OUTER HOUSE, COURT OF SESSION

[2014] CSOH 129

P119/14

OPINION OF LORD TYRE

In the Petition of

EAST RENFREWSHIRE COUNCIL

Petitioners;

for

An order under section 75(2) of the Local Government (Scotland) Act 1973 in respect of certain land at Cowan Park, Barrhead, East Renfrewshire

Petitioners: Findlay; Shepherd & Wedderburn LLP

19 August 2014

Introduction

[1] Cowan Park is a public park in Barrhead, East Renfrewshire. It was conveyed in 1910 by the trustees of the late James Cowan to the Provost, Magistrates and Councillors of the Burgh of Barrhead, subject to a condition that it was to be used in perpetuity as a public park for the use and enjoyment of the inhabitants of Barrhead, and maintained and properly equipped as a public park by the Town Council of Barrhead in all time coming. As a consequence of the local government reorganisations that have taken place in recent years, Cowan Park now forms part of the common good land of the petitioners.

[2] Barrhead High School is situated on land adjacent to Cowan Park. The present school building was constructed in 1971 on land which had formerly been within the area conveyed to the Town Council of Barrhead in 1910. In 1969, the land on which the school was built was conveyed by the Town Council to the County Council of Renfrew, the then education authority. In order to offset this loss of common good land, a somewhat larger area, adjacent to the land acquired in 1910, was conveyed to the Town Council for use as an extension to Cowan Park.

[3] The school building is in poor repair. Its fabric has been deteriorating for some time and its layout is not conducive to modern teaching requirements. The petitioners have resolved to demolish the existing building and replace it with a new school. They have considered various possible locations for the new school. Their preferred option, with a view to minimising cost and educational disruption, is to build the new school on land within Cowan Park. The existing school would then be demolished, with its former site being landscaped and incorporated into the park. Planning permission for such a development was granted in April 2014.

[4] Construction of the new school is to be financed in part by a private sector lender. In order to provide security for this funding it is proposed that the new school site will be leased by the petitioners to a company which will in turn grant a sub-lease back to the petitioners. The company will grant a security over its interest under the head lease in favour of the private sector funder.

[5] As a general rule, a local authority has no power to dispose of common good land or to appropriate it for other uses. However, section 75(2) of the Local Government (Scotland) Act 1973

confers a discretion on the court to authorise the disposal of common good land, subject to such conditions, if any, as it may decide to impose. In this application, the petitioners seek an order authorising the disposal of that part of Cowan Park on which they propose to construct the new school.

[6] When the petition came before the court on 23 April 2014 for the hearing of a motion to grant the prayer, the Lord Ordinary (Malcolm) remitted it to a reporter (Mr SC Smith QC) to inquire into and to report to the court on all the facts and circumstances relating to the application. The reporter duly made inquiries and produced a report dated 31 May 2014. He made certain observations and recommendations regarding the exercise of the court's discretion under section 75 and the conditions which might be imposed were the court minded to grant the application. The reporter also, however, raised a more fundamental issue regarding the jurisdiction of the court. He drew attention to certain previous decisions of this court which suggested that the circumstances of the present case did not give rise to any disposal which the court could competently be asked to authorise. In accordance with the reporter's recommendation, a hearing was fixed to enable the petitioners to make submissions on this matter.

The law relating to inalienable common good land

[7] The historical development of the law relating to common good property is narrated in Andrew Ferguson's very helpful Common Good Law (2006). By virtue of a series of 19th century decisions, it was established that in certain circumstances land or other property held by the magistrates and council of a burgh for the common good of its inhabitants could not be disposed of, destroyed or appropriated by the council for other uses. The key cases in this regard are Sanderson v Lees (1859) 22D 24, Grahame v Magistrates of Kirkcaldy (1882) 9R (HL) 91, and Murray v Magistrates of Forfar (1893) 20R 908. Land possessing this characteristic has come to be referred to as "inalienable" common good land. In Murray, Lord McLaren (at page 918-9) identified "at least three ways" in which land might acquire the characteristic of inalienability, namely appropriation to public uses in the charter or original grant, irrevocable appropriation by act of the town council itself, and appropriation implied from evidence that the land had been so used and enjoyed for time immemorial.

[8] The modern law concerning appropriation or disposal of land by a local authority is contained in sections 73 to 75 of the 1973 Act. Section 73 empowers a local authority to appropriate, for the purpose of any of their functions, land vested in them for the purpose of any other function. Section 74 provides that a local authority may dispose of land held by them in any manner they wish, although section 74(2) imposes a general requirement that the land must not be disposed of for a consideration less than the best that can reasonably be obtained. Section 75(1), headed "Disposal etc of land forming part of the common good", provides as follows:

> "The provisions of this Part of this Act with respect to the appropriation or disposal of land belonging to a local authority shall apply in the case of land forming part of the common good of an authority with respect to which land no question arises as to the right of the authority to alienate."

Section 75(2) then deals with the disposal of inalienable – or possibly inalienable – common good land, in the following manner:

> "Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly."

Section 75(3) allows the court or sheriff acting under subsection (2) to impose a condition requiring the local authority to provide, in substitution for the land proposed to be disposed of, other land to be used for the same common good purpose.

[9] It will be noted that sections 75(2) and (3) apply specifically to disposal of common good land. No mention is made of appropriation. In Portobello Park Action Group Association v City of Edinburgh Council 2013 SC 184, the court held that the 1973 Act did not remove, alter or diminish the pre-existing common law rights and obligations as they applied to appropriation of inalienable common good land. At paragraph 35, the court observed:

> "…For so long as inalienable common good land remains within the ownership of a local authority, Parliament must be taken to have intended all pre-existing fiduciary obligations, and corresponding community rights, to remain extant and enforceable. It would indeed be an extraordinary situation if, by the mere expedient of appropriating inalienable common good land to some function other than parks and recreation, a local authority could at a stroke free itself from all common law restraints and, having done so, perhaps also facilitate onward disposal without any need to obtain the sanction of the court under section 75(2)."

In summary, therefore, the absence of any reference to appropriation in section 75(2) does not mean that a local authority may appropriate inalienable common good land without court authorisation; rather, it means that the common law prohibition on appropriation of inalienable common good land by a local authority for other uses remains intact, with no power having been conferred on the court to sanction appropriation.

Do the petitioners' proposals constitute disposal or appropriation?

[10] The petitioners accept that Cowan Park is clothed with the characteristic of inalienable public good land by virtue of the terms of the 1910 conveyance in favour of the Town Council of Barrhead. Their application to the court is made on the basis that the proposed arrangements, if implemented, would constitute a disposal of the common good land upon which the new school is to be built. A lease, or at least a long lease, is capable in principle of being a disposal: East Lothian District Council v National Coal Board 1982 SLT 460 (OH), Lord Maxwell at 467. In two recent cases, however, the court has refused applications under section 75(2) as unnecessary, on the ground that the development proposed did not constitute a disposal. One of those was a decision of the Inner House in South Lanarkshire Council, Petitioners, 11 August 2004, unreported. No opinion was issued by the court, but the progress of the hearing is described in some detail by Ferguson, op cit, at pages 95-7. The facts of the case appear to have been similar to those of the present application in that it concerned a proposal to use part of a public park for the development of a new school, whose construction was to be financed by a public/private partnership. The delivery mechanism involved a lease by the local authority to a private sector partner for 30 years with a corresponding lease back to the local authority. The question whether this constituted a disposal falling within section 75(2) was raised ex proprio motu by the Court. The second case was North Lanarkshire Council [2006] CSOH 48, which again concerned the construction of schools on areas forming part of public parks, financed by a PPP arrangement. The facts were somewhat different in respect that no lease or sub-lease was involved; the contractor was merely given rights of occupancy. These two cases obviously pre-date the Portobello Park Action Group decision, in the course of which the Court observed (at paragraph 34) that

> "No issue of appropriation seems to have arisen, or to have been discussed, in either case, and the outcome of each can therefore be seen as purely jurisdictional."

[11] In order to determine whether the court's jurisdiction under section 75(2) is engaged in the circumstances of the present case, it is necessary to examine the petitioners' proposed arrangement in

more detail. Construction of the new school is to be financed through a company called hub West Scotland Limited ("hWS"), under a programme set up by the Scottish Government and managed by Scottish Futures Trust. The petitioners intend to enter into a design, build, finance and maintenance contract with a special purpose vehicle ("Subhubco") which is a subsidiary of hWS. Funding is to be provided by (a) private sector partners, (b) public sector partners including the petitioners, and (c) Scottish Futures Trust, in the proportions of 60%, 30% and 10% respectively. In order to provide security for the private sector funding, it is proposed that the new school site will be leased by the petitioners to Subhubco and subleased back by Subhubco to the petitioners. The draft Project Agreement provides that both the head lease and the sublease will be for a period of 25 years from the date of commencement of construction and will be registered in the Land Register. The rent payable under the head lease and also the sub-lease is to be £1 per annum (if asked). During construction, the draft Agreement requires the petitioners to grant Subhubco and its contractors access to the site, including certain rights of exclusive occupation. After construction, the draft Agreement requires the petitioners to continue to grant Subhubco and its contractors access to the site, though not exclusive occupation, for purposes such as maintenance. The rights granted to Subhubco are expressly declared not to be a lease of any part of the site, and it is further provided that Subhubco will occupy as a licensee only and will not have exclusive possession or any right or interest in the site except as provided in the Agreement. The petitioners are to make capital payments to Subhubco at the end of each phase of the development, and monthly payments throughout the 25-year contract period which will, among other things, allow Subhubco to service and repay the loan by the private sector funder. In the event of the occurrence of certain specified events of default by the other party, the petitioners and Subhubco are each given the right to terminate the agreement with immediate effect.

Argument for the petitioners

[12] Counsel submitted that the lease to be granted by the petitioners to Subhubco was a disposal for the purposes of section 75(2). The case law indicated that "disposal" should be given a broad meaning. If the arrangement amounted to a disposal, it could not also be an appropriation. Counsel emphasised that the structure of lease and sub-lease had a genuine commercial purpose, namely the creation of a real right in favour of Subhubco over which a security could be granted. Without such security, the private sector funder would not lend. The lease facilitated the grant of a floating charge or fixed security in terms of which the creditor would acquire rights exercisable in the event of default by Subhubco. As a last resort those rights might include entry into possession of the new school site, although it was more likely, in such an eventuality, that the creditor would co-operate in any attempt to rescue the project and leave the school in the petitioners' possession.

[13] As regards the two cases in which applications under section 75(2) had been refused as unnecessary, it was submitted that the second of these, North Lanarkshire Council, was distinguishable on its facts as it did not involve the grant of a lease. The decision in South Lanarkshire Council was not binding upon me because (a) it had proceeded on the basis of a concession by counsel, and (b) no opinions were delivered and accordingly it was not possible to ascertain the ratio. Reference was made to McLaughlin, Petitioner 1965 SC 243, Lord President Clyde at 246. That being so, I should not follow it because it was not clear that the court had addressed the possible consequences, in relation to absence of power to appropriate, of its refusal of the application as unnecessary. Had it done so, it would probably have taken a broader view of the meaning of "disposal". In any event, South Lanarkshire Council was also distinguishable in respect that it did not appear, on the basis of the limited information available, that the grant of the lease in that case had had a commercial purpose.

Decision

[14] The question I have to determine is whether, in the circumstances narrated, there would be a disposal by the petitioners that the court, if it thinks fit, could authorise. The petitioners' submission proceeded upon an assumption that if the head lease was properly characterised as a disposal, it was unnecessary to go on to consider whether the arrangements as a whole amounted to appropriation by

the petitioners of inalienable common good land. In my opinion that is not the correct approach. It risks focusing the court's attention on a single element of a more complex project and losing sight of the overall effect in relation to the future use of the common good land whose alienation is prohibited.

[15] The following features of the proposed arrangements seem to me to be of greatest significance:

1. The petitioners are currently the proprietors of the proposed new school site. They would remain proprietors of it during the construction phase, throughout the duration of the lease and sub-lease, and permanently after the termination of the lease and sub-lease.

2. The petitioners are currently in possession of the site. Because the lease and sub-lease have the same duration, they would remain in possession of it during the construction phase, throughout the duration of the lease and sub-lease, and permanently after the termination of the lease and sub-lease. Their occupation would, of course, be subject to the contractual rights of possession, including some exclusive possession during the construction phase, to be granted to Subhubco and its contractors, but those rights are expressly declared not to constitute a lease.

3. The site would cease to be used by the petitioners for the purposes of the common good with effect from the commencement of the construction phase.

4. Subhubco's creditor would have the rights conferred upon it by the terms of whatever security was granted by Subhubco in its favour. If one reasonably assumes that either (a) the creditor, at the time when the security comes to be taken, would be aware that a sub-lease in favour of the petitioners had been granted; or (b) if the sub-lease had not yet been granted, the petitioners would insist upon the creditor consenting to it, I am unable to accept counsel's submission that the creditor's remedies in the event of default would include a right to enter into possession (see e.g. Trade Development Bank v Crittall Windows Ltd 1983 SLT 510, Lord President Emslie at 517). Indeed, having regard to the entitlements conferred upon the petitioners by the draft Agreement in the event of default by Subhubco, I find it difficult to envisage circumstances in which the petitioners could ever be deprived of possession of the site.

[16] In summary, it seems to me that the only rights in respect of the new school site which would be relinquished by the petitioners are certain temporary rights of possession of the site during the construction phases. As the draft Agreement makes clear, those would be contractual rights and not real rights. In these circumstances I find nothing that would constitute a disposal by the petitioners for the purposes of section 75(2). On the contrary, I consider that the petitioners' proposals are properly to be characterised as appropriation. In essence, all that would change would be that the land would cease permanently to be used by the petitioners for the common good, and would be used by them instead for other purposes, namely the provision of education. In my opinion that could not reasonably be described as anything other than appropriation of inalienable common good land, which appropriation this court has no power to authorise. I should add, for the sake of completeness, that my view would have been the same if the draft Agreement had provided for the sub-lease in favour of the petitioners to be granted with effect from a slightly later commencement date, and hence for a shorter duration, than the head lease in favour of Subhubco.

[17] My conclusion that on the facts of the present case there would be no disposal requiring the authorisation of the court under section 75(2) is consistent with South Lanarkshire Council and North Lanarkshire Council. In my opinion, the same result must follow: as there would be no disposal, the petition must be refused as unnecessary.