of Scotland? Why was research not commissioned?

Alastair McKie: With hindsight, that would have been the correct course of action. That is why we apologise for the error.

The Convener: I appreciate that, but I am concerned about the fact that the bill could have become an act without what we have learned today coming to light. Hindsight is all very well, but it is not very effective once something is on the statute book.

Mary, did you want to come in?

Mary Fee (West Scotland) (Lab): No. My questions have been answered.

Jo Guest: It is fair to say that adjusting the plans will make them correct, but the financial implications of those adjustments will be very minor. One or two people will pay a bit more, but for the vast bulk of people, the practical consequences are likely to be pretty small.

The Convener: I appreciate that, but for the four new heritors, the consequences will be significant.

Jo Guest: There will be three new heritors, because one of them is an existing heritor.

The Convener: There is another point that I want to pick up on. Can you shed some light on why the Dollerie area has been excluded?

Jo Guest: I have some papers to hand round. When we prepared the plans and the schedule of heritors, we looked at the existing schedule of heritors, which, as you know, does not include Dollerie. The reason for that is confirmed in the book of reference, which specifically refers to the exclusion of Dollerie. I always understood that that was for the simple practical reason that the pow improvement works in 1846 could not have been carried out without the active co-operation of Dollerie.

Dollerie is the key point in the whole pow. Between the source of the pow at Methven Moss and Dollerie bridge—or rather, the Muckle Burn, which is just upstream from Dollerie—the fall is insignificant. To all intents and purposes, the pow is flat, and it runs through very soft soils. When you get to just upstream of Dollerie bridge, you get into hard sandstone and the ground levels rise quite significantly.

When the pow was improved in 1846, they had to dig through the sandstone rock at Dollerie in order to let the water through from all the flat ground upstream. In 1995, we did further improvements to the pow at Dollerie to improve the drainage upstream. I have with me photographs that I took at the time. They show that the work that was carried out was significant. We took out a huge depth of rock and large amounts of pretty unsuitable stuff. In order to dispose of the material, we had to dig pits in the fields on either side, bury the rock in them and then cover them over with soil. We were able to do that only through the good will of Mr Murray, who owned Dollerie at that time and whose forebears owned Dollerie in 1846. He received no compensation and no payment for that at all.

The Convener: Like the previous act, the bill seeks to give the commissioners permission to access people's property in order to carry out maintenance. Why is that access a matter of good

will in relation to the owner of Dollerie when it would be a legal requirement for other heritors?

Jo Guest: If we had said to Mr Murray that we wanted to come to his estate, dig up large amounts of rock and bury it in the fields, we would have come up against some difficulties.

The Convener: How big is Mr Murray's estate?

Jo Guest: It is not very big; perhaps a couple of hundred acres. It is a house with some nice parkland and a few fields around it.

The Convener: How many acres does the average resident in the Balgowan estate have?

Jo Guest: I appreciate the fact that they have a much smaller area.

The Convener: So it is a question of power.

Jo Guest: When you look at the land—

The Convener: It seems that there are two classes of heritors.

Jo Guest: I know that the 1846 plan shows Dollerie as being potentially improved but, when you go and look at it, you see that it is grassland that slopes down on a steep gradient towards the pow—

The Convener: I appreciate the significance and the importance of that land, but this is a question about rights. Why is an exception being made?

Jo Guest: Because I do not honestly think that the land at Dollerie benefits from the pow at all; I think that it is the other way round. Mr Murray has provided all the other people in the valley with a great benefit by allowing his land to be used—

The Convener: If I understand correctly, the assessment in the plan suggests that Dollerie benefits from the pow.

Jo Guest: I agree that that is what the 1846 plan says.

The Convener: But you are saying that Dollerie does not benefit from the pow.

Jo Guest: Well, if you go and look at it—

The Convener: You are saying that land that has been identified as benefiting from the pow does not. You are, therefore, contradicting the plans. Why is that any different from an objector saying that their lands on the Balgowan estate have not benefited from it? They are both opinions.

Hugh Grierson (Pow of Inchaffray Drainage Commission): Could I attempt to answer that? The 1846 plans showed that there was ground that benefited from the improvements. A note was then added by the surveyor, which the counsel

picked up on—it is in the plans, but I am not sure of the exact place—that said that, although the ground benefited from the pow, the same benefit could have been achieved without the vast cost that was spent on the pow, simply by draining into an area where water ran freely. That was written into the legal documentation at the time, and that is what our counsel picked up on when he gave the opinion that it was right that there should not be an on-going payment in relation to that land.

The Convener: That ultimately creates two different classes with regard to people who benefit. A key issue that has previously been raised is the distinction between water that drains from agricultural land that has soil on it and water that is injected into the pow from the Balgowan estate. At previous evidence sessions, you have suggested that everyone benefits. However, you are now saying that there are different classifications of benefit and that that has to be reflected to the extent that someone on the Dollerie estate can be exempted entirely. Is that not inconsistent?

Alastair McKie: In paragraph 4 of the opinion of counsel, it states:

“In addition, it should be noted that the penultimate page of the Report accompanying the Book of Reference”—

one of the legal documents that we have circulated this morning—

“states that the surveyor has not apportioned any part of the estimated expense of the works to Mr. Murray of Dollerie because of an agreement between him and the committee of heritors who had promoted the Bill, which ... ‘provided that he was not to be liable in any part of the expenses’.”

I understand your argument, which is one of fairness, but the promoters are attempting to follow the 1846 act and to use it as a proxy for identifying benefited land. To follow that would mean that Dollerie would be excluded.

The Convener: Mr McKie, there are sections in the bill to repeal the 1846 act.

Alastair McKie: Yes, I appreciate that.

The Convener: What is the justification for retaining the provision?

Jo Guest: The surveyor in 1846 said:

“I must also state that I have prepared the Plans of the Works in terms of that agreement, the effect of which is that the amount of the expense of the Works have been very considerably increased above what is necessary for the purpose of the drainage or expedient for Mr Murray's own interest.”

The Convener: I want to establish what the promoters think about the deal that was agreed. Is there a minute of the meeting at which that deal was agreed, or is there a contract that we can refer to?

Jo Guest: It is in the book of reference. I just read it for you.

The Convener: What about the nature of it? Was it a trade or an entitlement? Was it in perpetuity? What is the justification—

Jo Guest: It is in the book of reference.

The Convener: Why should that be preserved in the new act?

Alastair McKie: The promoters' position is that we are using the red line from the 1846 act—which we accept will be repealed—for the identification of benefited land; we are using that red line for the purposes of the pow bill plans. The red line, for the purposes of the 1846 act, excludes the lands at Dollerie, because of the agreement that you referred to and which has been discussed, so we are simply following what was done before. You might say, "Why do that? Why not do something different now?" and I understand your point.

The Convener: I appreciate that, but there are lots of things from the previous act that you do not wish to continue, hence the introduction of the bill. You have not argued that the land at Dollerie is not benefited land; indeed, you have argued that there is other land in residential areas that is benefited and that should be subject to the charges. Why, in principle, do you wish to maintain the provision? Is there any reason, other than continuity?

Jo Guest: It seems to be the right thing to do.

The Convener: It seems to be the right thing to do—that is the opinion of the promoters.

Jo Guest: If we are following the 1846 plans, we should be consistent, and that is the basis on which they were done.

Alastair McKie: I think that the promoters will consider the direction of the questioning and perhaps revert back to the committee with a written statement.

Mary Fee: I would like some helpful clarification. Substantial work has been done at Dollerie and, on the day that we visited, we stopped at Dollerie bridge and saw the degree to which work had been carried out. Was that work carried out with the permission of Mr Murray?

Jo Guest: Yes.

Hugh Grierson: It went beyond providing access. It involved putting a lot of spoil into his fields.

Mary Fee: Had no work been done at Dollerie, what would the impact have been on Mr Murray's property?

Jo Guest: It would have made no difference to him at all. If the work had not been done, he would not have had to put up with all that disturbance and mess.

Going upstream, we have been able to deepen the pow by about 2 feet, which does not sound like much, but is very significant. It has added considerable benefit to everybody upstream, all the way up to Balgowan.

Mary Fee: So if no work had been done at Dollerie, it would have had absolutely no impact on Mr Murray?

Jo Guest: No. I do not think that it would have had—

Mary Fee: You do not think, or you know?

Jo Guest: I know. He derived no benefit from the work that we did in 1995.

Hugh Grierson: Does he have any benefit upstream of that bridge? I think that it is all downstream—

11:30

The Convener: You are saying that the land at Dollerie is not benefited, so the land plans are wrong to state that it is.

Hugh Grierson: A section below the bridge is drawn in differently from the benefited land above. That section of land is benefited and the note with the plan says that that benefit could have been achieved without the expense of doing up the pow. Mr Symon estimates that the works resulting from the 1846 act would cost more than £1 million in today's money. The note says that Mr Murray could have achieved that benefit without going to huge expense. I presume that a simple drain would have done it. Although he benefited, he did not need to spend all that money in order to benefit. That is the key reason that the original surveyor left him out of the assessment.

Mary Fee: He benefited in some way—

Hugh Grierson: Yes. There is a bit of a—

Mary Fee: He could have benefited without spending that amount of money, but he must have benefited from the work.

Hugh Grierson: Yes. It was shown that there is benefit, but it does not require a huge on-going expense to obtain that benefit.

The Convener: There is a fundamental problem here. In previous evidence, the distinction between benefited and non-benefited land was binary. Now, it is not—now it is ambiguous.

Hugh Grierson: This information comes from the original data. We have looked much harder at it and that is what it says. Our initial response has

been to continue the arrangement. As Alastair McKie says, we are capable of reconsidering.

The Convener: Is it the promoters' position that there are gradations of benefited land and that some land is more benefited than others in the overall category of benefited land?

Hugh Grierson: That is the position as set out in the 1846 act, and we intend to follow it.

The Convener: So if anyone suggests that, for example, their property is less benefited than another while still being benefited within the category of benefited land, they have a valid point.

Hugh Grierson: It is not more or less benefited—it is benefited at zero cost or at on-going expense. I would be happy to say that to any of the householders. All of us, apart from the owner of Dollerie, must spend money to maintain our benefit. The distinction that was made for Mr Murray 150 years ago was that he did not have to spend money in order to benefit.

The Convener: We have talked about a decision that was made 170 years ago and you have spoken about a decision that was made 150 years ago. Why should those decisions be continued? Is that fair, equitable and reasonable?

Hugh Grierson: To me, it is.

Mary Fee: Have you had any discussion with Mr Murray about the potential for him to—

Jo Guest: Mr Murray does not own the house any more—he sold it about two years ago.

Mary Fee: Have you had any discussion with whoever owns the house now?

Jo Guest: Not at all; I have never met him.

Mary Fee: No discussion.

Jo Guest: None at all.

Mary Fee: It has not occurred to you to meet him to discuss the works and the access issues.

Hugh Grierson: No. It is never necessary to do any work in that section of the pow. I have been doing the pow for 30 years and 1995 was the only time we ever did work down there, which was entirely for the benefit of the people upstream.

Mary Fee: Potentially, you could be required to do work there.

Jo Guest: That is very unlikely, because that section goes through a hard-rock channel. The usual reason for doing improvements is that the bank has slipped in. In 30 years, 1995 was the only time that we ever did work there.

Mary Fee: At no time did the commissioners consider it good practice to speak to the new

owner of Dollerie to explain the function of the pow—

Jo Guest: He is not a heritor at the moment.

Alison Harris (Central Scotland) (Con): I have been listening to everything that has been said this morning, but I have to say that we are going round in circles. We have an act from 1846. I heard what you said about the owner of Dollerie being able to do different work so that he did not feed into the pow, and the fact that nowadays you regard that land as not benefiting. Is that correct? We need to drill down into the issue. Either he is benefited or he is not.

Jo Guest: He does not benefit—it is the other way around.

Alison Harris: Currently, he does not benefit.

Jo Guest: No, it is the other way around. We have benefited hugely from—

Alison Harris: I heard that; I understand that. However, the issue that Tom Arthur is, I think, trying to get to is that someone in 1846 deemed that the owner of Dollerie benefited and therefore wrote in that he would not have to contribute because he was gracious in allowing others on to his land. We do not think that it is acceptable for you to come to us in 2018 and say that, although the owner was deemed to benefit in 1846, because he was gracious enough to let others on to his land, the owner of that land nowadays does not have to pay. We need to translate that and be very clear whether, in 2018, he benefits. If he benefits in any shape or form, in modern-day terms, he should therefore be included in the calculation. If we ignore the position in 1846, does he benefit or does he not in 2018? Is there a simple answer?

Jo Guest: In my view, looking at it practically, I would say that he does not. From the photographs, you can see that there is a 12-foot-deep rock channel that goes through—

Alison Harris: I see all that. I just want to hear from you—

Hugh Grierson: If we use the original plans and the definition is whether he benefits or not, then he is in.

Alison Harris: If that is the answer, you need to look at the calculation again, quite frankly.

The Convener: If I am correct, Mr Grierson's opinion is that the owner of Dollerie has benefited and Mr Guest's opinion is that he has not.

Hugh Grierson: I said that if we use the map from 1846 or 1848, as we intend to, by that definition he is in.

Mary Fee: I want to move on to the issue of increasing costs, because all the new work that will need to be done, such as the redrawing of plans, will add a substantial cost. Do you have a figure for how much that will cost?

Jonny Willett (Savills): I can speak on behalf of Savills, which is undertaking the remapping exercise at no cost to the commissioners.

Mary Fee: There will be no additional cost to the heritors.

Jonny Willett: Not from Savills.

Mary Fee: What are the commissioners' views? Will there be any additional cost to the heritors from the delay in processing the bill through Parliament? You have had to take legal advice.

Hugh Grierson: There will be some additional legal fees.

Mary Fee: Do you have any idea how much that will be?

Hugh Grierson: I would not like to give a figure that could be wrong, but it will be several thousand pounds.

Mary Fee: Is the counsel opinion included in that figure?

Hugh Grierson: Yes.

Mary Fee: I believe that the original intention was to allow a three-year period to collect all the moneys. Have you given thought to perhaps increasing that period?

Hugh Grierson: No—not at this stage. We still have a forward budget that suggests that we can be on track in three years. Obviously we have not reached the end of the process yet, but we are still on track.

Mary Fee: Is there a particular reason why Savills is doing the exercise at no cost?

Jonny Willett: We accept that there were errors in the original exercise to map the exact path of the 1846 plan. We are rectifying those errors by following the correct boundaries this time.

Mary Fee: When you did the original exercise, did you do any research or check whether that was the correct plan to use? We have heard about plans from 1846 and 1848, and now about one from 1851, and there might be other plans. What did you do to satisfy yourself that you were using the correct plan?

Jonny Willett: I apologise, but I was not involved in the original mapping exercise. A former colleague, who no longer works for Savills, undertook that exercise and used a photocopy of the 1846 plan and Mr Guest's local knowledge and expertise.

Mary Fee: Another of the committee's concerns is that Mr Symon seems to have had very little difficulty in finding additional plans, drawing different land plans and deciding who should and should not benefit—and it appears that he is not a heritor. I struggle to understand how Mr Symon was able to do all that research and find all those additional plans, yet the promoters of the bill were not. Do you have anything to reassure us that you are absolutely confident that you have not missed anything else? Is there any explanation as to why Mr Symon could find those plans and you could not?

Jo Guest: Mr Symon is an academic who has made a particular study of this sort of thing. He has plenty of time to devote to it. As he said himself when we met him, he is something of a perfectionist.

Hugh Grierson: We were unaware that we had to find these plans because, as a layperson, I did not understand the act well enough. We have taken steps this time to get someone else to interpret the act for us and get counsel to give us proper advice on exactly what the schedules are and how they all fit together, and to bring that to you so that we are certain this time that we are following the correct methodology and have turned up all the information that we need to find.

Mary Fee: Did you not take legal advice at the start of the process?

Hugh Grierson: We had lots of legal advice, but this seems to be the ultimate that we can do to make sure that it is right.

Mary Fee: Mr Guest made the point that Mr Symon is an academic and a bit of an expert. You have spent 20 to 30 years walking the pow, and you have a deep personal and professional interest in it, as does Mr Grierson. Do you not therefore consider yourselves to be experts on the pow?

Jo Guest: I think that I am a reasonable practical expert, but I am not an academic and I am not somebody who regularly looks at archive material in the national archives.

Mary Fee: You were undertaking a substantial exercise to update the 1846 legislation, so I would have thought that you would have made sure that you had every i dotted and every t crossed before you got to the point of proposing a piece of legislation. That would mean doing all your research ensuring that you were using the right plan and that there was nothing else there. I struggle to understand why you did not do that.

Jo Guest: When we started this exercise more than three years ago, we were looking to produce a workable, practical plan rather than something

that was legally perfect. That was probably the misunderstanding.

Mary Fee: It has to be legally perfect to go through Parliament.

Jo Guest: Well, yes, but Parliament can adopt any plan and it is then legally perfect. It is the basis on which the plan is produced.

Mary Fee: It is about the evidence that you use.

Jonny Willett: We acknowledge that our original plans were based on the 1846 plan, which was a photocopy, but too much subjectivity was put into them and local knowledge adapted to them. Since Mr Symon's revelations, we have acknowledged that we have been weak and poor in this area and we intend to liaise with Mr Symon to find out his sources and work with him to ascertain whether the 1851 plan is the final plan that should be followed. We will map that to the red line boundary as far as we can tell from the 1851 plan.

Any areas of subjectivity will use an element of local knowledge or expertise. We will look at Mr Symon's opinions on it and that will be reported. Any area of subjectivity will be documented and highlighted to the committee.

We think that that is the best way to rectify what has been a mistake on our part.

Mary Fee: What work will you undertake to ensure that the evidence that Mr Symon has brought to light is accurate?

Jonny Willett: First, we need to have sight of the 1851 plan to make sure that it is authentic and in a workable condition. We will then do our own independent research along with Mr Symon's input to ascertain that there are no more plans. The 1846 act refers to the 1846 plan, the 1848 plan and the 1851 plan and to no other plans. I am just looking for confirmation of that.

Alastair McKie: I believe that to be the case, but it is something that we need to verify.

Mary Fee: When you said that you will look for Mr Symon's input to ensure that the 1851 plan is the latest plan, I am keen to understand what work your firm will do to establish that. Surely you are not going to rely on Mr Symon, as he could say that there was a plan in 1871 or 1881.

11:45

Jonny Willett: No we would not rely on that; we will do our own research, contact the National Archives of Scotland and do appropriate due diligence before we confirm the final version of this plan.

Mary Fee: The committee would like to see the evidence of how you have established that it is the

latest version of the plan on which you will base any further work that you do.

Jonny Willett: Of course.

Mary Fee: How long will that take?

Jonny Willett: Considering that it was just this morning that we were told about the 1851 plan, we need to factor in some time to have sight of it. Following that, the mapping exercise will take no longer than four weeks.

Mary Fee: Finally, I am interested in the views of Mr Grierson, Mr Guest and, indeed, Mr McKie on this matter. Do you accept that this latest episode—that is probably the only word that I can use—and all the evidence that has come to light have damaged the credibility of the commissioners among the heritors?

Hugh Grierson: Yes, it must have done.

Mary Fee: What steps will you take to repair that damage?

Hugh Grierson: The first step is to get the map right—that is the most important thing. After that, I suppose that the step will be contact with people—a people process.

Mary Fee: Do you intend to set up meetings with all the heritors? How will you communicate the change in the plan and explain to them if there are any discrepancies in who benefits and who does not?

Hugh Grierson: We do not have a plan for that at present. We are obviously aware that we have to communicate with the people who will be affected. Another process will have to start.

Mary Fee: Surely you will need to communicate with all the heritors.

Hugh Grierson: Something definitely has to happen. We have not got that far or made that decision. I will take advice about the process that is required.

Mary Fee: Does Mr Guest have any additional comments?

Jo Guest: Not really, no.

Mary Fee: Does Mr McKie?

Alastair McKie: No.

Mary Fee: Okay.

The Convener: It will be very helpful for the committee to see a document that sets out the plan for how the commissioners intend to engage with the heritors. It will also be exceptionally helpful to see documented evidence of the approach that the commission intends to take to ensure that no other relevant documents have been overlooked in the process.

There is a great deal of work to do and it has to be thorough. We cannot risk getting to the end of the process, when another set of maps have been composed, and then discovering that additional maps have come to light. It is essential that the promoters bring forward evidence of how to ensure that that will not be the case.

I accept that this is the path that the promoters wish to go down. However, it seems incredibly complicated and fraught with risk. Have the promoters given any thought to producing a new, 2018 assessment using modern techniques and standards that everyone can have confidence in, rather than relying on documentation that is 160 or 170 years old and, potentially, other documents that may come to light.

Jo Guest: I have discussed that possibility with the chairman of the Association of Drainage Authorities, who told me that it provides from time to time a service to define the benefited areas for arterial watercourses for internal drainage boards in England and Wales. That is a possibility.

The Convener: It was suggested previously that the cost would be prohibitive. Is that still the view?

Jo Guest: I will see Mr Thomson tomorrow, and I could discuss that matter with him. The cost might not be prohibitive.

The Convener: That assessment could provide a complete and up-to-date picture of what land is benefited and what land is not benefited, and it could be produced using modern techniques and digitised. It could be easily accessible and, most important, all heritors could have confidence in it. Would that be the aspiration?

Hugh Grierson: I am still of the opinion that that would be very hard to achieve. We would have no basis to instruct someone on how to define the edge of benefited land. Anyone whom we appointed to do that would need a basis to work from, and the only basis that we could give them is the evidence from the past.

Jo Guest: I am meant to be seeing Mr Thomson, who is the chairman of the Association of Drainage Authorities, tomorrow. He happens to be up here. I have not met him before, and I was going to see him. When I have spoken to him on the phone, he has told me that the association provides that service to members.

The Convener: Would you be willing to write to the committee to share the outcomes of that meeting?

Jo Guest: Yes.

Alison Harris: You will know that a third of all heritors have expressed their unhappiness with the bill. What is your response to their

submissions? In particular, they have raised the issue of residential heritors only being charged at a higher rate based on the footprint of their house and their gardens being charged at the same rate as fields. In addition, significant costs—

Jo Guest: The current proposal on the way in which residential properties would be assessed is that the notional area of their plot would be five times the footprint of the house, and there would be nothing on any surplus. Any surplus would be treated as amenity land, which, in effect, has a nil value.

Alison Harris: Okay.

Significant costs have been incurred so far in developing a bill that protects and represents the commissioners' position. Is it reasonable for the commission to object on grounds of cost to doing a proper reassessment of the benefited land, which we have discussed? Should the aim not be to achieve a bill that is fair and acceptable to the residential heritors as well as to the farmers?

Jo Guest: We have always striven for that.

Hugh Grierson: Yes. We are definitely in favour of finding a system of apportioning our costs that is fair, transparent and agreed by all and, so far, we have given that our best attempt.

Alison Harris: Are you concerned that so many heritors—a third of the total number and a large proportion of the residential heritors—have expressed such levels of concern about and unhappiness with the bill?

Hugh Grierson: Obviously, that is a setback. The main point in the recent letter seemed to be about double charging. That is what people at the development talk to me about. They believe that, if Scottish Water were to charge them to take over the sewage works, they would be charged on their council tax bill as well as being charged for the commission's costs, and they consider that to be double charging. We do not consider that to be double charging, as we do not see any overlap in our services. Scottish Water would be processing dirty water, treating it and releasing it into the pow. Our job would be to take it uphill and out of the catchment. Unfortunately, we think that Scottish Water's charges are applicable throughout the country and that, for people who live in the pow benefited area, that is an additional charge which it is fair and reasonable for them to pay.

Jo Guest: We also have to consider the fact that the properties of the people on the Manor Kingdom development are connected to the waste water treatment works, which is currently being run by the developer's successors at no charge. If we compare their situation with that of all the other people with residential properties on benefited land who have septic tanks, we see that they pay

the pow assessment and also the costs of maintaining and emptying their septic tanks. To get a septic tank emptied costs about £250. If the septic tank needs to be replaced, a typical septic tank for a domestic property costs between £3,000 and £4,000 to replace. Those costs have to be met entirely by the house owner. That means that they are paying the cost of their sewage treatment, so to speak, and they are paying the pow commission for their outfall.

If the Manor Kingdom residents end up having to pay the pow assessment for the outfall and the council tax supplement for the maintenance of the sewage works, it seems to me that they will be in exactly the same position. It would be inconsistent, compared with the people who have septic tanks, if they did not pay the pow assessment.

Alison Harris: Okay. I will move on and ask a couple of questions about rights of appeal.

There are two proposed rights of appeal—one for 10 or more heritors, and the other for individual heritors in circumstances in which the budget is £60,000 or greater. It is stated that the latter will be “index linked”. What index is being referred to? What index would be used?

Jo Guest: It would be the consumer prices index or the retail prices index.

Alison Harris: Which is it?

Jo Guest: I cannot remember which it is. Do you know, David?

David Nash: It was just a general proposal—a recognition that the figure would need to be index linked—but there was no final decision on which index it would be.

The Convener: Could you write to the committee and let us know whether it will be the RPI or the CPI? Thank you.

Alison Harris: The proposed amendment to the bill states that, if there is an appeal,

“the expert will decide what the budget should be”.

How will they do that, rather than only be able to assess whether the proposed work is necessary and the costs reasonable?

Jo Guest: One of the reasons that I am seeing Mr Thomson tomorrow is that ADA frequently provides experts to adjudicate in exactly these situations.

Alison Harris: So you are looking to find the expert.

Jo Guest: Yes.

Alison Harris: How will you know whether you will be paying a reasonable amount for a cleaning and repair contract if you do not test it in the market by getting quotes? I know that we have

discussed the issue in the past, and I appreciate what you have said about the person who has been doing it historically having the economies of scale and being good at doing the job, but—

Jo Guest: We instruct contractors to do other works in other situations, so we are aware of what the hourly rates are for a man on an excavator and of the typical rates for cleaning ditches and so forth. We can see very quickly whether they are comparable.

Alison Harris: You can see that, but in light of the fact that a third of the heritors are unhappy with the process, do you see where I am coming from?

Jo Guest: I do.

Alison Harris: It might be helpful, not necessarily to put the work out to tender, but to seek quotes. That way, you could say to anyone who complained, “We are paying so-and-so X, but here are three quotes.”

Jo Guest: I do not like getting quotes from people if I know that they are not going to get the work. It does not seem fair.

Alison Harris: That is the system of quotes nowadays. Another quote might come in cheaper than that of the chap who is doing the job and win the work.

Jo Guest: The maintenance of the pow depends to a large extent on co-operation and the good will of all the farmers and owners through whose land it passes. Having somebody who knows them all, understands how they work and can organise the work to fit in with the operation of their farms is extremely helpful. If we parachute in somebody who just happens to be a cheap chap with a digger, who does not know anybody and does not understand how the farms work, it would be—

Alison Harris: My point is not that you should parachute in someone to undercut the person who does the work at the moment. My point is that you are now in a position where you are no longer dealing with just the farmers along the line; you are now dealing with 31 heritors who are extremely unhappy with the process. They might not have the farming background or the knowledge of how things work, and I appreciate that the process that you have described is probably how things work in farming. I feel that it would be appropriate for you to seek quotes so that you keep yourselves right in the eyes of those people and can turn round and say to them, “We’re paying him this, because it would cost that elsewhere.” That is my point.

Jo Guest: Yes. I do not know whether that is a matter for the bill or whether it is just good practice from the point of view of the surveyors.

Alison Harris: I certainly think that it is good practice.

Jo Guest: Yes.

12:00

Mary Fee: The Manor Kingdom residents pay about a third of the total that is collected along the pow, and there is a proposal for one commissioner to represent them.

Jo Guest: It is two at the moment.

Mary Fee: Yes, or two. There has been a suggestion that, given that they pay a third, they should have three commissioners. Would you consider allowing the Manor Kingdom residents to have three commissioners?

Hugh Grierson: We think that two is sufficient. We started with a proposal for one, and the issue was drawn to our attention. With two commissioners, each section would then have two, which seems about the right place to be. The Manor Kingdom residents pay a third of the amount. Two seems about right.

Mary Fee: Would you consider having three?

Hugh Grierson: That would need other changes. We would need to look at the quorum again. When we moved from one to two, we looked at the quorum numbers. If we were to consider changing again, we would have to see what that would do to the group.

Mary Fee: When you say “we”, are you talking about the original commissioners?

Hugh Grierson: I presume so. I suppose that whether to propose another amendment is a decision for the commissioners.

Jo Guest: There will, I hope, be an initial rush of enthusiasm when the bill is enacted but, based on past experience, in the years ahead, I think that it might be a struggle to find three commissioners.

Mary Fee: I accept that you can say what has happened in the past, but you do not know what will happen in the future. It is clear that there is an interest among the residents of the Balgowan estate in becoming more involved. Surely from the point of view of increasing openness and transparency, it would be good to have more people involved. I believe that there is a Balgowan community group. Have you spoken to it?

Hugh Grierson: I have been to one of its meetings and have spoken to it. There was a residents association, which I believe relied on funding that is no longer in place. I think that the residents asked in their correspondence whether, if they got together another association, we would be interested in communicating with that, and the answer is that, yes, we would.

Mary Fee: In the past, have they been fairly active?

Hugh Grierson: They were briefly very active for a year or so, but I think that they are not so active now.

Mary Fee: Thank you.

The Convener: I have a general question about engagement. Has any progress been made regarding the website and other means of communication?

Hugh Grierson: No. We are not looking to tackle that until after the bill is enacted and we have some money.

The Convener: Okay—I appreciate that.

Jo Guest: Is there not also a data protection issue? That issue arose when we discussed having a requirement in the bill for us to publish information on a website, which would enable us to be totally transparent.

The Convener: I was not suggesting a website in that form were the bill to be enacted; I was simply talking about a means of keeping heritors and people who are affected up to date.

Jo Guest: I think that that would be a good thing, and it would simplify the administration.

The Convener: I was just talking about on-going communication throughout the bill process, which we have discussed previously.

We have touched on the issue of waste water treatment and double charging. You might have touched on this already, but will you confirm for the record your understanding of who owns the waste water treatment works?

Jo Guest: I think that they still belong to the successors to Manor Kingdom. Who is that, Shirley?

Shirley Davidson (McCash & Hunter): Avant Homes.

Jo Guest: I think that all the amenity land in the Manor Kingdom development, including that treatment works, belongs to Avant Homes, which has taken over from—

Shirley Davidson: Manor Kingdom.

Jo Guest: Yes.

Shirley Davidson: Well, it is Manor Kingdom, which has changed its name to Avant Homes.

The Convener: That concludes questioning from the committee. Would the promoters like to make a concluding statement or any final remarks?

Alastair McKie: We have none.

The Convener: I thank the promoters and their associates for attending. Clearly, there is a lot to consider and reflect on. The committee will await the outcome of the mapping exercise, correspondence regarding Mr Guest meeting the Association of Drainage Authorities to discuss a potential future assessment and correspondence regarding other matters, including which method of indexation the commission will seek to use. The correspondence on mapping and a potential future assessment will help to inform our understanding of the commissioners' position with regard to the Dollerie area.

I again thank the witnesses for coming along and suspend the meeting to allow them to leave.

12:05

Meeting suspended.

12:06

On resuming—

The Convener: Agenda item 2 is consideration of the three objections to the bill. In light of this morning's evidence on the land plans, I propose that we defer further consideration of the objections until the situation with the land plans has been clarified. Is that agreed?

Members indicated agreement.

The Convener: Given the circumstances that we now find ourselves in, the date of the committee's next meeting is not yet known. We will provide notification of that on our website once the date has been confirmed.

Meeting closed at 12:07.

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