OUTER HOUSE, COURT OF SESSION

2020 CSOH 73

P39/20

OPINION OF LORD TYRE

In the Petition of

GRANTON CENTRAL DEVELOPMENTS LIMITED

Petitioner

for

an order against Edinburgh City Council under section 45(2)(b) of the Court of Session Act 1988

Petitioner: J Campbell QC; Turcan Connell
Respondent: Burnet; Morton Fraser LLP

14 July 2020

Introduction

[1] On 23 June 2003, the respondent ("the Council") granted outline planning permission to Forth Ports Authority for a large mixed use development to be known as Granton Harbour Village. The petitioner is a successor in title to Forth Ports Authority, having acquired the land in 2014. The 2003 permission was granted subject to implementation of 22 conditions and the conclusion of a section 75 agreement. Various reserved matters applications have been made and granted since 2003, and work on site has begun. A section 75 agreement has been concluded.

[2] One of the conditions of the 2003 permission was that applications for approval of reserved matters had to be made within 15 years after the date of the outline permission, *ie* by 23 June 2018. In April 2018, the petitioner submitted an application to the Council for "extension of time limit of the existing outline planning approval to extend the duration for five years to 20 June 2023". The Council failed to determine the application within 4 months, and the petitioner appealed against the non-determination to the Scottish Ministers. On 8 November 2018, a reporter appointed by the Scottish Ministers determined the appeal by granting it. The Council appealed against that decision to the Inner House of the Court of Session. By interlocutor dated 9 April 2020, the Inner House refused the Council's appeal (see [2020] CSIH 13).

[3] On 18 November 2019, the petitioner submitted an application for what is now called approval of matters subject to condition (an "AMSC application"), formerly known as an application for approval of reserved matters, in relation to 51 West Harbour Road. The Council refused to validate the application on the ground that it was linked to the 2003 outline permission (now known as planning permission in principle) that had expired in June 2018. In April 2020, the petitioner re-submitted the AMSC application, referring both to the 2003 permission and to the reporter's decision. Each of these applications was accompanied by payment of a fee of £401, calculated by the petitioner on the basis that under the relevant regulations the fee chargeable was subject to a cumulative cap for applications made under the same planning permission in principle (in this case the 2003 permission). The Council's reason for refusal was that the 2003 permission having expired, any AMSC application could only be made under the permission granted by the reporter's decision, in respect of which a fee of £26,450, based on floor area, was payable.

[4] The practical issue underlying this petition for judicial review is therefore the amount of the fee payable by the petitioner in order to obtain validation of this – and presumably any future – AMSC application. The question of law arising for determination is the proper interpretation of the law and regulations governing the submission of planning applications and the fees chargeable for validation of such applications.

Application to develop land without compliance with conditions previously attached

[5] Section 42 of the Town and Country Planning (Scotland) Act 1997 provides *inter alia* as follows:

> "(1) This section applies… to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> > (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly;
> >
> > (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

[6] The rationale behind the opening words of subsection (2) of the English counterpart provision was explained by Sullivan J in *Pye* v *Secretary of State for the Environment* [1999] PLCR 28 at page 44:

> "…Prior to the enactment of (what is now) section 73 [ie the English counterpart of section 42], an applicant aggrieved by the imposition of conditions had the right to appeal against the original planning permission, but such a course enabled the local planning authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to 'go back on the original decision' to grant planning permission. So the applicant might find that he had lost his planning

> permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.
>
> It was this problem which section 31A (now section 73) was intended to address…"

[7] As is now common ground between the parties to these proceedings, the granting of an application under section 42 has two effects. Firstly, the grant of permission under section 42 constitutes an independent permission to carry out the same development as previously permitted, but subject to the new or amended conditions: *Lambeth LBC* v *Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317, Lord Carnwath, delivering the judgment of the Supreme Court, at paragraph 11. Secondly, the original planning permission is not superseded but remains extant and unamended. As Sullivan J observed in *Pye*, in a passage cited with approval by the Supreme Court in *Lambeth*:

> "Whilst section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and unamended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions. In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to 'go back on the original planning permission' under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained."

Submission and validation of a planning application

[8] The procedure for submission and validation of a planning application is contained in the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (SI 2013/155). Regulation 9 lists the information that must be contained in an application for planning permission and the documents that must accompany it. These

include payment of any fee required. As regards a section 42 application, regulation 11(2) provides that only some of the information and documents listed in regulation 9 need be submitted; these include payment of the fee.

[9] Regulation 14, entitled "Validation date" provides that an application made under *inter alia* regulation 9 is taken to have been made on the date when the last of the items or information required to be contained in or accompany the application has been received by the planning authority. Under regulation 17(1), when the planning authority has received an application made in accordance with regulation 9, including the necessary accompanying documents, it must send an acknowledgment to the applicant. If, on the other hand, the application is not made in accordance with regulation 9, including the necessary accompanying documents, regulation 17(3) provides that the planning authority must send the applicant a notice identifying the missing information or documents. The planning authority is under no obligation to "validate" or process the application until the appropriate fee has been paid: *Ramoyle Developments Ltd* v *Scottish Borders Council* [2020] CSIH 9, Lord Malcolm (delivering the opinion of the Court) at paragraph 16.

Payment of the appropriate fee

[10] The fees payable in respect of applications for planning permission are set out in the Schedule to the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations 2004 (SI 2004/219) ("the Fees Regulations"). For present purposes, the key provision is paragraph 5 which, as amended to take account of the changes in terminology noted above, states as follows:

> "(1) This paragraph applies where–

> (a) an application is made for approval, consent or agreement in respect of one or more matters requiring such approval, consent or agreement in terms of a condition imposed on a grant of a planning permission in principle ('the current application');
>
> (b) the applicant has previously applied for such approval under the same planning permission in principle and paid fees in relation to one or more such applications; and
>
> (c) no application has been made under that permission other than by the applicant.
>
> (2) Where the amount paid as mentioned in sub-paragraph (1)(b) is not less than the amount which would be payable if the applicant were by the current application seeking approval, consent or agreement in respect of all the matters requiring such approval, consent or agreement in terms of conditions imposed on a grant of a planning permission in principle and in relation to the whole of the development authorised by the permission, the fee payable in respect of the current application shall be £401."

Put shortly, paragraph 5 imposes a fee cap where the cumulative total of fees paid for AMSC applications in relation to a grant of planning permission in principle exceeds or equals the amount that would be payable on a new grant of planning permission in principle in relation to the whole development. In those circumstances the fee is capped at an amount which has been increased from time to time, and is currently £401.

The order sought

[11] The petitioner seeks an order requiring the Council to fulfil its statutory duty under the 2013 Regulations by registering, validating and determining its application in relation to 51 West Harbour Road for approval of matters mentioned in conditions attached to the 2003 planning permission without compliance with the 15-year time limit, conform to the reporter's decision and the decision of the Inner House.

Arguments for the parties

[12] On behalf of the petitioner it was submitted that the AMSC application in relation to 51 West Harbour Road had been made under "the same planning permission in principle" as previous AMSC applications which had resulted in the fee cap being reached. The condition in paragraph 5(1)(b) of the Schedule to the Fees Regulations was accordingly met, and the correct fee had been tendered. The only difference between the 2003 permission and the permission granted in the reporter's decision was that in the latter the 15-year time limiting condition had been removed. This was an administrative difference which did not go to the substance of the permission. The expression "the same planning permission in principle" ought to be construed purposively to allow for evolving practical considerations. In substance, the two planning permissions in principle were identical.

[13] On behalf of the Council it was submitted that although the 2003 permission had not been extinguished by the grant in the reporter's decision, it could no longer be used as the basis of an AMSC application because the time limit had expired. The only competent course of action was for the petitioner to submit an application, accompanied by the correct fee, under the permission granted by the reporter following the section 42 application. It was not correct to characterise the reporter's decision as extending the time limit in the 2003 permission: it was a different grant of permission, without the time limit. This was not, therefore, an application under "the same planning permission in principle" as required by paragraph 5(1)(b) of the Schedule to the Fees Regulations. If the fee cap had been intended to apply to planning permission granted under section 42, the regulations would have said so expressly. As soon as the petitioner paid the correct fee, the AMSC application would be validated and processed.

Decision

[14] In my opinion the Council's analysis is correct. It is common ground that, as a matter of law, following the grant or refusal of a section 42 application, the original planning permission remains in existence. But, as Sullivan J recognised in *Pye* at pages 45-47, the practical consequences of the original permission remaining in existence will differ according to whether, in terms of a condition, the time limit for submitting AMSC applications under the original permission has or has not expired.

[15] In the present case, the 2003 permission remains in existence as a matter of law. But it remains in existence in the same terms as when it was granted, including the 15-year time limiting condition. It follows that, in practical terms, no AMSC applications may now be made under it. It is in my view incorrect, as the petitioner seeks to do, to equiparate the 2003 permission with the section 42 permission. Apart from the time-limiting condition in the former, they are in identical terms but they are entirely independent of one another. That is a matter of substance, not form. The fact that the 2003 permission remains extant as a matter of law is of no continuing practical utility to the petitioner because the conditions contained in it cannot be met in relation to this or any future AMSC application.

[16] I therefore conclude that in relation to the AMSC application for 51 West Harbour Road, the fee cap in paragraph 5 of the Schedule to the Fees Regulations is not applicable. The Council is accordingly not under a duty to validate and process the application until the correct fee has been tendered.

[17] For these reasons I shall repel the petitioner's plea in law, sustain the respondent's fourth plea in law, and refuse the petition.