OUTER HOUSE, COURT OF SESSION

[2020] CSOH 16

P216/19

OPINION OF LADY CARMICHAEL

In the petition of

MARK GUILD & ANOTHER

Petitioners

for Judicial Review

Petitioners: Burnet; Burness Paull LLP
Respondent: J Findlay QC; Morton Fraser

13 February 2020

Background

[1] The petitioners seek reduction of a decision of the respondent, Angus Council, to demolish Lochside Leisure Centre, Craig O'Loch, Forfar ("the leisure centre"). The first petitioner is a property developer who was permitted to organise an inspection and survey of the leisure centre to assess its potential for future use. The second petitioner made an offer to purchase the leisure centre.

[2] On 1 May 2018 the Policy and Resources Committee of the respondent considered a report reference number 151/18 from his head of infrastructure. The report recommended that the leisure centre be declared surplus to requirements and be demolished and the land

reinstated. The report narrated that the leisure centre was no longer used following the completion of another facility in February 2017. It included the following:

> "The building had previously suffered subsidence with ongoing settlement and whilst a number of potential opportunities have been explored the building will ultimately need to be demolished … The building has suffered from some vandalism since its closure and the potential to be used as a library decant has been explored and discounted, allowing the building to be declared surplus … At this time the proposal following demolition would be to return the areas to grass including some realignment of the paths around the building. Any alternative uses will be reported to the committee as appropriate… The availability of the property has been circulated to all directorates with no alternative uses or interest being shown."

The committee resolved to approve the recommendation to demolish the leisure centre.

[3] The first petitioner expressed concern to the respondent that it had not appreciated the potential for continued use of the leisure centre. The chief executive of the respondent commissioned an ad hoc review of report 151/18, with a view to reviewing the processes and evidence that led to the recommendation and other associated matters. The chief executive found that the evidence available was consistent with the decision-making. She was critical of the audit trail in relation to the decision-making. She said that she would have recommended obtaining an independent structural review, but noted that one had by the time of her recommendations, been instructed.

[4] The respondent permitted the petitioners and others to inspect the leisure centre with a view to making a proposal for its continued use. Various investigations followed. A structural engineer instructed by the first petitioner carried out a non-disruptive inspection on 4 September 2018 ("the first Millard report"). A structural engineer instructed by chartered surveyors engaged by the respondent carried out a non-disruptive inspection on 15 October 2018. A roofing contractor carried out an inspection for the first petitioner on 16 November 2018. Each of these inspections resulted in a report. The petitioners founded on parts of those reports in their submissions. The first petitioner's structural engineer

reviewed papers relating to structural inspections of the leisure centre from 1998, 2001, 2008 and 2018 and provided a further report in December in relation to his review ("the second Millard report").

[5] On 20 November 2018 the respondent's Scrutiny and Audit Committee considered a report by the respondent's chief executive, and was provided with a copy of the internal audit report. The minutes of the meeting record that the committee agreed to note the contents of the internal audit review regarding the leisure centre. On 17 January 2019 the respondent sent a letter to the petitioners and others who had expressed an interest in the leisure centre. It included the following:

> "Angus is aware that you have made contact regarding the surplus building that was previously used as Lochside Leisure Centre.
>
> Angus Council's formal position, as agreed by the elected members, is that Lochside Leisure Centre is to be demolished and the Council are in the final stages of assessing the tenders for demolition. This process will conclude shortly and the Council intends to formally commit to that demolition contract.
>
> A number of parties have contacted the Council in recent days to express/ note an interest in the building.
>
> While Angus Council is not actively seeking offers for the building, an interested party was previously offered the opportunity to view and assess the building and was provided with information on the condition and running costs of the surplus asset. As such, the Council acknowledges it has a duty to treat all parties equally and demonstrate it has done so. Attached to this email are the relevant documents to assist any interested party.
>
> Accordingly, Angus Council are contacting known interested parties to make them aware that only those parties who contacted the council previously will be given an opportunity to inspect the building on a date and time to be confirmed shortly. Thereafter, interested parties will have up to Noon on 30th January to submit a formal written offer for the building, …"

[6] On 22 January 2019 the first respondent wrote a letter which was circulated to all councillors, enclosing both Millard reports.

[7] The respondent provided access to the leisure centre to the petitioners and other parties on 23 January 2019. On 30 January 2019 the second petitioner offered to purchase the leisure centre. On 7 February 2019 there was a meeting of the full council of the respondent. At that meeting the respondent considered a report by its head of infrastructure in relation to the leisure centre ("report 48/19"). It contained recommendations that the Council:

> "(i) confirms that [the leisure centre] is demolished with the Common Good land lying beneath reinstated to extend the park.
>
> (ii) agrees that the modular building previously used as changing rooms is offered for sale subject to removal by prospective purchasers."

[8] Report 48/19 had not appeared on the publicly available agenda for the meeting. It was added as an urgent item. The minutes of the meeting include this passage:

> "In accordance with the provisions of Standing Order 11(2)(ii) the Provost ruled that Report no 48/19 (including addendum) and exempt Report 49/19 were to be considered as matters of urgency, in order that the Council could come to a decision timeously."

[9] Report 48/19 contained five options:

- Option 1 - do nothing; leave the building as it is currently
- Option 2 - demolish
- Option 3 - sale via the current offer
- Option 4 - sale through marketing
- Option 5 - community asset transfer

It contained also the following passages:

> "5.5 Given the submitted offer for the building, it is appropriate for the council to consider the merits of such an offer alongside the steps to progress the disposal of the building and the common good land.
>
> 5.6 The council has policy guidance on the Common Good Funds … The Local Government (Scotland) Act 1994 s15(4) requires the Council to have regard to the interests of the inhabitants of the areas to which the Common Good formerly related when administering the Common Good Funds. The council is to ensure the long

term sustainability of the common good fund, retention of the ownership best meets our aspiration to ensure the community has full access to this part of the country park for future generations. Any disposal or Community Asset Transfer will lead to period of delays whilst the statutory processes for consultation and possible court approval are complied with. During which period the building will incur maintenance costs and the demolition contract cannot be awarded and no access will be available to this area of land.

5.7 The provisions of Section 104 (disposal and use of common good property: consultation) of the Community Empowerment Act 2015 came into force on 27 June 2018. Section 104 requires that, before taking any decision to dispose of, or change the use of common good property, the council must publish details about the proposal and notify certain bodies and invite those bodies to make representations in respect of the proposal.

5.8 The decision to demolish the building pre-dates this legislation. Accordingly, legal advice is that there is no requirement to consult on the demolition of the building including the reinstatement of the ground and landscaping as part of the country park.

5.9 If Members are minded to dispose of, or change the use of the Common Good land on which the Leisure Centre is built, other than by demolition, the requirement to consult now applies. […]

5.10 In addition there is the strong possibility that any disposal of the common good land would require court approval in accordance with section 75 of the Local Government (Sc) Act 1973 … For the purposes of assessing the financial implications in this report it has been assumed that court approval will be required."

[10] Report 48/19 went on to detail various financial considerations, including ongoing running costs of £4,000 per month for the leisure centre, mostly by way of non-domestic rates and insurance. That figure excluded costs arising from vandalism or other necessary emergency repairs. It narrated that sale of the building via the current offer would bring a capital receipt to the common good account in respect of the land, and the general fund capital account in respect of the building. It included estimated legal costs and costs of officer time associated with sale arising from the need to apply to the court in respect of a sale. It narrated that costs might be incurred in respect of a sale which did not then proceed.

[11] Paragraph 8.1 of report 48/19 is in the following terms:

> "Option 2 is recommended as per Report No 151/18 and confirmed in Report No 362/18 for the reasons explained within the report. The council is to ensure the long term sustainability of the common good fund and it is felt that Option 2 best meets our aspiration to ensure the community has full access to this part of the country park for future generations. Any disposal or Community Asset Transfer will lead to a period of delays whilst the statutory processes for consultation and possible court approval are complied with. During which period, the building will incur maintenance costs and the demolition contract cannot be awarded and no access will be available to this area of land."

[12] The first petitioner avers that he became aware, because of a response to a specific inquiry by him, that the respondent was to consider the future of the leisure centre at the meeting of 7 February. The first petitioner avers that he made representations orally and in writing at the meeting. A copy of his speaking note has been produced. The second petitioner avers that he was abroad and unaware of the matter. The respondent admits that the first respondent made oral representations, but not that he made written representations.

[13] The respondent's members voted by a majority of 13 to 8 to accept the recommendation that the leisure centre be demolished.

[14] The respondent's position is that the leisure centre building does not appear on its common good account and is not common good property. The land on which it stands is, however, common good property. Although the petitioner placed a call on the respondent to state why the building was not on the common good account, the petitioner did not at the substantive hearing dispute the respondent's position about this matter.

[15] The respondent did not move that I should sustain its first plea in law, one of time-bar.

Joint statement of issues

[16] Parties lodged a joint statement of issues. The issues were formulated as follows:

(1) Whether the decision was made in accordance with the procedure requirements of the respondent's own Standing Orders. If not, did the petitioners suffer any prejudice as a result.

(2) Whether the decision made by the respondent required to be made under and within the statutory requirements of section 104 of the Community Empowerment (Scotland) Act 2015 ("the 2015 Act").

(3) Whether the decision made by the respondent required to made under and was within the statutory requirements of section 15(4) of the Local Government (Scotland) Act 1994 ("the 1994 Act").

(4) Whether the decision made by the respondent required to be made under and was within the statutory requirements of sections 74 and 75 of the Local Government (Scotland) Act 1973 ("the 1973 Act").

(5) Whether the respondent took into account irrelevant considerations or failed to take into account relevant material considerations.

(6) Whether the respondent required to give proper, adequate and intelligible reasons for its decision and, if so, whether it did.

(7) Whether in all the circumstances the respondent's decision was unlawful.

Summary of submissions

Petitioners

[17] The respondent failed to follow its own Standing Orders. It had not placed the item concerning the leisure centre on the agenda, and it had not recorded in the minutes of the meeting the special circumstances on the basis of which the provost had concluded that the matter required urgent consideration. The respondent was entitled to consider something as

a matter of urgency. There must be a record made in the minutes of the explanation as to why the decision to do so had been taken. The reference to timeousness in the minute was not an adequate explanation. The tenders for demolition would still have been valid at the time of the respondent's next scheduled meeting on 21 March. The urgency could not arise from the circumstance that an offer had been made. The respondent had set a deadline of 30 January for offers, more than a week before 7 February. It was not sufficient to provide reasons in the pleadings, as the respondent had done. The decision was in any event unreasonable, as, even on the reasons disclosed in the pleadings, there was no urgency.

[18] The second petitioner was unable to attend the meeting at short notice. If he had attended he would have made representations. He would have asked for the decision to be postponed with an opportunity for the public to participate or to clarify any concerns the respondent had about his offer. The respondent had a duty under section 15(4) of the 1994 Act to have regard to the interests of the inhabitants of the area to which the common good formerly related when taking decisions in relation to common good land.

[19] The respondent had failed to comply with its duties under section 104 of the 2015 Act. That provision imposed a duty to consult where the respondent was considering disposing or changing the use of any property that was held as common good land. The respondent had misdirected itself in law by taking the view that it did not require to consult because a decision to demolish had been taken before the 2015 Act came into force. At the meeting on 7 February 2019 the respondent was considering whether or not to dispose of or change the use of common good land, and the 2015 Act applied.

[20] The respondent had failed to comply with its duty under section 74 of the 1973 Act not to dispose of land for a consideration that is less than the best that can reasonably be obtained ("best value"). The decision of the respondent was not supported by reasons that

were adequate in law, and was unreasonable so far as best value considerations were concerned. The respondent had not taken any steps - such as placing the leisure centre on the open market for sale - to ascertain what a purchaser might pay for it. Demolition was a costly option, and other options would not involve similar expenditure. The failure to place the property on the open market and ascertain the "best price" was also characterised as a failure to take into account material considerations.

[21] The respondent proceeded on an error of fact. Report 48/19 was misleading. It included this statement, at paragraph 4.2:

> "The difference of opinions is in terms of the serviceable life of the building; with uncertainty over the foundations [sic] stability, and with ongoing maintenance and, revenue costs. With over 20 years of inspections of the building until shortly before its closure, problems have persisted, and can be foreseen as ongoing, to a point that, the building is no longer serviceable."

That statement mischaracterised the content of the expert reports on the condition of the building, and there was no proper basis for it. Insofar as the decision was based on the proposition that the leisure centre was or would become no longer serviceable, it was flawed. If the decision to treat the matter as urgent was based on that proposition, it, also, was flawed. Insofar as the respondent relied on a "Survey of Foundation Settlement" dated October 2010 it acted unreasonably. It should not have relied on it without instructing a more detailed report. The respondent had failed to monitor the progression of cracks in the leisure centre since October 2010.

[22] The petitioners argued, finally, that the respondent had failed to take into account the first petitioner's representations. He had asked for the decision to be delayed

> "to fully take account of the updated information on the condition of the leisure centre and the potential future uses for it, and to consult with the public in relation to those possibilities."

Respondent

[23] The special circumstances leading to consideration of report 48/19 were contained in the minutes of the meeting. Even if there had been a breach of the requirements in the standing orders, the petitioners had failed to demonstrate that they had suffered prejudice as a result. The second petitioner had sent the Millard reports to the elected members of the respondent. The first petitioner had attended the meeting and made representations.

[24] The reasons for the decision to add the item to the agenda were as set out in the respondents answer 3:

> "… [report 48/19] was added as an urgent item due to the timing of the receipt of the offer for the leisure centre … and the need to progress with the demolition contract in advance of the summer season if the building was to be demolished and offer not accepted so as to avoid impact on other uses nearby and due to public interest in the future of the leisure centre as demonstrated by interest by the press. The respondent is incurring costs and expenses in relation to the vacant leisure centre in the order of £4,000 per month and will continue to do so until it is demolished. Further as noted in [report 48/19] officers had procured tenders for the demolition of the building. Tenders were received on 11 January 2019 and remained open for acceptance until 11 April 2019. The decision to proceed with the consideration of [report 48/19] at the 7 February 2019 meeting was duly taken by the Provost in accordance with the respondent's standing orders and is duly minuted, which minutes have been approved. If it had not been considered at that meeting it would not have been brought before the Council until 21st March 2019."

[25] The provost had made the decision, and so the substance of the standing order had been complied with. The provost had formed an opinion, and that had been recorded. This was not a "failure to give reasons" case. It fell to be distinguished from cases in which reasons required to be given for a substantive decision, explaining the outcome of the deliberations of a public authority. What was alleged was a procedural failure or irregularity, and there could be no remedy unless prejudice were established. In any event, the reference to timeousness could be understood in a context in which a decision to demolish had been taken some months previously. It was clear from the reports regarding

the leisure centre that a decision required to be taken quickly or timeously. The respondent needed to decide quickly whether or not to change tack. It was correct to say, as the petitioners did, that the tenders for demolition would have remained valid until after the next meeting of the respondent. That might have been a reasonable basis for declining to consider the business, but the provost had been entitled to take a different view. If I were against the respondent in relation to any requirement to give reasons for the urgent consideration of the business, then I had a discretion as to whether to reduce the decision of the respondent. This was not a situation in which reasons were being manufactured ex post facto.

[26] Counsel submitted that at the meeting on 7 February 2019 the respondent was determining whether or not to "change course". The only decision made on 7 February 2019 was one not to interfere with the decision of 1 May 2018. There had been no challenge to the decision of 1 May 2018. The respondent had obtained tenders for the demolition work, which had now expired.

[27] The respondent had before it a further report, report 49/19, relating to the offer to purchase the leisure centre, but merely noted its contents. Report 49/19 related that if members were minded to pursue sale rather than demolition, the leisure centre ought to have been marketed for sale. That did not arise, however, as the respondent had confirmed the decision to demolish.

[28] The provisions of the 2015 Act did not apply because the respondent did not decide to dispose of or change the use of any common good property. The first task for the respondent was to consider whether it even wanted to contemplate the loss of part of the country park for future generations. If it did not, it had no need to engage with the restrictions on the sale of land on which the petitioners relied. The respondent had no

obligation to consider selling the land. The building was not held on the common good account: report 48/19, paragraph 3.2. It was the land that was held on the common good account. This was reflected in paragraph 6.4.2 of the report - sale of the building would bring in a capital receipt to the Forfar Common Good account (land) and General Fund capital account (building). The land was held by the council for the common good, but the building was not. There was no change of use of the land. The land had been used for community purposes and would remain in community use after the building had been demolished. Where common good land was being retained, section 104 of the 2015 Act was not engaged.

[29] There had been no breach of section 74 of the 1973 Act. The respondent did not dispose of any land. In any event, the value of the land required to be considered not only in financial terms, but by reference to the benefit of retaining the land within the common good land managed by the respondent. There was no requirement when retaining common good land to ascertain what value might be obtained if it were to be sold.

[30] The respondent was under no obligation to place the site on the open market, bearing in mind that the site was common good land and its significance as part of the wider common good land around Forfar Loch. There was no obligation to market property to see what price might be achieved, in the knowledge that it was not going to be sold.

[31] The complaint about error of fact was without substance. Examination of the content of a number of passages in the reports about the condition of the building disclosed that report 48/19 represented the position fairly and accurately.

Decision

Standing orders

[32] Clause 11(2) of the respondent's standing orders states:

> "Except as otherwise prescribed by statute, no item of business shall be considered at a meeting of the Council unless either:-
>
> > (i) a copy of the agenda including the item has been open in advance to inspection by members of the public in terms of the 1973 Act; or
> >
> > (ii) by reason of special circumstances which shall be recorded in the minutes of the meeting, the Provost is of the opinion that the item should be considered at the meeting as a matter of urgency."

I was not referred to section 50B(4) of the 1973 Act, but note that it is in similar terms:

> "An item of business may not be considered at a meeting of a local authority unless either—
>
> > (a) a copy of the agenda including the item (or a copy of the item) is open to inspection by members of the public in pursuance of subsection (1) above for at least three clear days before the meeting or, where the meeting is convened at shorter notice, from the time the meeting is convened; or
> >
> > (b) by reason of special circumstances, which shall be specified in the minutes, the convener of the meeting is of the opinion that the item should be considered at the meeting as a matter of urgency."

A very similar provision appears at section 100B(4) of the Local Government Act 1972.

[33] Although the statement of issues identifies a separate argument under reference to section 15(4) of the 1994 Act, the petitioner referred to this provision only in relation to the paragraph of the petition regarding failure to comply with the standing orders. Section 15(4) requires that a local authority to which property held for the common good was transferred from a previously existing local authority shall administer that property having regard for the interests of the inhabitants of the area to which the common good related prior to 16 May 1975. I understood the reference to be intended to emphasise the need for the respondent to take those interests into account in administering the common

good, and the potential prejudice to members of the public in not having notice of the agenda item.

[34] The requirement in the standing orders that the special circumstances be recorded is a requirement to give reasons. It requires that the circumstances informing the opinion of the provost be recorded. It is a safeguard against arbitrary departures from the normal prescribed procedures. The reasons must be comprehensible. Those prescribed procedures are there to secure the aim that members of the public have notice of the respondent's business. They are there to secure transparency. They afford members of the public the opportunity to make representations to their elected representatives. The requirement that the reasons for a departure from those procedures be recorded has the purpose of securing public confidence in the integrity and transparency of local authority decision making.

[35] I asked parties for submissions as to whether giving adequate reasons for the decision to consider the business as a matter of urgency was a condition of the lawfulness of the decision of the provost, under reference to *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board* 2005 SLT 315. I drew that reported case to their attention. I use the word decision, because the provost's opinion is a decision by him or her that special circumstances exist such as to permit departure from the normal requirements. For the decision to be lawful, there must be special circumstances. Those must be recorded in a way that allows members of the public to understand what the circumstances were that merited a departure from the rules that normally secure their right to have advance notice of the business of council meetings by means of inspection of the agenda. Neither party considered that the present case was directly analogous to *Chief Constable, Lothian and Borders Police*.

[36] The decision in this case, unlike that in *Chief Constable, Lothian and Borders Police*, and those in many of the cases cited by Lord Reed in his opinion, does not relate to the substantive merits of a dispute, but to a decision to proceed with urgency and outside the normal and prescribed timeframe. It is, however, relevant to consider the purpose of the provision, and the interests that it seeks to protect. As I have already mentioned, the interest protected by the need to give reasons is an important one. Any derogation from the normal procedure requires justification, and it is prescribed that that justification, by way of special circumstances, requires to be recorded, and recorded in a particular way. I consider that the giving of adequate reasons by way of recording in the minutes the special circumstances justifying treating an item of business as urgent is a condition of the lawfulness of the decision to proceed.

[37] Whether reasons are adequate must be assessed to the approach in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345, at 348. A decision must leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what the material considerations were which were taken into account in reaching it. The reference to the informed reader means that in some cases reasons expressed very summarily will be adequate and comprehensible by reference to other available information, and in particular information that was before the decision maker.

[38] I accept that there is nothing in the minutes themselves to explain what was meant by "timeously", or by reference to what date, circumstances or event timeousness was being assessed. Report 48/19, however, does refer to a number of the circumstances now mentioned by the respondent in answer 3. The dates of receipt and expiry of the tenders appear at paragraph 5.1. The ongoing costs of running the building appear at paragraph 6.4.1. The timing of any offer would have been clear to all concerned, given the

deadline imposed by the respondent. A copy of the letter imposing the deadline was an appendix to the report. The need to progress with the demolition contract in advance of the summer season so as to avoid impact on other uses, and press interest are not considerations narrated in the report.

[39] There is a danger that reasons provided subsequent to the decision, particularly in the context of proceedings for judicial review, will be influenced by the existence and nature of those proceedings. They may be entirely inadmissible in situations in which the giving of reasons is a condition of the lawfulness of the decision: *Chief Constable, Lothian and Borders Police*, paragraph 70. In assessing the adequacy of the reasons given for proceeding urgently, I therefore disregard those considerations now narrated in answer 3, but not disclosed in the report or associated papers. Having regard only to the circumstances disclosed in report 48/19, I consider that the informed reader, looking at the report and the minutes together, would be able to discern that timeousness was being assessed by reference to the dates of expiry of the tenders, the timing of the offer, and the ongoing running costs of the leisure centre. I do not consider that there has been a failure to give reasons such as to vitiate the decision to proceed urgently.

[40] I do not consider that the decision was unreasonable. While it might have been open to a decision maker reasonably to conclude that matters could be deferred until the meeting of 21 March, I consider that it was reasonably open to the provost, having regard to the matters I have already referred to as being disclosed in the report to decide that the item of business ought to be dealt with urgently.

[41] If I had decided that the decision to proceed urgently was unlawful because of a failure to give reasons, I would not have considered that the question of prejudice was relevant, given my view that adequate reasons are a condition of the lawfulness of the

decision. If, contrary to that analysis, prejudice is relevant to this chapter of submissions, my conclusion is that the petitioners have not identified any prejudice to them. They have not identified what additional material might have been put before the respondent so as to cause the respondent's decision to be different, had more notice been given of the meeting. Both Millard reports were with the elected representatives by reason of the first petitioner's letter dated 22 January 2019. It included a plea for more time to be taken to consult. The speaking note which the first petitioner used when he made oral representations on 7 February 2019 canvasses quite fully the issues relating to the state of information about the condition of the leisure centre which feature in this petition. It contains a complaint about the lack of notice of the meeting. It contains a further request for more time to consult. It refers to the desirability of the respondent's accepting the second petitioner's offer. Putting matters another way, if the decision to deal with report 48/19 falls to be treated as a failure to observe procedural requirements properly, no material has been presented to demonstrate that there was a real possibility that the decision as to whether to demolish or to take a different course would have been different had that failure not occurred.

Section 104 of the Community Empowerment Act 2015

[42] Section 104 is in the following terms:

> "(1) Subsection (2) applies where a local authority is considering—
> (a) disposing of any property which is held by the authority as part of the common good, or
> (b) changing the use to which any such property is put.
>
> (2) Before taking any decision to dispose of, or change the use of, such property the local authority must publish details about the proposed disposal or, as the case may be, the use to which the authority proposes to put the property.
>
> (3) The details may be published in such a way as the local authority may determine.

(4) On publishing details about its proposals under subsection (2), the local authority must—

(a) notify the bodies mentioned in subsection (5) of the publication, and

(b) invite those bodies to make representations in respect of the proposals.

(5) The bodies are—

(a) where the local authority is Aberdeen City Council, Dundee City Council, the City of Edinburgh Council or Glasgow City Council, any community council established for the local authority's area,

(b) where the local authority is any other council, any community council whose area consists of or includes the area, or part of the area, to which the property mentioned in subsection (1) related prior to 16 May 1975, and

(c) any community body that is known by the authority to have an interest in the property.

(6) In deciding whether or not to dispose of any property held by a local authority as part of the common good, or to change the use to which any such property is put, the authority must have regard to—

(a) any representations made under subsection (4)(b) by a body mentioned in subsection (5), and

(b) any representations made by other persons in respect of its proposals published under subsection (2)."

[43] The argument for the petitioners was that the respondent was considering disposing of the property, or, alternatively, changing its use. That was apparent from the various options set out in report 48/19. Two of the options - those involving sale - obviously involved disposal of the property. Demolition involved a change of use.

[44] Although the language of subsection (1) refers to a local authority "considering" disposing of property or changing its use, a reading of the whole section, and in particular subsection (2), makes it clear that what is prohibited is a decision to dispose or change the use of property without publication of the proposal and the opportunity for representations. The intention appears to be to prevent a decision to dispose of property or change its use without first allowing community councils and other interested community bodies an opportunity to learn of the disposal, and to allow them and others to make representations. The section does not require publication and opportunities for representations before

making a decision not to dispose or change the use of property. It is not engaged where a council is not acting or proposing to act in a way which would alter the status quo.

[45] I deal first with the question of disposal. By its decision of 7 February 2019 to demolish the building, the respondent was not deciding to dispose of common good property. The respondent determined not to sell, and there was no decision to dispose of the land by sale. The common good property in this case is the land, and not the building. Demolition of the building will not result in disposal of the land.

[46] I was referred to *Waddell and others* v *Stewartry District Council* 1977 SLT (Notes) 35. That case related to the demolition of the town hall in Gatehouse of Fleet. There appears to have been no dispute in that case that the town hall formed part of the common good. The defenders would not have been entitled to alienate or dispose of it without the authority of the court, in terms of section 75(2) of the Local Government (Scotland) Act 1973. The Lord Ordinary required to determine whether the demolition should be regarded as a disposal for the purposes of a motion for recall of an interim interdict. The following passage of his Opinion appears at page 36 of the report:

> "Prima facie, to dispose of land is to make it over to someone else. Whether or not that involves a transfer of ownership as well as possession and control will depend on the context in which the transaction takes place. It is clear from the authorities to which I have referred that property of this nature is extra commercium. It could not be sold, without the authority of the court, because that would be to deprive the community of something which, as a community, they were entitled to have. It follows that it could not be alienated by donating it and as the same result would follow so far as the community is concerned, it would seem logical that its demolition, for example for road widening purposes, would likewise be an ultra vires act. In *Crawford v. Magistrates of Paisley* (1870) 8 M. 693, opinions were expressed that a steeple formed part of the inalienable property of the burgh which the magistrates were not entitled to take down without judicial authority, except on the ground of absolute necessity. At p. 696 Lord President Inglis said: 'It must be observed that this steeple is not only the public property of the burgh, but it is inalienable property. They could not sell it, and most unquestionably they could just as little pull it down without judicial authority, unless the immediate risk was so imminent as to entitle them, for the safety of the community, to do so' . Likewise,

> Lord Deas, at p. 697, expressed himself thus 'As your Lordship has observed, this steeple was part of the inalienable property of the burgh, which they could not sell, and could not take down, except on necessity'. I have accordingly come to the view that in this context what constitutes alienation must be liberally construed and would include any action which effectively deprives the community of something which, by custom or dedication by direct grant, they are entitled to have. If an authority cannot deprive the community of the use of property which is inalienable by disposing of it in the ordinary commercial sense of the term, or by making a gift of it, it would only be in accordance with the underlying principle that they could not deprive the community of its use by destroying it, except in the highly special circumstance of imminent danger to the public. In the context of the deed itself, the object of the grant being the declared purpose of providing a town hall, I consider that a similarly wide construction falls to be placed on the words 'dispose of', and these words would accordingly comprehend the action contemplated by the defenders.
>
> As to whether the same words where they appear in s. 75 of the 1973 Act fall to be similarly construed I express no view. These provisions were not canvassed in argument in any detail and notwithstanding the wide terms of s. 74 (1) it may well be that in this statutory context disposal of land is envisaged only in a commercial sense. The previous statutory provision, namely s. 171 of the 1947 Act, would seem to relate to the selling and feuing of land but the group of sections in that Act relating to the disposal of land generally is very different, and much more specific, than the way in which this is treated in the 1973 Act."

[47] The case falls to be distinguished from the present one, in that the court proceeded on the basis that the building in respect of which demolition was proposed was property to which section 75 of the 1973 Act applied: it was land forming part of the common good with respect to which a question arose as to the council's right to alienate it. The sense of the final paragraph in the foregoing passage suggests that the reference to section 75 ought to be a reference to section 74. The Lord Ordinary had been considering the construction of "dispose of" in section 75(2), and then goes on to reserve his position as to whether the expression has the same meaning in a different provision, which must be section 74, the provision dealing with achieving the best consideration that could reasonably be obtained on disposal. He expressed the provisional view that it might relate only to disposal in a commercial sense rather than comprehending acts such as demolition.

[48] I require to deal with the question whether demolition of the leisure centre amounts to a change of use for the purposes of section 104. The respondent submitted that the use of the land remained a leisure and recreational use. It would be different if what were proposed was that a leisure use were to be changed to, for example, an education use (as in *East Renfrewshire Council*, petitioner [2014] CSOH 129 and *Portobello Park Action Group Association* v *City of Edinburgh Council* 2013 SC 184), or a housing use. Before the leisure centre was erected, the land had been used for leisure and recreational purposes. It had continued to be used in that way after its erection, and would continue to be used in that way when the leisure centre had been demolished.

[49] Whether a particular decision as to the use to which property is put amounts to a change of use which will engage section 104 is a mixed question of fact and law which will require to be considered on the basis of the facts and circumstances arising in any particular case. I was not provided with any authority as to the construction that should be given to the expression in the context of the 2015 Act. The approach of the respondent might suggest that change of use might be regarded as broadly similar to appropriation of land held for one function for the purposes of another function: 1973 Act, section 73(1).

[50] Changing the use of common good land in a park from a leisure use in order to build a school on the land would seem likely to engage the provision. It seems likely that what would under other legislation amount to an appropriation for a different function would engage the provision. It must be doubtful whether Parliament intended that every type of change of use - for example the substitution of a tennis court in a park with a basketball court - would engage section 104. I accept the analysis proffered by the respondent. The common good land is presently used for leisure purposes, and that will remain the case after the building has been demolished.

[51] The petitioner in submissions laid some emphasis on paragraphs 5.7-5.9 of report 48/19, quoted above. The advice is not in most of its substance wrong. I have concluded that the decision to demolish did not engage section 104 in this case. Decisions to sell would have done so. The underlying analysis is not, however, correct. The advice proceeds on the basis that section 104 is not engaged because the "original" decision to demolish was made before the 2015 Act came into force. That perhaps explains the respondent's insistence in these proceedings that there was no new decision, but a non-departure from an earlier decision. Section 104 was not engaged. That was, however, because the decision made on 7 February was not one to dispose of the property or change its use, not because it represented adherence to an earlier decision. Paragraph 5.9 is unhappily expressed. It could be construed as reflecting an understanding that demolition did represent a change of use, and that the only reason why section 104 was not engaged was the earlier decision to demolish. As I have explained, that is not how I have construed section 104.

[52] No argument appears in the petition, nor was one made at the substantive hearing, that the respondent's decision was unlawful by reason of section 75 of the 1973 Act, although such a contention is listed in the joint statement of issues. It is apparent from paragraph 5.10 of report 48/19 that the respondent had not reached a concluded view as to whether the land in question was alienable, or whether it was land to which section 75(2) applied. The respondent clearly had in mind that a disposal of the land might well require the approval of the court. For the reasons that I have already given, there is no disposal of common good property by reason of the demolition of the leisure centre. In the circumstances of this case no change of use of the common good property arises. If a question as to whether the land could be alienated arose, then there could be no disposal

without the authority of the court under section 75(2). There is no provision in the 1973 Act for a court to give authority for appropriation of inalienable common good property for another purpose: *East Renfrewshire Council*; *Portobello Park Action Group Association*. Section 73 and section 75(1) of the 1973 Act do not override the common law so far as inalienable common good property is concerned: *Portobello Park Action Group Association*.

Error of fact/lack of factual basis

[53] The petitioner's submission was that the content of report 48/19 was such that the respondent proceeded to make a decision on the basis of factually incorrect information. Mr Burnet placed particular emphasis on the content of the two Millard reports. The first of these included the following:

> "There were very few structural defects observed externally during the inspection, and any cracking noted appeared to be caused by thermal shrinkage and not by progressive ground movement. The external walls appeared to be well detailed with vertical movement joints noted at regular centres. Internally, the masonry walls were exposed in a number of areas and no cracking or evidence of structural movement was noted. In the areas where the masonry was concealed by finishes, the finishes generally consisted of a brittle finish directly applied to the masonry. Any cracking observed internally generally appeared to be cosmetic and not symptomatic of ongoing structural movement. Due to the brittle nature of the finish it is thought that any movement of the structure would be clearly visible.
>
> The ground floor appeared to be significantly sloping in areas, particularly in the areas adjacent to the sports hall. The floors appear to be sloping down towards the sports hall and squash courts suggesting that separate parts of the structure have settled at differing rates. In this area of the building it was noted that the floor was finished in tiles. In a tiled floor finish any recent ground movement is generally characterised by cracking and tiles becoming boss. No such defects were noted thus suggesting that the ground movement is historical and not progressive.
>
> In conclusion, it would appear the building does show evidence of structural settlement; however, the defects noted are not symptomatic of ongoing or progressive structural movement. The nature of the finishes in the building would clearly present evidence of ongoing ground movement issues, this evidence was not observed during the inspection."

[54] The second Millard report contained a review of other structural survey reports, and in particular one dated 26 July 2001, which it characterised in the following way:

> "The findings from the survey were that there were three localised 'soft spots' located within the footprint of the building. The report also stated that 'monitoring of the building has revealed that ongoing building movement to be very slow' and 'settlement may have happened during construction and does not pose a threat to the building's fabric in the future.'"

[55] A structural survey report dated 9 July 1998 includes consideration, at paragraphs 5.2.1 and 5.2.2 of differential settlement and subsidence, including explanations as to why these might have occurred, connected to the construction techniques used when the leisure centre was built, and in particular the use of stone column piles in landfill sites without bottom feeding the stone into the bore. Another structural survey report, dated 26 July 2001, referred to the report of July 1998, and also to two earlier reports. The report of 26 July 2001 referred to "soft spot locations" in the sports hall store/polygym rear door, the polygym front wall, and the sports hall corner next to the café. It included the following passages:

> "Although monitoring of the building has revealed the on-going building movement to be very slow, remedial works including mini-piling should be instigated in this area to prevent further deterioration of the building fabric (Report 3) in the medium to short term."
>
> and
>
> "Therefore this suggests the settlement may have happened during construction and does not pose a threat to the building's fabric in the future, however annual surveys are recommended for walls in this area as large variations in ground water level may lead to heavy cracking."

Mr Findlay pointed out that the quotation in the second Millard report from the first of these passages was incomplete.

[56] The report of 26 July 2001 included conclusions and recommendations in the following terms:

> "**5.1 Increased Frequency of Building Maintenance Inspections – Focusing on 'Soft Spots'**
>
> The contour survey has revealed that the building is situated on three 'soft spots'. It is recommended that the frequency of the maintenance inspections be increased from 2 years to an annual inspection looking for cracking in the three areas as follows: …"

A further document, a 'Structural Overview' from July 2008 included the following:

> "It is of the utmost importance to review the structural performance of this building from its construction in 1977 since this is a key factor in identifying an appropriate strategy for managing the future structural integrity of the building. Differential foundation movement still continues resulting in increased distortion/damage of structural elements inducing stresses for which they are not designed. Various repairs have been undertaken over the years which have failed or are failing. The existing foundation system can also be sensitive to external factors such as high groundwater levels or drying out promoting local accelerated foundation movement.
>
> The report prepared in 2001 by this Dept. recommended that the frequency of structural inspections should be increased to an annual basis and this should be implemented without delay. This is necessary since structural damage can be expected to continue therefore it is crucial that vulnerable areas are identified and monitored in a consistent and regular fashion as part of the overall future management of this facility.
>
> …
>
> From the visual inspection undertaken on 25/6/2008 and although there is ongoing foundation movement resulting in the failure off [sic] previous repairs, I do not feel there is immediate concern from a structural point of view. It is imperative however, that the structural defects within this building are carefully monitored on a structured basis to ensure that no defects propagate to a stage where they may become potentially dangerous and compromise the safety of the general public and staff within the building."

[57] A further report, entitled "Survey of Foundation Settlement" from October 2010 included the following

> "The precise levelling points, installed in 2009 have been surveyed in August 2009 and again in June 2010.
>
> The results of this survey, together with a key plan for the survey points, are enclosed in this report.
>
> Over this 9 month period the maximum settlement recorded is 4mm. This translates to an annual settlement of over 5mm. The survey highlights the fact that the main

> hall is settling at a faster rate than some of the other buildings. The results generally tie-in with the observed slopes in the floor and changes in level, which have occurred over the life of the building. The building seems to be settling at a similar rate to the rate of settlement up to now. It is reasonable to predict that this settlement will continue until the building becomes unserviceable.
>
> Monitoring of the settlement will continue annually. It is advisable to carry out a structural survey of the building, to establish that none of the roof or suspended floor structural members are likely to collapse because of dislodged bearings. The integrity of supporting walls should also be checked."

[58] A letter from Morgan Consulting Civil and Structural Engineers, instructed by Shepherd Chartered Surveyors on behalf of the respondent, and dated 19 October 2018, included the following:

> "From our limited inspection we saw no indication of recent dramatic movement. Movements are not severe, but in places are significantly worse than normally expected or considered acceptable. Conditions might be expected to continue similar to existing for some years with some gradual ongoing movement and deterioration, however no definite assurances would be given, and foundations and future movement integrity and stability must be considered suspect. Inspection monitoring is recommended to continue, to ensure safety is not compromised."

[59] As mentioned above, the first petitioner wrote a letter dated 22 January 2019, which had been circulated to all councillors, attaching the two Millard reports dated 7 September and 17 December 2018. The letter represented that the leisure centre was fit for purpose and with a lifespan of more than 30 years.

[60] I consider that I should approach the content of report 48/19 in a similar way to that in which a planning officer's report should be approached. In *No Kingsford Stadium Ltd* v *Aberdeen City Council and others* [2019] CSOH 19, Lord Tyre described that approach at paragraph 12. The report should be construed in a practical, reasonably flexible and commonsense way, in the knowledge that it is targeted at parties who are well aware of the facts and issues: *Waterstone Estates Ltd* v *Welsh Ministers and others* [2018] EWCA Civ 1571, paragraph 11. The question for the court is whether, on a fair reading of the report as a

whole, the planning officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made: *Mansell* v *Tonbridge and Malling Borough Council* [2018] JPL 176 at 42 (CA).

[61] The author of paragraph 4.2 of report 48/19, quoted above, at paragraph 21 was entitled to summarise the material for the elected members in the way that he did. He was entitled to characterise the material as reflecting uncertainty regarding the stability of the foundations, and to identify ongoing costs of maintenance. He was correct to state that problems had persisted over a protracted period. He was entitled to characterise the available information as indicating that persistent problems were foreseeable, and as continuing in the future to a point that the building was no longer serviceable. That opinion was expressed in the Survey of Foundation Settlement dated October 2010. He referred to a difference of opinion regarding the serviceable life of the building, which clearly relates in part to the opinion stated in the second Millard report, and repeated in the first petitioner's letter of 22 January 2019, that the building's future lifespan could exceed 30 years. The opinion of Millard was more optimistic than that of those providing surveys for the respondent. It is notable that paragraph 4.1 of report 48/19 included quotation from the second Millard report, including the passage regarding the building's possible future lifespan.

[62] Following the approach described in *No Kingsford Stadium*, there is nothing in the way in which the information was put before the respondent in report 48/19 to support the contention that the respondent made its decision on the basis of any error that is susceptible to judicial review.

Duty to obtain best value

[63] Section 74 of the 1973 Act provides:

> "(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, a local authority may dispose of land held by them in any manner they wish.
>
> (2) Except in accordance with regulations under subsection (2C) below,1 a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained.
>
> (2A) Subsection (2) does not extend to a disposal where—
> (a) the best consideration that can reasonably be obtained is less than the threshold amount; or
> (b) the difference between that consideration and the proposed consideration is less than the marginal amount.
>
> (2B) The Scottish Ministers shall, by regulations, fix the threshold amount and the marginal amount for the purposes of subsection (2A) above.
>
> (2C) The Scottish Ministers may, by regulations, provide as to the circumstances in which and procedure by which local authorities may, under this section, dispose of land for a consideration less than the best that can reasonably be obtained.
>
> (2D) Those regulations may include provision—
> (a) requiring a local authority proposing to dispose of land at less than the best consideration that can reasonably be obtained to appraise and compare the costs and other disbenefits and the benefits of the proposal;
> (b) requiring the local authority, before deciding in favour of the proposal, to be satisfied that so deciding would be reasonable; and
> (c) setting out factors to which the local authority must have regard when considering whether its decision would be reasonable.
>
> (2E) References in this section to the best consideration that can reasonably be obtained by a local authority are references to that consideration as assessed by a suitably qualified valuer. …"

[64] This argument fails for much the same reason as does the argument relating to a decision to dispose under section 104 of the 2015 Act. The duty arises when there is a disposal. Section 74 does not impose a duty to decide to dispose of land in order to obtain a consideration. It prohibits disposal for consideration less than the best that can reasonably be achieved. I do not consider that "dispose" in this provision comprehends "demolish",

but means alienating, for example by sale or donation. In *Waddell* "dispose" was given a broad and purposive construction in the context of common good property which was the inalienable property of the burgh, and the application of section 75. That is not the context of section 74. In *Waddell* the Lord Ordinary, *obiter*, tentatively expressed a view to similar effect.

[65] The petitioners sought also to formulate this branch of their argument as a failure to give reasons as to why the best financial outcome or best consideration should not be sought. They complain that the respondent had not put the leisure centre on the open market in order to ascertain what price a purchaser might be prepared to offer, or whether a third party might offer to lease it. The respondent was not, therefore, aware what the best consideration that might reasonably be achieved was. The petitioners point out that demolition was a costly option. It was therefore unreasonable or premature to decide to demolish the leisure centre.

[66] In the first place, the petitioners did not provide any authority to support the contention that before determining whether to retain common good land the respondent required to ascertain what consideration might be achieved for it on disposal. Second, there is still at common law no general duty to give reasons, and no argument was presented as to why there was a duty to give reasons in this context. If there is such a duty, it is apparent from the contents of report 48/19 what considerations were before the respondent at the meeting of 7 February 2019 in relation to each of the options it was considering, including the recommendation that it accepted by its decision. Those considerations included the desirability of maintaining control over the land in question, retaining the land as common good, and providing a further amenity area as part of the country park. Considerations also included the delay, cost, and risk of failure associated with any exercise involving disposal

of the land, particularly given the prospect that an application to the court would be required under section 75(2) of the 1973 Act. These were all matters which the respondent was entitled to take into account.

Material considerations

[67] Similar contentions were presented as a failure to take into account material considerations, which were said to be the information on the condition of the leisure centre, the representations by the first petitioner asking for the decision to be delayed, the failure to place the leisure centre on the open market, and the failure to take into account the best price that might be achieved before deciding whether or not to demolish the leisure centre. The formulation of those contentions in that way adds nothing to the submissions which I have already considered and rejected.

Disposal

[68] I therefore refuse to grant the orders sought in the petition.