



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 3
P162/17

Lord Justice Clerk
Lord Menzies
Lady Clark of Calton

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

SIMON BYROM

Petitioner and Reclaimer

against

THE CITY OF EDINBURGH COUNCIL

Respondents

and

DREAMVALE PROPERTIES LTD

Interested Parties

Petitioner and Reclaimer: Anthony Engel, Lay Representative
Respondents: Armstrong QC; City of Edinburgh Council Legal Services
Interested Parties: JDC Findlay QC, Burnet; DLA Piper Scotland LLP

10 January 2018

[1] At the outset of the hearing, the court indicated that it was willing to grant the reclaimer's motion to allow him lay representation from Mr Anthony Engel, to advance any

relevant arguments relating to the only three issues which had been argued before the Lord Ordinary. Those issues were:

- (1) whether the respondents had special regard to the impact of the development on the conservation area, specifically in relation to the Edinburgh Central Library and its setting, the argument being predicated on the effect of the development on views from the library;
- (2) whether the respondents had regard to the Category A listing and, if they did not, whether that was material; and
- (3) whether the respondents erred in their assessment of the air quality issue.

[2] The document purporting to set out the grounds of appeal contains numerous diffuse and unfocused complaints about planning policy and practice in general, the vast majority of which were not raised in the judicial review and cannot be entertained during the reclaiming motion. As was pointed out in the statement of reasons given on 4 January 2018 in refusing a motion for a PEO, these matters included:

- i general complaints about the planning legislation, practice and process, including the relevance of the Principles of Public Life;
- ii defects in the procedure in the particular planning process, including the advertisement of the development and consultation upon it;
- iii Edinburgh as a UNESCO world heritage site;
- iv the absence of an environmental impact assessment;
- v the safety of a service road;
- vi the loss of light to the Library; and
- vii an alleged failure of the planning officials to perform their public duty.

[3] These matters do not relate to the petition or to the decision to which the reclaiming motion relates. In relation to item vi, at the hearing of the judicial review it was specifically conceded on behalf of the claimer that this issue had not relevantly been raised in the petition.

[4] The primary focus of the purported grounds of appeal is the nature of the planning decision made by the respondents rather than the decision of the Lord Ordinary. As a consequence, the grounds repeatedly stray into issues relating to the merits of the planning decision, rather than the Lord Ordinary's decision about the legitimacy of the process. The nature of the document purporting to set out grounds of appeal is explained in more detail in the court's statement of reasons of 4 January. As was there pointed out, there seems to be a fundamental misconception about the limits of the court's jurisdiction on a petition for judicial review, and any associated reclaiming motion. Even where the grounds address the decision of the Lord Ordinary, that same misunderstanding is perpetuated. For example, it is contended that the Lord Ordinary was not presented with sufficient background to formulate a fully reasoned assessment of the case, and repeatedly deferred to the Council's planning report. The subsequent elaboration of this point suggests that the claimer expected the Lord Ordinary to deliver a decision on the merits. It also develops into arguments which were not part of the petition and which are not relevant for present purposes.

[5] The arguments advanced to the Lord Ordinary were limited in nature, and limited to the points which we listed at the outset. It was an inevitable consequence of the nature of the arguments presented to the Lord Ordinary, and the terms of the grounds of appeal, that Mr Engel was restricted in the arguments which he could present, recognising the difficulty in seeking to advance points of law which had not been taken before the Lord Ordinary. This was particularly acute in relation to his presentation of the first point. Nevertheless, he did his utmost to assist the court and to focus on any points of relevance which he could identify. We are grateful for his assistance.

[6] On the first issue, the impact on the Central Library, the Lord Ordinary correctly observed that there was material before the committee, from several sources, which had referred to the issue of views in the context of the setting of the Library. The fundamental question of what the impact would be was a matter of planning judgment for the committee, based on all the information before it. There was no basis for thinking that the committee had failed to have regard to all the material before it. As the Lord Ordinary concluded:

“This was one of a number of matters raised before the committee. In my view, the absence of specific reference to views from inside the library in the planning report and in the decision is an insufficient basis for a contention that the committee had failed to consider the matter. “

[7] On the issue of listing category, the decision to grant planning in this case was made in the knowledge that there was a proposal to upgrade the listing of the Library from category B to category A. The decision took into account the architectural value and setting of the Library. The Lord Ordinary noted that this was not a case of listing a previously unlisted building during the planning process, or even making an unexpected upgrade in listing, it was simply the implementation of a change which had already been anticipated. Furthermore, the Lord Ordinary concluded that:

“while the subject matter of listing or re-listing a building is capable of being a material consideration the facts relating to this application militate against it being characterised as such.”

She considered that in the absence of any adverse impact, the category of listing was not material.

[8] On the third point, essentially the argument advanced to us was that the committee reached a wrong decision on the issue of air quality because they accepted evidence before them that there would be minimal effect on air quality. On that issue, the committee was faced with two competing views, essentially based on differing interpretations of the same

data. The Lord Ordinary correctly concluded that reaching a decision on this was thus a matter “squarely within planning judgement”, the resultant decision being one that the decision-makers were entitled to reach on the evidence before them. There is no basis for considering that they ignored or misunderstood any of the evidence placed before them.

[9] We recognise that the claimer is a lay individual, and we have given careful consideration to the document in which he sought to specify grounds of appeal, and the arguments which Mr Engel advanced on his behalf. We have to agree with senior counsel for the interested party that essentially the claimer was seeking to re-run the arguments made to the Lord Ordinary without identifying errors of law in her decision. In paragraph 8 of the Statement of Reasons of 4 January the Lord President stated that the court “has been anxious not to decide the matter on the basis of form rather than substance”. We have endeavoured to follow that precept, but our function is to focus on alleged errors of law, not on the merits of the case. We have been unable to identify any alleged error in law on the part of the Lord Ordinary, or any other basis upon which her decision might be impugned. Accordingly, the reclaiming motion must be refused.