Judicial Review: Petition of GREGORY BROWN for review of a decision by GLASGOW CITY COUNCIL (Cathkin Park, Glasgow)

Cases under the Land Reform (Scotland) Act 2003 · https://scotways.com/ken/brown-v-glasgow-city-council/

Case Report: [2024] CSOH 76

Court of Session, Court ref: P234/24

Decision by Lord Sandison 6th August 2024

Key point: duty of access authority to uphold access rights.

The facts: The case concerns the judicial review of a grant of planning permission by Glasgow City Council for the construction of a 3m high boundary fence to a sports pitch at Cathcart Road, Glasgow (Cathkin Park). The park is home to the Jimmy Johnstone Charitable Trust (the Trust) which teaches children to play football. The trust leases a football pitch at Cathkin Park. The lease required that the Trust maintain public access to the sports pitch for local community sports groups when the Trust is not using it. The consented fence included a lockable gate and would allow the trust to control access to the football pitch. The petitioner objected to the grant of planning permission on the basis that it would restrict access to the part of the park fenced off by local residents who used that part of Cathkin park frequently for recreation.

Legal arguments: The petitioner challenged the grant of planning permission on three grounds.

Firstly that the council had made an error in fact material to the decision, giving rise to unfairness. The Petitioner argued that the grant of permission was based on an error on the part of the Council that public access, was not being wholly removed. The petitioner argued that this was an error by the Council since the purpose of the development was clearly to prevent or severely restrict public access to the park so that it could only be taken via a lockable gate controlled by the Trust.

Secondly the Petitioner argued that the decision was not in accordance with the relevant planning legislation - section 25(1) of the Town and Country Planning (Scotland) Act 1997. The council they argued failed to take into account relevant parts of the national planning framework and that it had misinterpreted parts of the city development plan in determining the application.

Thirdly the Petitioner argued that the planning authority had failed in its statutory duty to uphold access rights in terms of section 13 of the Land Reform (Scotland) Act 2003 (“the 2003 Act”). It was argued that members of the Public had enjoyed access rights with respect to the pitch in terms of the 2003 Act when it was not being used for the purpose of playing sports. The Petitioner argued that these rights had been restricted or indeed eliminated by the decision to grant planning permission and this breached the section 13 duty incumbent upon the planning authority.

Decision: The court rejected the first line of argument concerned with an alleged error of fact on the part of the Council. The Lord Ordinary found no support in the material produced to the court that the Council had made such an error. He found that the Council had understood the access issue that was at stake and it concluded that access was not going to be removed altogether but would continue via an obligation on the Trust to continue to allow access by local community sports groups to access the pitch when it was not in use for football matches, being repaired or maintained.

The Court rejected the second argument based on a failure to correctly take into account the development plan. The Lord Ordinary applied the test for a challenge to planning judgement by a local authority set out in the case of City of Edinburgh Council V Secretary of State for Scotland 1998 (HL) 33. The test concerns failure on the part of the planning authority to properly take into account relevant policy in the development plan, or matters material to the decision, taking into account irrelevant matters or making an irrational assessment of relevant considerations. The court found that the criticisms made by the Petitioner as to the treatment of the development plan by the Council justified intervention by the court. The Judge accepted the Council had acted within the ambit of its broad planning judgement and that in part the Petitioner’s arguments represented no more than a disagreement with the planning judgement.

In relation to the third argument regarding the duty of the Council imposed by section 13 of the 2003 Act the Court took the view that to assess the impact of this provision it was first necessary to assess whether the public had access rights to the football pitch for recreational purposes. If no such rights existed the duty in section 13 does not engage. This consideration required the court to look at sections 6 and 7 of the 2003 Act. Section 6 may exclude public access rights on sports

or playing fields or areas set out for a particular recreational purpose. However, this is qualified by section 7 so that the exclusion of access rights only arises where the land is being used for as either a sports or playing field or where the exercise of such rights would interfere with the recreational purposes for which the area had been set out. The court concluded that access rights had not been excluded by section 6 as read with section 7. The court then went on to confirm that the duty under section 13 of the act was consistent with the duties of the local authority as a planning authority. The Lord Ordinary observed that in section 37(2) of the Town and Country Planning Act 1997 the planning authority must have regard to "any other material considerations". The court observed that section 13 was one of a growing number of such duties in legislation. Section 13 had a particular impact upon planning decisions and is, at least potentially, a material consideration capable of affecting a determination made by the planning authority. The Lord Ordinary went on to determine that there was no evidence produced that section 13 had been considered as a part of the planning decision. Neither the report by the local planning committee, nor the determination of the application itself contain any evidence that the section 13 duty had been taken into account. This said the Lord Ordinary reaches the conclusion that there was a failure on the part of the planning authority to consider a potentially material matter. Since the Court could not conclude that had section 13 been taken into account, then there would have been no real possibility of a different decision, perhaps resulting for example in the imposition of conditions which might have produced a better balance of access rights amongst the parties involved, it followed that the challenge to the grant of planning permission should succeed and the decision be reduced for an error in law.

Comments: This is a useful legal decision as it is the first to turn on the Land Reform (Scotland) Act 2003's Section 13 duty of access authorities to uphold access rights. It demonstrates that the duty has to be shown to have been taken into account when making potentially relevant planning decisions.

Further reading: Malcolm Combe, author of the latest ScotWays Law Guide, has published a blog about this case.

Note on the parties in this case:

Petitioner, Gregory Brown, represented by Deans, McPhee, R&R Urquhart LLP.

Respondent, Glasgow City Council, Burnet KC, Breen, Harper Macleod LLP.