FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 30
P941/18

Lord President
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition of

COLIN LIDDELL AND OTHERS

Petitioners and Reclaimers

against

ARGYLL AND BUTE COUNCIL

Respondent

Petitioners and Reclaimers: J Campbell, QC, BBM Solicitors
Respondent: J Findlay, QC, McLean, sol adv; Brodies LLP

10 June 2020

[1] In this petition for judicial review the proprietors of Ardencaple House, an 18th century List B house at Clachan Seil, Isle of Seil, Argyll and Bute, seek reduction of a decision made by the local planning authority, namely Argyll and Bute Council, to grant planning permission for the erection of a single dwelling house at a site 1.5 km to the south of the property. The petition was refused by the Lord Ordinary - see [2019] CSOH 57. The petition sets out two grounds of challenge. In this reclaiming motion (appeal) against the decision of the Lord Ordinary, the first complaint is not maintained. The second was an

alleged failure by the planning authority to consider the desirability of preserving the listed building and its setting, contrary to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, section 59(1). That provision provides as follows:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, a planning authority or the Secretary of State, as the case may be, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

[2] Before the Lord Ordinary and again in this court it was stressed that, despite requests, the planning officer responsible for preparation of a report of handling which recommended the grant of permission, did not visit Ardencaple House. The key contention is that she failed to identify and define the extent of the setting of the property, thereby disabling herself from a valid exercise of the statutory duty imposed by section 59. It is submitted that the affidavit of the officer, which was lodged after commencement of the present proceedings, confirms that an essential fact finding element was omitted, thus the decision of the authority, which was based upon her report, is subject to a fatal flaw.

The decision of the Lord Ordinary

[3] The Lord Ordinary noted that, amongst other things, the planning officer visited a position halfway between the house and the development site. In the affidavit she gave satisfactory reasons for her view that the proposal would not affect either the house or its setting. Whether it was necessary to visit the house was a matter for her. In *Simson* v *Aberdeenshire Council* 2007 SC 366 it was confirmed that it is for the planning authority to determine whether the threshold for the application of the statutory duty had been crossed. The decision was that the proposed development would not affect the listed building or its

setting. It followed that the duty to have special regard to the desirability of preserving the house or its setting did not arise

The background circumstances

[4] Before considering the submissions made to this court it is appropriate to provide further detail as to the background to the legal challenge. In her report of handling the planning officer made reference to an objection lodged on behalf of Ardencaple House by a firm of chartered surveyors which offers professional services on, amongst other things, planning matters. She noted that the relevant objection was as to landscape impact. A full landscape and visual assessment should be obtained. The site was at a high point and the dwelling house would have a significant adverse visual impact on the landscape. It should be rejected in principle. The development would be particularly noticeable when viewed from Ardencaple House. It would be visible on a ridgeline, being the only man-made feature in an otherwise natural panorama. Consideration should be given to a landscape study undertaken as part of the 2009 local plan which identified that views out of Ardencaple House are of particular importance. The continuation of those views would include the proposed dwelling house on the skyline.

[5] In response, the planning officer noted that no designation required there to be a landscape and visual impact assessment. The site does occupy a relatively high point in the landscape and is part of a wider area of panoramic landscape quality. It was at the same level as existing development and would be seen against the rising hills to the south, which would provide a suitable backdrop against which the proposed dwelling house will be appropriate within its local and wider landscape context and in accordance with the existing settlement pattern. The purpose of the 2009 study was to identify those Rural Opportunity

Areas (ROAs) which could accommodate future development. Some of the ROAs were removed. The application is in an area of defined settlement which has never been in an ROA. The 2009 study referred to Ardencaple House in the context of its setting to the north of a specific landscape compartment, LN61. The application site is approximately 1km to the east of LN61 within an area of defined settlement. It is some 1.5km south-east of Ardencaple House. The landscape impact of the proposed development had been carefully assessed and it was not considered that a single dwelling house within the defined settlement would have any material harmful impact on the landscape.

The planning officer's affidavit

[6] As already noted, the petition complained of an alleged failure to consider the desirability of preserving the listed building and its setting, contrary to section 59 of the 1997 Act. In response the planning officer lodged an affidavit, which can be summarised as follows. The officer was aware that Ardencaple House is listed. She was familiar with the proper approach to developments which might affect a listed building or its setting, including the relevant guidance and the duty set out in section 59. In 2014 the listed building was not identified as a likely restraint on development because of its distance from the existing settlement. In the context of a subsequent pre-application site visit the officer considered the proposed development from a number of locations at the site and the roads surrounding it. She noted that Ardencaple House was visible from the site at a considerable distance. She assessed matters from an agricultural building adjacent to the access road to the house. This position is halfway between the development site and Ardencaple House. She was satisfied, having regard to the distance between them, namely 1.5km, the character of the landscape and landform between the house and site, and its topography, that the

development would not affect the house or its setting, and that the presence of the house was not a restraint on the development. She was aware of the duty under the Act. The development was not within the setting of the house. The desirability of preserving the house or its setting was not a determining issue, therefore she did not require to address the matter in her report. The landscape had the capacity to absorb the development. After discussion with her area team leader it was decided that it was not necessary to visit Ardencaple House itself. The matter had been comprehensively assessed on previous site visits.

The petitioners' submissions

[7] The petitioners submit that the planning officer's report of handling misleads by omission. She did not equip herself with the necessary material facts upon which a proper professional judgement could be made. She did not identify the extent of the setting of Ardencaple House, therefore she could not understand the relationship among the house, its setting, and the proposed dwelling house; nor apply the test in section 59. She disabled herself from carrying out a valid assessment as to whether the proposal would affect the setting of the house. She did not pay special regard to the desirability of preserving its setting. It followed that her conclusion was *Wednesbury* unreasonable.

[8] The officer wrongly asserted that the new house would be at the same level as the existing built development nearby. If it was on the same level, it would not be visible from Ardencaple House, and therefore could not impact upon it. The Lord Ordinary wrongly considered that he did not require to resolve this issue. Furthermore the officer could not reasonably consider the hills to the south, which are some 5km distant, as being a visual "backdrop" to the development. Her conclusion was based on erroneous facts. The Lord

Ordinary erred in equating the decision with an exercise of planning judgement. He identified reasons for the officer's conclusion when none were stated. As a generality it was accepted that an assessment of the extent of the setting of the listed building is a matter of planning judgement, but it must be based on accurate facts flowing from the necessary investigative steps.

[9] It was submitted that the planning officer simply concentrated on the distance of the proposed development from the listed building. The Lord Ordinary allowed a failure to investigate the facts in a proper manner to be subsumed by the "mantra" of planning judgement. In both written and oral submissions reference was made to a number of authorities including *East Northamptonshire District Council* v *Secretary of State for Communities and Local Government* [2013] 2 P & CR 5, Lang J at paras 45/47; *Tesco Stores Limited* v *Dundee City Council* 2012 SC (UKSC) 278, Lord Reed at paras 17/21 and Lord Hope at paras 34/35; *Barnwell Manor Wind Energy Limited* v *East Northamptonshire District Council and Others* [2015] 1 WLR 45; *Simson* v *Aberdeenshire Council* (cited above); and *Catesby Estates Limited* v *Steer* [2019] 1 P & CR 5 at paras 28/30.

The submissions for Argyll and Bute Council

[10] The petitioners' second plea-in-law proceeded on the incorrect basis that the terms of the 1997 Act had been ignored. In any event the planning officer was not required to define the setting of the listed building. She concluded that the proposed development would not affect the house or its setting. The petitioners have provided no expert evidence as to the nature and extent of the setting of Ardencaple House. It is not for counsel to make assertions on the subject.

[11] It has always been acknowledged that, unlike the other houses in the settlement, the proposed dwelling house would appear over the ridgeline when viewed from Ardencaple. However, it would not break the skyline. There is no factual error as to the backdrop provided by the hills to the south; just a difference of opinion as to their efficacy in minimising the visual impact. The petitioners' challenge is to matters of planning merit or judgement. No error of law or *Wednesbury* unreasonableness has been demonstrated.

[12] It is for the planning authority to decide on the amount of information it requires and to identify the determining issues. The purpose of a planning officer's report is to summarise the relevant policy guidance, identify the issues to be determined, and summarise the material and arguments on the basis of which the decision should be made. The officer exercises judgement on how much and what information should be in the report. The relevant case law demonstrates that whether a proposed development would affect the setting of a listed building is very much a matter for the planning authority. A number of authorities were cited in support of the above propositions.

[13] Having made three site visits the planning officer reached the view that the proposed dwelling house would not affect the setting of the listed building. This decision was informed by the relevant guidance. It is unsurprising that it was not mentioned in the officer's report. No-one, and this includes the owners of Ardencaple House and their planning consultant, had referred to an impact on the setting of the house. No professional evidence has criticised the officer's approach or her conclusions. There is no guidance or rule that a listed building must be visited in order to assess impact on its setting.

[14] Counsel for the planning authority referred to the two stage process for consideration of the impact of a development upon a listed building, all as described by Lord Abernethy in *Simson* at paragraph 17. In the present case the analysis did not require

to proceed beyond the first stage, namely of assessing whether there would be an effect on the listed building or its setting. This having been answered in the negative, the duty to give special regard to the various factors did not arise. In *Newsmith Stainless Ltd* v *Secretary of State for Environment, Transport and the Regions* [2017] PTSR 1126, at paragraph 7, Sullivan J emphasised the difficulties faced by anyone mounting a legal challenge to the conclusions of an inspector (reporter in Scotland) or a planning officer.

Decision

[15] The evaluation was that a dwelling house extruding above a ridgeline, though not the skyline, some 1.5km distant from the property, would not affect its setting. In other words, no harm would be done. It followed that the "special regard" duty did not arise. The listed building and its setting were not material considerations, nor did they give rise to a determining issue. Given the absence of any mention of the listing and the setting in the letter of objection, the planning officer was presented with no contrary assertion. Any criticisms as to the extent of her investigations or discussion of the matter in her report should be seen in that context.

[16] The "setting" of a listed building is a reference to the surroundings in which it is experienced. Often this will engage visual and physical considerations. Here the objection concerned the visual impact of the proposed dwelling house and its allegedly unacceptable intrusion in the landscape. These are classic issues of planning judgement with which the courts will not lightly interfere. The planning officer made her views on this objection clear in her report, which in turn was accepted by the decision-maker. It is far from obvious what other factor or factors flow from a reference to the setting of Ardencaple House. There is no assertion that, apart from the alleged impact on views to the south from the property, there

is any historical or other consideration of significance in this context. The complaint presented in the petition as originally lodged was that the officer overlooked the listing of Ardencaple House and its implications in terms of section 59. This having been confounded by the terms of her affidavit, the attack changed to the proposition that, in carrying out the exercise, she omitted a necessary step, namely a visit to the house itself. It is said that this alone would have enabled a proper definition and description of the nature and extent of the setting of the house, this being a pre-requisite to any proper assessment as to whether the development would or would not affect it.

[17] It is not arguable that in her report the officer had to set out a written narrative or definition as to the nature and extent of the setting of the listed building. As counsel for the planning authority commented, she was not sitting an academic examination. She did require to investigate the circumstances so as to allow her to form an appreciation of the setting of the house, such as would allow her, using her professional knowledge and expertise, to evaluate the impact, if any, of the development on the setting of the house. The complaint is that the officer failed to visit the house, and as a result disabled herself from a proper appreciation of its setting and of the impact on it of the proposed dwelling house.

[18] A challenge of a similar nature was considered by the Court of Appeal in *Catesby Estates Limited* v *Steer* (cited above). Lang J had concluded that an inspector left significant matters out of account and as a result adopted too narrow an interpretation of the heritage asset under consideration, this amounting to an error of law. After reviewing the guidance south of the border and some of the relevant case law, which included *R (Williams)* v *Powys County Council* [2018] 1 WLR 439, and in the context of a statutory provision in identical terms to that in the Scottish Act, Lindblom LJ observed that three general principles emerged – see paragraphs 28/30. First, it is necessary for the decision-maker to understand

what the setting is – even if its extent is difficult or impossible to delineate exactly – and whether the site of the proposed development will be within it or in some way related to it. "Otherwise, the decision-maker may find it hard to assess whether and how the proposed development 'affects' the setting of the listed building…". Secondly, there is no single approach to identifying the extent of a building's setting. In every case the decision-maker "must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice." Thirdly,

> "the effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether … it will harm the 'significance' of the listed building as a heritage asset, and how it bears on the planning balance – are all matters for the planning decision-maker…".

In the absence of a clear error of law, the court should not intervene. Citing an observation of Lord Carnwath, it was noted that courts should "respect the expertise of the specialist planning inspectors." (The same would apply to planning officers entrusted with reports of the kind in question in the present case.)

[19] Applying the above principles, the appeal against the decision of Lang J was upheld on the basis that there were no errors of the required kind in the inspector's decision. He exercised a planning judgement on the particular facts of the case. He reached reasonable conclusions, all of which were available to him.

[20] The inspector's detailed discussion of the listed asset and its setting, all as recorded in the Court of Appeal's decision, reflected the fact that these were highly controversial issues focussed in the detailed submissions before him. That cannot be said in the present case, hence the absence of any equivalent passage in the report of handling. However, the court does have an explanation as to the planning officer's investigations, reasoning and

conclusions in her affidavit. For present purposes the key determination was that the development would have no harmful impact on the setting of Ardencaple House.

[21] Under reference to the first of Lindblom LJ's three principles, can it be said that the decision-maker did not understand the setting of the listed building, and whether the proposed development would be within it or in some way related to it? In the court's view, the answer is no. The contrary proposition depends upon the misconception that the planning officer could only reach a proper understanding after a visit to the house itself. There may be cases where a visit of that kind is obviously necessary, but there is no reason to place this officer's task in that category. She considered that her investigations, which included three visits to the locality, equipped her with a sufficient appreciation of the views from the house, the local topography, the distance of the house from the development, and the nature of the development's intrusion on the landscape and those views, to allow her to evaluate whether the development would or would not affect the setting of the house. The submission that the investigations were inadequate is no more than a challenge to her judgement on that matter. There is no sound basis for this court concluding that, absent a visit to the house itself, she was unable to form a proper appreciation as to the nature and extent of the setting of the listed building, and as to the potential impact of the proposed development.

[22] The second and third principles identified by Lindblom LJ emphasise the limited nature of the court's power to intervene in cases of this kind and the respect which is due to a planning officer's professional judgement and evaluation. With regard to the main challenge mounted by the petitioners, in the view of the court no error of law or defective procedure has been demonstrated.

[23] As to the other complaints, there was no requirement for the Lord Ordinary to grapple with and resolve the suggested dispute as to the level of the development as compared with the buildings in the adjacent settlement. It has always been acknowledged that the proposed dwelling house would be visible from Ardencaple House, and that the other buildings cannot be seen. Whether this is because of the difference in the levels of the houses, their respective sizes, or a difference in local topography, or a mixture of factors, was, for the purposes of the planning officer's exercise, neither here nor there. As to the suggestion that the officer should not have considered the backdrop of the hills to the south as providing mitigation in respect of visual intrusion, this again raises a matter of planning judgement, not an error of the kind which falls within the court's jurisdiction. Finally, we note that there is no merit in the submission that in her affidavit the officer failed to provide adequate reasoning for her conclusion in respect of the duty in section 59.

[24] For the above reasons, which largely echo those of the Lord Ordinary, the reclaiming motion is refused. The court will adhere to the interlocutor of the Lord Ordinary dated 31 July 2019 refusing the petition.