IN THE SUPREME COURT OF THE FALKLAND ISLANDS
JUDICIAL REVIEW

Case Ref: SC/CIV/03/12

BETWEEN:

THE QUEEN

On the Application of

QUARK FISHING LIMITED

Applicant

-and-

THE DIRECTOR OF FISHERIES OF THE GOVERNMENT 0F SOUTH GEORGIA AND THE SOUTH SANDWICH ISLANDS

Respondent

Hearing: 27 – 30 November 2012

Representation:

Applicant:
Fergus Randolph QC
David Scannell, Counsel
Instructed by Pinsent Masons, Solicitors

Respondent:
Dermot Woolgar, Counsel
Instructed by the Attorney General

Judgment

1. The Applicant (Quark), a company owned jointly by Mr. Michael Summers and a Spanish company, owns the MV Jacqueline, which is registered and flagged to the Falkland Islands. On 2 March 2012 the Director of Fisheries of the Government of South Georgia and the South Sandwich Islands (GSGSSI), Dr. Martin Collins (the Director), notified Quark that its application for a licence for its vessel to fish for Patagonian toothfish in the South Georgia and South Sandwich Islands (SGSSI) maritime zone (sub-area 48.3) during the 2012 season had

been unsuccessful. As the vessel had been awarded such a licence in the previous 14 seasons, apart from 2001 when the refusal to grant it a licence was successfully challenged by Judicial Review (R (Quark Fishing Ltd) v S/S Foreign and Commonwealth Affairs (2002) EWCA Civ 1409) (Quark 1), Mr. Summers contacted the Director and the Foreign and Commonwealth Office (FCO) for information as to the reasons for this refusal. Considering the response to be inadequate, he sought legal advice and Quark now seeks to challenge that decision by way of Judicial Review on four Grounds. They do not stand or fall together, and I shall consider each in turn.

2. The reason that this Application is brought against the Director of Fisheries is that he is the GSGSSI officer, appointed by the Commissioner pursuant to *The Fisheries (Conservation and Management) Ordinance 2000* (the 2000 Ordinance), which Ordinance makes him responsible for the administration of the fishery. In particular it makes him responsible for the conservation of its fish stocks and the development and management of the fishery, and empowers him to take such measures as he considers expedient or necessary for the regulation of fishing, including the issuing of fishing licences. He decides the total allowable catch (TAC), and the number of licences that will be issued and to whom they will be issued in any particular season. In relation to the latter two, by reason of an amendment to the 2000 Ordinance made by the *Fisheries (Conservation and Management) (Amendment) Ordinance 2002* (the 2002 Ordinance), he has to consult the Secretary of State at the Foreign Office as to whether there are any foreign policy implications, and has to accept any advice received. Each toothfish licence stipulates the quantity of fish that may be taken by the licensed vessel, and is for one season only, which runs from 1 May to 31 August. Although the 2012 season has now come and gone, a declaration is sought that the Director's refusal of a licence to the Jacqueline in 2012 was unlawful, so that the same can be taken into account when licences are allocated for the 2013 season.

3. As I am aware that the outcome of this Application is of interest to a number of fishing companies, it may be helpful if I first identified the general principles relevant to Judicial Review, further details of which can be found in Fordham's *Judicial Review Handbook (6th Ed)*. Judicial Review is not an appeal. The Court does not consider the merits of a decision and substitute its own judgment, but rather considers the decision-making process itself. It is not concerned with whether a decision reflects good or bad administration, and public bodies, when exercising a discretion or judgment, or deciding the weight to be given to a particular fact, particularly when such involves expertise, are usually left to get on with it. The purpose of Judicial Review, which is a remedy of last resort, is to ensure that government is conducted within, and not above, the law; that is, to ensure that the powers asserted comply with the substantive law, and that the way in which they are exercised conforms with what the legislature must have intended, namely fairly and reasonably and in good faith. The outcome of a case depends on its own particular facts, in respect of which the

circumstances will be considered from the decision-maker's point of view at the time that he made the decision, and the Court will only interfere where there has been an unlawful performance of a statutory duty. Where it is alleged that a decision was what lawyers refer to as Wednesbury unreasonable (Associated Picture Houses Limited v Wednesbury Corporation (1948) 1 KB 223, Lord Greene MR at 233), and so amounted to an abuse of power, it is for the Applicant to establish, on the balance of probabilities, that the decision-maker took into account matters he ought not to have taken into account, or failed to take into account matters he should have taken into account, or has nevertheless come to a decision which is irrational. The threshold of irrationality is a high one, namely that the challenged decision is so unreasonable that no reasonable decision-maker could ever have come to it.

Ground 1

4. This alleges that the Director unlawfully failed to consult on key changes to the applicable decision-making procedures for the 2012 season, because Quark had a legitimate expectation that the criteria for the granting of licences would not be changed to its disadvantage without prior consultation, and so he breached the principles of natural justice. Specifically, it is submitted that loyalty was disregarded, when previously it had been taken into account.

5. To understand this submission, and that made in relation to Ground 3, where it is alleged that the Director failed to give proper weight to the Jacqueline's historical involvement in and experience of the fishery, it is necessary to consider how the GSGSSI licensing system operated. An application form had to be completed, the applicant having consulted the *Toothfish Licensing 2012 Information for Applicants*, which, at Annexe B, sets out the criteria against which the allocation of licences would be assessed. It stated that it was the responsibility of applicants to show whether, and to what extent, vessels would meet and advance those criteria, and that applicants should support statements with documentary evidence.

6. Unlike previous years, the 2012 application form gave the maximum score that could be achieved in respect of each of its 5 criteria. The Director, in his affidavit, states that in the previous three years he had used a scoring system, although he had not revealed this. Prior to inviting applications for the 2012 season he had reassessed the scoring allocation of each criterion and set out the maximum scores of each criterion in the application form. It is not suggested that, in so doing, the Director was motivated by anything other than a desire to improve his decision-making and the interests of transparency. There is no evidence that this resulted in any objection being taken by any of the applicants. Further, the new form encouraged the applicant to address each of the licensing criteria individually. Nevertheless, the Director frankly admitted that he did consider whether the threshold for the consultation of interested parties prior to making these changes had been reached, but concluded that such was not

necessary, given the scale and extent of the alterations, and the fact that they were incremental and evolutionary.

7. The actual descriptions of the criteria will have to be considered in more detail under Ground 3, but it is helpful to note at this stage how they differed from those of 2011. The descriptions of the 5 criteria are the same, but in the 2012 form they were given headings and maximum scores i.e. Compliance (5), Safety (5), Catch Efficiency (3), Experience (3) and Raising Standards (3). Also, in the narrative of the Experience criterion, the word “experience” replaced the words “historical involvement.”

8. It is submitted that, as Quark had successfully applied for a licence for many years against the same criteria, clearly something had changed in 2012, and that this has now been identified. There was either a failure to take “loyalty” into account at all or, if that word is synonymous with historical involvement, track record and experience in the fishery, its importance had been significantly reduced by the reassessment of the points available. Either way, Quark’s application was adversely affected by the changes and, consequently, it had a legitimate expectation that it would be consulted before such changes were made, particularly as a licence is so valuable. It is accepted that the Director in his discretion was entitled to make the changes. The complaint is that it was unfair for him to do so without first consulting the interested parties, so that they could comment upon the proposed changes.

9. As to the contention that “loyalty” had been arbitrarily dropped from the 2012 criteria, Mr. Randolph, Queen’s Counsel for Quark, relied on correspondence in 2001, referred to by the Director in his Affidavit, in particular a letter dated 8 February 2001, in which loyalty to the fishery was stated to be a relevant factor. Having considered this documentation, the Court of Appeal in Quark 1 held that past practice had generated a legitimate expectation that loyalty would be taken into account, Laws LJ stating at paragraph 60:

> “I accept Mr. Vaughan’s submission that by past practice a legitimate expectation had been generated that loyalty would be taken into account; and I accept his further submission that the Secretary of State has shown no rational basis for its being disregarded, at least, as I have said, as between the four British-registered vessels.”

10. I became concerned during argument as to terminology and invited Mr. Randolph to consider this. Having done so, he submitted that the concept of “loyalty” was interchangeable with those of “track record”, “historical involvement” and “experience.” Although “loyalty” as a matter of ordinary usage could import a measure of faithfulness and fidelity to the fishery evidenced by presenting oneself, year after year, for a licence, there could be no “loyalty” without “track record” and “historical involvement,” the latter having replaced the word ”loyalty” in the licensing documentation.

11. Mr. Woolgar, counsel for the Director, submitted that, when considering the use of the word “loyalty” it was important to have regard to the historical context in which it was used. In the early years of the fishery it was important to ensure that there were enough applicants to extract the TAC, and thereby maximise the revenue based upon it. Therefore, it was understandable that applicants would be rewarded for simply coming back each year and applying to take part. Thus “loyalty” in the sense of faithfulness and adherence was a factor up to and including the time that the matter was considered by the Court of Appeal in Quark 1. However, following this decision the then Director sent a revised version of the policy to the fishing companies, including Quark, in which the word “loyalty” was not used. Instead there was a reference to historical involvement. Mr. Summers wrote a letter in response to this consultation which did not take objection to this. The reason for the change, as the Director makes clear in his affidavit, is that significantly more applications were being received than the number of licences that could be granted, if the TAC was to be divided into commercially viable portions, and so “loyalty” in the fidelity sense was no longer a consideration. That word was not synonymous with “track record” and “historical involvement” and “experience,” which incorporate considerations of the length of participation and performance in the fishery, which the Director states in his affidavit he did take into account when making his licence allocation decision. Therefore, Mr. Woolgar submitted, “loyalty” in the wide sense asserted by Mr. Randolph, was taken into account in 2012, and so there had been no significant change to criteria in 2012 from those that applied in 2011, and no duty to consult arose.

12. On the available evidence I accept that originally “loyalty”, in the sense of being willing to make repeated licence applications, was a factor taken into account by the Director of Fisheries in the early years. I also accept that Mr. Summers may well have considered that such was still a factor in 2012. In his letter accompanying Quark’s application, under a heading “Loyalty and Track Record,” he referred to its unbroken track record since 1997 upon which it sought a level of priority for its vessels above those that could not demonstrate that commitment, although it is to be noted that this is in almost identical terms to that contained in his letter that accompanied Quark’s 2003 application.

13. However, I am not satisfied on the evidence that, by the time the fishery had become over-subscribed and the Director’s task was to allocate a limited number of licences amongst several applicants, “loyalty” in the sense of fidelity was any longer a factor, and there is nothing in the licensing documentation to suggest that such was the case. Further, it is difficult to see a basis upon which it would still have been a factor, in distinction to the number of years of participation and performance in the fishery, whether this came within historical involvement, track record or experience which, the evidence of the Director establishes, were taken into account within the 2012 criteria.

14. What had changed, however, was the readjustment of the importance of the criteria, which had previously been scored equally, as a result of which "Experience" now carries a maximum score less than that of the Compliance and Safety criteria, and I consider that it is in respect of this change that the question of whether a duty to consult arose in this case.

15. Mr. Randolph submitted that it did. He did not allege that there was any assurance as to the continuance of an existing policy giving rise to a substantive legitimate expectation. Nor did he allege a procedural legitimate expectation, as there was no express promise to consult or established practice of consultation. It arose, he submitted, by way of a secondary procedural legitimate expectation, which is a concept that has evolved in a number of cases, to which Counsel helpfully referred me, and reference to some of them in this judgment is unavoidable.

16. That such could arise was recognised by Simon Brown LJ, as he then was, in R.v.Devon County Council ex parte Barker (1992) EWCA Civ 16 when he stated (page 204 of Authorities Bundle 1):

> "Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

17. Mr Randolph relied heavily on the use of the words "attain" and "denied" in brackets which, he argued, showed that a legitimate expectation could arise even though there was no existing but only a prospective benefit that was likely to be disadvantaged, as was the position of Quark as it had no right to a licence but only a right to apply for a licence. However, if its chances of succeeding in such an application were adversely affected by changes in the weighting of the criteria, it was unfair if it was afforded no opportunity to comment upon them.

18. Simon Brown LJ acknowledged the difficulty in identifying the circumstances in which a secondary procedural legitimate expectation would arise, stating that it (page 206):

> "…comprises those interests which the law recognises are of a character which require the protection of procedural fairness. What then is the touchstone by which such interests can be identified? It cannot be merely

> that the law insists they be not unfairly denied else there would be no point in introducing the concept of legitimate expectation in the first place; one would simply look at the decision in question and ask whether the administrator acted fairly in taking it."

In seeking to resolve this, he referred to the categorisation of Lord Diplock in Council of Civil Service Unions v Minister for Civil Service (1985) AC 374, namely that such a legitimate expectation arises when a decision affects someone:

> "by depriving him of some benefit or advantage which…he had been permitted by the decision-maker to enjoy and which he can expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment..."

19. Simon Brown LJ went on to state that the only touchstone of such a legitimate expectation emerging from this speech was that the claimant had in the past been permitted to enjoy some benefit or advantage. Whether he could then legitimately expect procedural fairness, and if so to what extent, depended on the court's view of the demands of fairness in the particular case, which are likely to be higher when an authority contemplates depriving someone of an existing benefit or advantage than where the claimant is a bare applicant for a future benefit, although that was not to say that the latter was without any entitlement to fair play, as developing jurisprudence suggested that he too must be fairly dealt with, not least in the field of licensing.

20. Mr. Randolph also relied on the approach of Laws LJ in R (Bhatt Murphy) v Independent Assessor (2008) EWCA Civ 755 in which, at paragraph 50, he said:

> "The power of public authorities to change policy is constrained by the legal duty to be fair…If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetuate an abuse of power."

This, he submitted, was precisely the position of the small group of fishing companies that had applied for a licence in the past. The duty to consult was heightened by the significant value of a licence if awarded.

21. Mr. Woolgar submitted that it was important to remember that Quark was not denied the renewal of a licence which had hitherto been automatically granted. Quark was a bare applicant and, as such, had to make a fresh

application each year, in which the nature and extent of compliance with the various criteria had to be made out, so that such could be assessed against that of other applicants, the number and identity of which may vary each year, as may the number of licences available. Quark, at the time of its 2012 application, was deriving no substantial benefit under the licensing policy. Its 2011 licence had been time-limited and had expired. The fact that it had received a licence in previous years created no precedent. It had no statutory entitlement to a licence, nor any guarantee of a licence, and an applicant had to sign a declaration that he understood that on the application form. Quark, therefore, had no expectation other than that its application would be considered, along with all the other applications, fairly. Simon Brown LJ's judgment and tentative asides in brackets in Devon County Council did not establish that a secondary procedural legitimate expectation arose in such a case, for which there would need to be a clear dictum. No one, despite his prediction as to development of jurisprudence, had subsequently taken up, and grappled with, the idea that a proposal to deny an ability to attain a prospective benefit, as opposed to a proposal to withdraw an existing benefit, can give rise to a secondary procedural legitimate expectation to be consulted. He referred to the more recent case of R (BAPIO Action Ltd) v Secretary of State for the Home Department (2007) EWCA Civ 1139, in which Sedley LJ, stated at paragraph 43:

> "The real obstacle which I think stands in the appellant's way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policies, albeit subject to such constraints as the law places upon the process and the product. One set of constraints in modern pubic law are the doctrines of legitimate expectation, both procedural and substantive."

Sedley LJ went on to state that it was not unthinkable that the common law could recognise a general duty of consultation in relation to measures that were going to adversely affect an identifiable interest, but the potential implications of doing so were a reason to be cautious, and to require introduction by Parliament and not the courts.

22. Mr. Woolgar stressed that it is not the law that every longstanding policy cannot be altered without prior consultation. In fact there is no general duty of consultation at common law, even with persons who may be adversely affected by a change in policy, even though to do so may be best practice. He relied on an earlier passage of Laws LJ in Bhatt Murphy, where, at paragraph 41, he opined:

> "...a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically…enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (BAPIO paragraph 43) as the entitlement of central government to formulate or re-formulate policy."

He continued at paragraph 49:

> "I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally there can be no objection to that, for it involves no abuse of power…one would expect at least to find an individual or group who in reason have substantial grounds to expect the substance of the relevant policy will continue to enure for their particular benefit."

23. Mr. Woolgar submitted that these comments were applicable to the present case, where, in reassessing the weighting of the criteria, the Director was exercising his discretion as to the content and pace of change, and the law did not require him to consult potential interested parties each time he did so. If it did, his effective administration of the fishery would be seriously undermined. He suggested that, although judges had been battling in the foothills to determine the circumstances in which a secondary procedural legitimate expectation will arise, all such cases had involved applicants that were deriving benefits which supported an enduring or continuing state of affairs, which benefits had been completely withdrawn. Further, he submitted that the authorities established that a duty to consult, based upon a secondary procedural legitimate expectation, only arose in the most extreme circumstances, and that there were good reasons for this, as it was important that the doctrine of legitimate expectation was not so extended as to cause a decision-maker to opt for safety and consult wherever there was doubt as to a duty of consultation, with the resulting detriment to the efficient conduct of public business.

24. I accept that Quark considers that it has been disadvantaged by the changes in the weighting of the licensing criteria and that the value of its

participation in the fishery has thereby been reduced. However, the Court has to consider this matter from the decision-makers' perspective, and must not confuse outcome with process. Any change is likely to be regarded as benefiting one and disadvantaging another. The question for the Court is whether, in the circumstances of this case, it was unlawful to make the changes without consulting those likely to be affected by them. Neither the fact that the Director considered whether consultation should take place, nor the Cabinet Office principles of consultation, are determinative. What is determinative is whether I am satisfied that a secondary procedural legitimate expectation to be consulted arose in this case. Despite Quark's longevity as a participant in this fishery and the repeated grants of a licence to the Jacqueline, these had not generated any right to a licence, or any expectation that it would automatically be granted one, nor did it have an expectation that the criteria would not be changed. In 2012 all that it had was the ability to apply for a fresh licence and an expectation that its application would, along with all the others, be considered fairly. Even if a secondary procedural legitimate expectation can arise in respect of a prospective benefit of a bare licensee, in respect of which there is presently no precedent, I accept that that there are cogent reasons, relating to effective administration, as to why such should arise only in the most restricted circumstances. If the circumstances in the present case were sufficient to give rise to a duty to consult, that would mean that a duty to consult would arise in very many cases, including in this case each time that the Director wished to change his criteria. Such would, I believe, be an undesirable extension to legitimate expectation which, in its present state, the law does not support. Accordingly, having considered the authorities, and the arguments based upon them, I am not satisfied that Quark's factual situation gave rise in law to a legitimate expectation, and this Ground is rejected.

Ground 2

25. This alleges a misapplication by the Director of the advice given to him by the Secretary of State for Foreign and Commonwealth Affairs, and a failure to take into account a material consideration when considering Quark's application.

26. The advice was contained in letters from the FCO dated 22 February and 2 March 2012. They followed earlier communications, which are detailed in paragraphs 51 to 56 of the Director's affidavit, commencing with the Director's letter of 27 December 2011 in which he informed the FCO that, having set the TAC for the 2012 toothfish season at 1850 tonnes, he had indicated in the *Information for Applicants* that a maximum of six licences would be offered. Eleven applications had been received, three of which were from United Kingdom/United Kingdom Overseas Territory flagged vessels (which I shall refer to as UKOT vessels). However, the owners or operators of a Spanish flagged vessel had indicated an intention, if awarded a licence, to reflag it to the Falklands for the duration of its stay in the SGSSI maritime zone, and subsequent correspondence related to whether the Director should treat it as a

UKOT or a Spanish flagged vessel. Ultimately the Director decided that it should be treated as a Spanish flagged vessel and no criticism is made of that decision. Whether a vessel was regarded as UKOT or foreign flagged was important as in the *Information for Applicants* it is specifically stated, on no less than three occasions, that the Director reserved a right to give preference in the allocation of licences to UKOT vessels. Therefore, as I described it at the leave hearing, he reserved the right to consider an application of a UKOT vessel on a non-level playing field, simply because it was UKOT flagged.

27. The FCO's advice, contained in Jane Rumble's letter of 22 February 2012, was that the FCO was content with his proposal as to the number of licences to be granted and continued:

"We note that GSGSSI normally distributes the licences between UK/UK(OT) and foreign flagged vessels at a proportion of around one third to a half of the total licence allocation reserved for UK/UK(OT) vessels, and that this has enabled a good distribution of licences to foreign vessels whilst supporting continued United Kingdom Flag State engagement in the industry. This year you are advised to reserve a minimum of 2 licences for UK/UK(OT) flagged vessels when deciding upon your allocation."

28. She then advised him that one licence should go to one of the two New Zealand flagged vessels and one to the Chilean flagged vessel. She continued:

"In respect of the remaining licence allocation you are advised to give equal priority to vessels flagged to Norway, South Africa, Spain, the second New Zealand flagged vessel, the Spanish flagged vessel whose owners or operators intend, if she is awarded a licence, to reflag her to the Falkland Islands for the duration of her stay in the SGSSI Maritime Zone, and any remaining unlicensed UK(OT) flagged vessel."

29. It is to be noted that the remaining licence is referred to in the singular whereas, if only two, namely one third, of the licences were awarded to UKOT vessels, there would be two remaining licences. However, if three, namely one half, of the licences were awarded to UKOT vessels, there would be no UKOT vessel in the remaining group.

30. Perhaps understandably, the Director sought clarification by telephone, and he received a letter from Mr. Jansen dated 2 March 2012. This confirmed that the intention was to refer to the remaining licence(s), depending on whether he had initially awarded two or three licences to UKOT vessels. Mr. Jensen also confirmed that the advice to reserve a minimum of 2 licences to UKOT vessels applied to the three existing UKOT vessels, and not to the Spanish flagged vessel that intended to reflag, which had been put into the remaining group of vessels.

31. The advice to the Director, therefore, was that there was a two stage process. In the first reservation of licences stage, he was to decide whether to award a licence to two or all three of the UKOT vessels and, if he decided at that stage not to award a licence to one of the UKOT vessels, that vessel was to be considered again at the second equal priority stage, when it would rank equally with the remaining vessels, once the obligatory award of a licence to a New Zealand flagged vessel and the Chilean flagged vessel had been made.

32. The Director's reasons for not awarding a licence to the Jacqueline are contained in his letters to Mr. Summers dated 6 March and 6 April 2012. In the former he stated that, as the FCO advice obliged him at the outset to reserve a minimum of two licences to UKOT flagged vessels, he awarded licences to the two highest scoring UKOT vessels, of which the Jacqueline was not one. He then awarded a licence to the highest scoring New Zealand flagged vessel and to the Chilean flagged vessel. That left two licences to be allocated amongst the remaining pool, which he awarded to the two highest scoring vessels. The Jacqueline was the fourth highest scoring vessel in that pool and, with a score of 12 points, was eighth overall. In information provided during the hearing it was revealed that two vessels scored 18 points, one scored 17, three scored 16 and one scored 14.

33. In his April letter the Director stated:

"Last year the Jacqueline benefitted from the fact that I gave preference in the allocation process to the three applications which the GSGSSI had received in respect of UK/UKOT-flagged vessels. As I said in my letter of 6th March, this year the advice I received obliged me to reserve a minimum of two licences to UK/UKOT-flagged vessels, and the Jacqueline did not benefit from that preference because it was exercised in favour of the two highest scoring UK/UKOT-flagged vessels."

34. It was argued that in making these assertions, the Director was in fact admitting that he had not considered whether to reserve a licence for the Jacqueline at the first stage. However, in his April letter he continued:

"I accept that GSGSSI had the discretion to grant a licence to the Jacqueline, and I understood that clearly at the relevant time. I could have reserved a third licence for a UK/UKOT-flagged vessel but, given the relatively low score of the Jacqueline, decided not to do so."

35. At paragraph 34 of the Application it is asserted that, if the only circumstance in which the Director would have exercised his discretion in favour of the Jacqueline was if she had scored within the top 6, he had not considered whether to give her preference as a UKOT vessel, and so had misapplied the FCO advice.

36. In paragraph 62 of his affidavit the Director denies that the Secretary of State's advice required him to consider granting a third licence to a UKOT flagged vessel irrespective of scores. It contained no express instructions to that effect and left the decision as to whether to award just 2, or 3, licences to UKOT vessels to him, and left the judgment as to how to make that decision to him. Having selected the 2 highest scoring UKOT vessels he states:

"I duly considered whether to give preference to the third UK/UKOT-flagged vessel – that is to say that I considered whether to exercise the right reserved by our policy to give preference to UK/UKOT-flagged vessels by awarding a third licence to a third UK/UKOT-flagged vessel. "

37. He goes on to explain that he did not do so because of her relatively low score, and continued:

"I would accept that the right reserved by our policy to give preference to UK/UKOT-flagged vessels would enable a licence to be awarded to UK/UKOT-flagged vessel no matter how poorly her application had scored, but I do not think that this means I must disregard UK/UKOT-flagged vessels' scores every time, and I certainly do not consider that the Secretary of State's advice required me to disregard the Jacqueline's score on this occasion."

38. Quark's challenge, set out in Mr. Randolph's skeleton argument and further developed in oral argument, related to the first stage of the Director's consideration. The use of the word "minimum" meant that he was obliged at this stage to consider whether to reserve a licence to the third UKOT vessel. When so doing, it was not argued that he had to exclude all consideration of her scores, but what he could not do was to confine himself to that consideration alone, which is what he said he did. By so doing he in effect proceeded to the second stage, in which the Jacqueline was specifically stated to have no preference, before the first stage had been completed. At the first stage, therefore, the Director had to have regard to matters additional to her scores, relevant to her status as a UKOT vessel. For example, he should have had regard to international implications and sensitivities, referred to in paragraph 29 of his affidavit, and what ramifications the failure to reserve a licence to the third UKOT vessel might have upon them. As a result the Director failed, at the first stage, properly to take into account a material consideration, namely whether she, as a UKOT flagged vessel, should receive a preference. That failure made his decision in respect of the Jacqueline unlawful.

39. Mr. Woolgar submitted that it was obviously open to the FCO to decide that, for political reasons, it wanted half of the vessels in the 2012 fishery to be UKOT vessels. It did not do so. From the foreign policy point of view two was enough. As a result it was left to the Director to exercise a value judgment as to whether the third UKOT vessel should be given preference, and that is what he did by reference to its relatively low scoring. Nothing in the FCO advice

prevented him from so doing, nor was it Wednesbury unreasonable for him to have done so.

40. In determining this Ground, it seems to me important to note that a UKOT vessel was not entitled to a licence unless the FCO advice said so. No complaint is made of the Director's allocation of the two licences, that had to be awarded to UKOT vessels, to the two that had the highest scores. I accept that the decision of whether to exercise his right to prefer the third UKOT vessel was a real one and one that was left to the Director, as were the criteria upon which he made his decision, as is made clear in Jane Rumble's affidavit. I do not consider that these involved considering international political sensitivities or ramifications. That had been the task of the FCO, and was the reason that the Director had to seek and follow its advice. The Director's task was, as he states in his affidavit, to operate a high quality fishery by encouraging high quality applicants, including UKOT vessels. To this end, exercising his expertise, he awarded scores under various criteria in order to be able to judge the quality of an applicant. Having done so, he was unable to find that the score of the Jacqueline, when looked at relatively against the other applicants, justified him in reserving her a licence, even when considering her on the non-level playing field in which a UKOT vessel could be judged less harshly than a foreign flagged vessel. I am satisfied, therefore, that he considered the Jacqueline's application in the context of whether he could justify reserving a licence for her on the basis that she was a UKOT vessel. I am not satisfied that, because he considered only her relative low score at the first stage, he should be taken as having proceeded directly to the second stage, even though her actual score meant that she had no chance of being awarded a licence at the equal priority stage. Accordingly, I am unable to find that he misapplied the FCO advice or that he failed to take into account a material consideration. This Ground therefore fails.

Ground 3

41. In the light of my finding under Ground 1 as to "loyalty" in the fidelity sense, "loyalty" in Ground 3 falls for consideration in its wide sense of track record, historical involvement and experience. Under this Ground it is alleged that the applicants had a substantive legitimate expectation that the Director would not alter the weight that he gave to these factors without giving them sufficient notice, by way of transitional provisions, so that they could consider their position. The two weeks notice that they received of the Director's intention to give a maximum score of only 3 to the "Experience" criterion was, it was submitted, quite insufficient. Further, it is alleged that his actual scoring of the Jacqueline under this criterion was Wednesbury unreasonable.

42. In relation to the first allegation, Mr. Randolph relied on the dicta, at paragraph 47, of Sedley LJ in R v MAFF ex parte Hamble Fisheries (Offshore) Ltd. (1995) 1 C.M.L.R. 533 at 552:

> "The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusion. While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy). To postulate this is not to place the judge in the seat of the minister…it is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it."

43. Mr. Woolgar, by reference to ex parte Baker, and R v North and East Devon Health Authority ex parte Coughlan (2001) QB 213, pointed out that the doctrine of substantive legitimate expectation normally required a clear and unambiguous representation akin to estoppel. Under Ground 3 it was alleged that a substantive benefit arose from the continued operation, unaltered, of a policy. The Court had to be careful to distinguish between a legitimate expectation that a policy will continue and an ordinary expectation that it will do so. This was made clear by Laws LJ in Bhatt Murphy at paragraphs 34 and 35:

> "It seems to me, however, that on the face of it the existence of a promise or practice of present and future policy serves as a somewhat fragile boundary by which to set limits to substantive legitimate expectations. Once set in place, every policy of a public authority, not subject to a terminal date or terminating event, may no doubt be expected to continue in effect until rational grounds for cessation arise. A promise of its continuance, if it points to no particular date or future event to mark the end of the policy, represents little more than this ordinary expectation. And nothing is added by referring to a practice of the policy in operation over time.
>
> In this context, then, the notion of a promise or practice of present and future policy risks proving too much. The doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy over an appreciable period. That would expand the doctrine far beyond is proper limits."

44. Laws LJ went on, at paragraph 43, to state that authority showed that a practice which is the genesis of a substantive expectation must constitute a specific undertaking, directed to a particular individual or group, by which the relevant policy's continuance is assured. There was no such undertaking in the present case.

45. I accept that submission. Although factors relevant to experience in the fishery had been taken into account for a number of years, and Quark may well have believed that such would continue, I am unable to find that there was ever any undertaking that the weighting of those factors would not change from year to year.

46. In relation to the second allegation, Quark argued that the award of only 2 points to the Jacqueline under “Experience” was woefully inadequate and so unreasonable that his assessment was vitiated.

47. The descriptions of the relevant criteria set out in Appendix B of the *Information for Applicants* relevant to this Ground, together with the Director’s comments as to how and why he scored the Jacqueline, contained in his letter of 6 March 2101, are:

1) **Compliance**. The compliance record of the vessel, her owners, charterers, and operators as recorded in South Georgia fisheries or recorded in, or ascertainable from published CCAMLR (Convention for the Conservation of Antarctic Marine Living Resources) tables, CCAMLR scientific observer reports, CCAMLR inspection reports, and other relevant documents, records and publications. Applicants will be given an opportunity to comment where the Director is minded to refuse a licence on the grounds of the compliance record of the vessel, her owners, charterers, and/operators (Maximum score 5).

(Score 5 out of 5. The Jacqueline has a good compliance record in the fishery and scored the maximum 5 points.)

3) **Catch Efficiency.** The ability of the vessel to catch efficiently whilst minimising by-catch. Applicants who have not recently fished in the South Georgia toothfish fishery should provide validated evidence of catch rates in other fisheries (Maximum score 3).

(score 1 out of 3. The Jacqueline’s average daily catch over 3 years was 2.5 tonnes. Vessels with over 3.5 tonnes per day were awarded 3 points, vessels over 2.75 tonnes were awarded 2 points, and vessels over 2 tonnes were awarded 1 point).

4) **Experience**. The experience in the fishery of the vessel, her owners, charterers and operators. This will include inter alia: previous contributions to fisheries science and previous contributions to the raising of standards in the fishery (Maximum score 3).

(score 2 out of 3. The Jacqueline had a long history in the fishery, but in that time she has made limited contributions to fisheries science and to the raising of standards)

48. The Director is criticised for considering that a vessel which has a perfect compliance record over the previous 5 years is just as likely to comply with the terms of its licence in the forthcoming season as one that has a longer compliance record. That was why vessels with considerably less experience than the Jacqueline had also scored the maximum of 5 points. As a result, Quark argued, its length of participation in the fishery was not adequately rewarded, even though it scored the maximum points under the "Compliance" criterion.

49. As for Catch Efficiency, as the Director had admitted that this was based on the average daily catch rate over a three year period, how, asked Quark, did track record form part of this criterion?

50. Further, as in the description of the "Experience" criterion past contributions to fisheries science are to be taken into account, which must have accounted for 1 point, that meant that he had reduced the points available for experience to 2, out of an overall maximum score of 19, which was derisory,

51. Quark had other concerns arising from the Director's remarks, such as his assertion that the length of participation of a vessel, being inanimate, was not as significant as the length of participation of the owners, charterers or operators, particularly as the "Experience" criterion specifically referred to the experience of vessels. In any event, the fact that a particular vessel had coped with the challenging conditions of the fishery must be of significance, and of more relevance, than the track record of a charterer who might bring to the fishery a vessel that had no track record in the fishery.

52. Mr. Woolgar pointed out that the Director had answered these criticisms in his letter of 6 April 2012 where he stated:

"Your analysis of the scoring system is incorrect in several respects. You appear to equate the track record of the Jacqueline with merely the number of years that she has been in the fishery, and by asserting that one of the three points which are available for Experience is reserved for science, you conclude that the Jacqueline's track record counts for just 2 points out of a maximum of 19. This is not so. Track record means much more than just the number of years in the fishery: track record refers to both the length and quality of participation in the fishery, and this is considered under "Compliance," under "Catch Efficiency" and under "Experience." It is not the case that one of the three points which are available for "Experience" is reserved for science."

53. In any event, these criticisms fell foul of one of the cardinal principles of public law, namely that the weight to be attributable to a relevant criterion was a matter for the decision-maker, unless it could be shown to have been Wednesbury unreasonable, in which the threshold of irrationality was a high one. A decision had to be shown to be so unreasonable that no reasonable decision-maker could ever have come to it. In the present case the evidence showed that

the Director had considered the length and quality of the participation of Quark and the Jacqueline in the fishery. The fact that Quark believed that this had resulted in an undervaluation was not something that the Court on a judicial review could enquire into, as such came nowhere near to the threshold of irrationality.

54. It seems to me important to consider the purpose and status of the descriptions of the criteria set out in the *Information for Applicants.* Their purpose is stated in the application form to indicate the information and evidence that should be provided, although the criteria were stated to be not exclusive, and it was specifically stated in the *Information for Applicants* that the Director could take into account any further matters that he considered to be relevant. Further, the application form had a specific box in which additional information in support of an application could be set out. There was nothing, therefore, to prevent an applicant from advancing anything in support of its application. In any event, although it may be argued that the descriptions of the criteria could be improved, it is not alleged that they failed to alert the applicants as to the significant factors that they needed to address in their application. The criticism is that the Director did not give them sufficient weight.

55. The status of the criteria was not that of a statutory provision. So far as the Director was concerned, they were not a shackle or straightjacket, but a guide, of his own devising, as to the considerations that he should take into account, having made a judgment as to their relative importance, when coming to an overall assessment as to the strength of a particular application, having regard to past and prospective performance in the fishery. These were all matters for his expertise, and I accept are not matters that a disappointed applicant can ask the Court to review, short of irrationality.

56. The Director's belief that performance over a 5 year period evidenced a likelihood of compliance in the forthcoming season, cannot be said to be an irrational one, neither can consideration of the experience of charterers etc. as well as that of a vessel. Further, the Director's reference to Catch Efficiency referred to the quality of participation in rather than experience in the fishery. As for the suggestion that he had allocated a point for past contributions to science under "Experience," the Director's evidence was that this was a wrong assumption.

57. Having considered the submissions that have been advanced under this Ground, I am quite unable to find that the threshold of challenge has been established. In the result, this Ground fails.

<u>Ground 4</u>

58. This Ground alleges that it was Wednesbury unreasonable for the Director to have awarded only 1 point under the "Raising Standards" criterion.

59. The description of this criterion and the Director's comments in his letter of 3 March 2012, are as follows:

5) **Raising Standards**. The extent to which the participation of the vessel in the fishery is likely to contribute to the raising of standards of the fishery (for example, a vessel may contribute to the raising of standards by using equipment of a specification better than or adopting a working practice of a higher standard than that currently required by CCAMLR or GSGSSI) (Maximum score 3).

(Score 1 out of 3: The application in respect of the Jacqueline did not provide any evidence that her participation in the fishery would be likely to contribute to the raising of standards. I nevertheless awarded 1 point, because she caught larger than average-sized fish in 2011, though that fact had not been mentioned in the application).

60. It is submitted that the Director's assertion that Quark had provided no evidence that her participation would be likely to contribute to the raising of standards was quite simply wrong. It should be noted that the Director's contention was not that Quark did not put forward any evidence, but that what was put forward did not evidence a likely contribution to the raising of standards in the fishery. As this allegation is fact sensitive, it is necessary to set out the contentions in Quark's application under this criterion, and then the Director's responses to them. Mr. Summers stated as follows:

"Quark and the Jacqueline have been in the fishery since its earliest years, and have played a major part in the progressive development of higher standards in vessel safety, seabird conservation, compliance with conservation measures, and enhancing the profile and reputation of the SG fishery.
Our vessel has always been on the UK register, and has been a leader in vessel safety, including the availability of immersion suits before it was a requirement. The vessel has been in compliance with the Torremolinos Convention by virtue of her MCA inspection and safety requirements.
We have contributed to seabird mortality avoidance, including installation of the water spray system and a number of sink rate tests to develop best practice.
The standards of fish preparation on the Jacqueline had always been of the highest standard, creating a good reputation for SG toothfish in the market. It remains sought after by key buyers. We joined the MSC certification scheme at its inception, and have provided positive support of its development.
We have been a forerunner in finding ways to avoid depredation of stocks by killer whales and sperm whales, and will continue to work with whatever methods prove most successful.
We have carried out all scientific work allocated to us in a timely manner, and provided good support to CCAMLR observers. Provision has been made for a single cabin for the observer."

61. In the additional information box it was stated that further information was contained in the covering letter. This was a reference to Mr. Summers' letter of 23 December 2011, in which he referred to: an intention to take continuing measures to improve hook deployment and whale avoidance measures; the reconfiguring of the vessel's hydraulics to alter its sound to avoid attracting whales and the continued development of the Orcasphere; the occasional deployment of the umbrella system, its experience of which was attached in an annexe, if necessary bearing in mind the growing whale depredation system, if such did not significantly cut into catch rates; the use of a system of cutting the fish that achieved the CCAMLR conversion factor. He also stated that Quark was ready to participate in developing new methods to improve ecological protection standards in the longline fishery, and would be willing to make recordings with a deep water camera to which it had access, to observe line interaction and seabed benthos, and would like to discuss with the Director how best to make use of it. He referred to the introduction of electronic label reading facilities in 2011 which it was intended to continue to develop.

62. Following notification that the Jacqueline had not been awarded a licence, Mr. Summers met with the Commissioner and the Director, and on 20 March 2012 he wrote to the Commissioner complaining of the score that had been awarded under the "Raising Standards" criterion. He pointed out that Quark was a fishing and not a scientific research company, but it was more than happy to take part in any science programme to support the fishery, and had made this clear in the past 2 years. The response had been that GSGSSI would consult MRAG (Maritime Resources Assessment Group) and advise, but no advice had been received. When the offer to use the deep water camera had been made the previous year it had received the same response.

63. The Director responded in his letter of 6 April 2012, asserting that very limited evidence had been provided under the "Experience" criterion as to Quark's previous contributions to the raising of standards, and that the umbrella system had produced only inconclusive results thus far. Under the heading "Raising Standards" he continued:

"(n) Raising standards is not principally about science activities, and I regret it if you formed this impression from our recent meeting. There are a range of ways in which standards can be raised – for example by adopting measures to improve safety, or which avoid or mitigate environmental impacts, or which improve the overall sustainability of the fishery. Ideas that improve our scientific capacity will also be considered, but they are certainly not the only way of raising standards. In your application form, you gave no indication of how the participation of the Jacqueline in the fishery would raise standards. I agree that Quark is not a scientific company, but then neither are the operators of other vessels, and yet many of them have made and continue to offer to make significant scientific contributions, including provision of expert scientists on their vessels and

extensive scientific research, including the making of scientific reports to CCAMLR and GSGSSI."

64. After Mr. Summers had sent to the Director draft grounds for judicial review, Ros Cheek, the Head of Legal Services, having obtained the Director's instructions, responded by a letter dated 3 May 2012, the contents of which the Director accepts in his affidavit. She stated that the Director could find nothing in the letter accompanying the application to support the raising of standards and that the Director wished to make the following points:

1. It was clear to the Director that you were seeking permission to fish with trotlines and umbrellas entirely at your discretion in the forthcoming season. You were expressly declining to carry out any trials using trotlines and umbrellas…you were not proposing ...to make any identifiable modifications to the umbrella system; in particular, although you acknowledged in Annexe II that the umbrella system causes damage to fish from adjacent hooks, you merely stated "this is an issue we would like to work on..." and you did not address the damage the umbrella itself can cause to the fish held against the umbrella as the line is hauled in. "None of these matters constituted evidence, in the judgment of the Director, that the participation of the Jacqueline was likely to raise standards of the fishery."

2. Although you expressed a readiness to participate in improving ecological protection standards and to consider other experimental work "you identified no new methods or experimental work yourself and accordingly the Director took the view these were purely passive offers which did not merit any weight."

3. Deep water camera systems of your type have previously been trialled in the fishery, without tangible results and hence, as you will know, GSGSSI has purchased and already uses a more sophisticated camera system to monitor line interaction in the fishery. "Accordingly in the judgment of the Director the offer to deploy (your) camera did not merit any weight."

6. You referred to introducing electronic label reading facilities in 2011 which you would continue to develop. "Almost all the vessels in the fishery have been using electronic label reading equipment for several years now: the Jacqueline has been, in fact, a late adopter of such equipment. Accordingly in the judgment of the Director this particular aspect of your application did not suggest that the participation of the Jacqueline would be likely to raise standards in the fishery."

65. Quark argues that, as the criterion of "Raising Standards" does not mention science activities, whereas the "Experience" criterion does refer to previous contributions to fisheries science, it is understandable that Quark did not

refer to such under “Raising Standards.” However, as he took the same into account in relation to other vessel operators, he discriminated unfairly against Quark. Further, by considering that her contributions to science referred to under the “Experience” criterion were of limited value, Quark had been penalised twice. In his affidavit the Director stated that he was entitled under the “Raising Standards” criterion to take account of any scientific proposals, and that if he had not taken them into account there, he would have considered them anyway, as he was entitled to do, to the extent that he found them persuasive and cogent.

66. Quark also submitted that the description of its offer as purely passive was entirely unfair. The criterion required the applicant to put forward proposals. To say, “you tell us what to do and we will do it” was a proposal that should not have been devalued in the way the Director sought to devalue it. It was argued on behalf of the Director that he was under no duty to take measures to improve Quark’s application, and his judgment that the offer was a passive one unlikely to result in a raising of standards in the forthcoming season could not be said to be Wednesbury unreasonable. He was entitled to come to a similar view in relation to the offer of a camera, as the offer was one that Quark simply sat on, whereas it could have taken proactive measures to move its offer forward, in the absence of which it was unlikely to raise standards in the fishery as a whole, which was the test, not a likelihood that Quark may improve its individual performance.

67. Mr. Woolgar correctly submitted that the “Experience” criterion looks back, and specifically refers to previous contributions to raising standards, whereas the “Raising Standards” criterion clearly looks forward. He argued that, by inference, the latter included anything in the future relevant to raising standards, including science. If such was so obvious, submitted Mr. Randolph, why did the Director award a point based on the catch of the Jacqueline in the 2011 season? The response was that this reflected the Director’s ability to take into account any further matters, even though such were not contained in the written application, and, if the Director had been mistaken in so doing, that was hardly something of which Quark could complain.

68. Although the description of the “Raising Standards” criterion refers to contributions that were likely to contribute to the raising of standards of the fishery, and so looked to the future, I consider that it was understandable if an applicant referred to past contributions, if such were to continue in the future, in the hope that they would be considered to be likely to contribute to the raising of standards in the forthcoming season. I can also understand why Quark would consider that his evaluations were harsh and appeared to belittle its past contributions over a number of years, during which it had successfully performed in the fishery, as well as its proposals and offers for the future.

69. However, I do not understand Quark to allege that any submissions that it put forward, whether past or future, were not considered by the Director. Once again the Court has to remind itself that those evaluations involved

considerations of judgment and weight based on his experience of and expertise in the fishery. Unless it can be shown that they involved irrationality on his part, the Court must not, and indeed cannot, try to evaluate his evaluations. Although the expression of his valuations could have been more diplomatically phrased, I am unable to find on the evidence before me that any of them satisfied the threshold of Wednesbury unreasonableness.

Costs of the Leave Hearings.

70. Quark's original application for leave, filed in June 2012, contained 6 grounds. In determining that application I considered that I would be assisted by an oral hearing at which the putative respondent was represented. On 2 July 2012 I ordered that such should take place but, due to the unavailability of counsel, this was not heard until 19 September 2012. Following that hearing, I extended the time for the bringing of the Application, refused leave in relation to two of the grounds, but granted leave for the remaining four and gave reasons for so doing in a Ruling dated 21 September 2012. I ordered that the substantive hearing should commence in Stanley on 27 November 2012, and made orders preparatory thereto. I am quite satisfied that this hearing was necessary to my consideration of whether leave should be granted.

71. In my ruling in relation to what became Ground 2, I stated that, in the light of the documentation and the submissions that had been made, I considered that the allegation that the Director had misapplied the advice that he had been given by the Secretary of State merited further consideration at a full hearing. I was conscious that at this stage no affidavit evidence had been filed in relation to this issue, and so was somewhat circumspect as to the content of my Ruling. Mr. Scannell, counsel for Quark, submitted that once I had granted such leave, there was no need for Quark to amend that ground, as such was necessary only where a different or additional ground was alleged. However, I believe that it is vital that the statement of facts and grounds upon which leave is granted in a judicial review, and therefore upon which arguments are to be advanced at the substantive hearing, are clear. Both the Applicant and Respondent need to know the case that they respectively are able to advance or have to meet, and the Court needs to know the issues that it has to try. If such is not the case, a great deal of unnecessary preparation and argument can result. The leave hearing gave the Court an opportunity to ensure that such did not occur in this case. Unusually, that took three hearings, but I am satisfied that both parties benefited from the clarification as to what could and could not be advanced at the Stanley hearing.

72. When the Notice of Application was redrafted, additional paragraphs in relation to what was to become Ground 2 had been added, which alleged that the Applicant's legitimate expectation that priority would be accorded to UKOT vessels had been breached, and the Director had misapplied the Secretary of State's advice. There was no amendment alleging a failure to take into account a

material consideration, as had been posited at the first hearing. As a result the Respondent objected and a further hearing took place on 5 October 2012, at which extensive further discussion took place as the basis upon which leave had been granted. Draft amendments and deletions were considered, in relation to which I granted leave to amend. I offered to initial these, but counsel considered this to be unnecessary. In addition, I refused leave to the Respondent to appeal the granting of an extension of time. When the amended grounds were re-drafted, the Respondent again objected that such did not conform to my Order. The Applicant did not agree, and so a third hearing was necessary to resolve the matter, which was held on 26 October 2012. At this hearing it was agreed that the heading of the Ground should be amended and what was to become paragraph 33A should be added, and this was set out in my further Order granting leave to amend. I was then satisfied that Ground 2 accurately expressed the basis upon which leave had been granted. It was accepted that there was a lot to cover at the substantive hearing, as this Judgment amply demonstrates, and its time estimate was increased.

73. In respect of each hearing I ordered that the costs of and occasioned by them should be considered at the Review hearing, at which Mr. Scannell submitted that Quark should receive its costs in any event, as the need for these hearings resulted from the Respondent's unreasonable refusal to agree to the Grounds as drafted and re-drafted. Mr. Woolgar submitted that the Respondent should have his costs of these applications, as such resulted from a persistent attempt by Quark to resist clarity with the intention of preserving the widest possible basis upon which to challenge the Director's decisions. The normal rule, he submitted, was that the party which sought an amendment should pay for it.

74. The award of costs is a matter for my discretion. Having considered the submissions that have been made, I am quite satisfied that these hearings were necessary to enable a fair hearing of the issues to take place. In so far as it may be argued that such resulted from the stance being adopted by a party, I would attribute that equally between the parties, and I am certainly not satisfied that either party was being deliberately unreasonable. In the result, although I have found that the Judicial Review Application has failed, I consider that in relation to these preliminary hearings the appropriate order is that each party should bear its own costs.

Christopher Gardner QC
Chief Justice
16 January 2013