EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2012] CSIH 69
P780/11

Lady Paton
Lord Emslie
Lord Philip

OPINION OF THE COURT

delivered by LADY PATON

in the reclaiming motion

by

PORTOBELLO PARK ACTION GROUP ASSOCIATION

Petitioners and Reclaimers:

against

THE CITY OF EDINBURGH COUNCIL

Respondents:

Petitioners and Reclaimers: Martin QC, Findlay; Drummond Miller LLP
Respondents: S Wolffe QC; Brodies LLP

12 September 2012

Introduction

[1] This is the opinion of the court, to which each member of the bench has contributed.

Proposed new building on common good land

[2] A new building is required for Portobello High School, Edinburgh. Plans and designs have been prepared. Planning permission has been granted. Contractors are ready to carry out the work. But a difficulty has arisen as the site selected by the respondents ("the Council"), namely Portobello Park, is inalienable common good land. When the land was conveyed to the Council's predecessors in 1898, the disposition provided:

> "... the area or piece of ground hereby disponed shall be used exclusively as a public park and recreation ground for behoof of the community of said city and it shall not be competent to nor in the power of my said disponees or their foresaids to erect or build or give liberty to any person or persons to erect or

build houses or buildings of any kind whatsoever thereon except buildings to be used as a house or houses for the park officers and gate keepers to be employed by my said disponees or for other purposes appropriate to the uses of the area or piece of ground hereby disponed as a public park or recreation ground ..."

[3] In view of the title restrictions, local residents, and in particular the Portobello Park Action Group Association ("the Association"), challenged the Council's stated intention to appropriate part of the park for the construction of the new school building. The proposed appropriation would be from the Council's Services for the Community department to the Children and Families Department, thus keeping the title in the Council's name.

[4] In July 2011, after various meetings, protests, objections, deputations and correspondence, the Association lodged a petition seeking judicial review, contending *inter alia* that the inalienable common good land could not be so appropriated. On 7 March 2012, Lady Dorrian sustained the Council's plea of *mora*, taciturnity and acquiescence, and dismissed the petition. She expressed a view on the merits, *obiter*, which was unfavourable to the Association. The Association reclaimed. On 26 April 2012, the Council made a decision to appropriate the park land. The pleadings were duly amended to reflect that decision, which was also challenged by the Association.

[5] During the reclaiming motion, both parties provided full written and oral submissions.

The relevant legislation

[6] **The Local Government (Scotland) Act 1973**

"73. - Appropriation of land

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to the following provisions of this section, a local authority may appropriate for the purpose of any functions, whether statutory or otherwise, land vested in them for the purpose of any other such function ...

74. - Disposal of land

(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 ...

75. - Disposal, etc, of land forming part of the common good.

(1) 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.

(2) 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.

(3) The Court of Session or sheriff acting under subsection (2) above may impose a condition requiring that the local authority shall provide in substitution for the land proposed to be disposed of other land to be used ..."

[7] **Town and Country Planning (Scotland) Act 1959**

"24. - Exercise of powers of appropriation

...

(2A) Before exercising any power of appropriation in relation to land which consists, or forms part of a common or of an open space (not being land which is held for use as allotments) an authority to whom this Part of this Act applies -

(a) shall, for at least two consecutive weeks in a newspaper circulating in their area, publish a notice of the proposed appropriation; and

(b) shall consider any objections to that appropriation which may be made to them ..."

[8] **Local Government in Scotland Act 2003**

"20. - Power to advance well-being

(1) A local authority has power to do anything which it considers is likely to promote or improve the well-being of -

(a) its area and persons within that area; or

(b) either of those.

(2) The power under subsection (1) above includes power to -

(a) incur expenditure ...

(c) enter into arrangements or agreements with any person ...

(3) The power under subsection (1) above may be exercised in relation to, or for the benefit of -

(a) the whole or any part of the area of the local authority;

(b) all or some of the persons within that area.

(4) The power under subsection (1) above includes power to do anything -

(a) in relation to, or for the benefit of, any persons or place outwith the area of the local authority, or

(b) in any such place.

if the authority considers that doing so is likely to achieve the purpose set out in that subsection...

21. - Guidance on exercise of power under section 20

(1) Before exercising the power under section 20 above, a local authority shall have regard to any guidance provided by the Scottish Ministers about the exercise of the power ...

22. - Limits on power under section 20

(1) The power under section 20 above does not enable a local authority to do anything which it is, by virtue of a limiting provision, unable to do.

(2) In subsection (1) above, a 'limiting provision' is one which -

(a) prohibits or prevents the local authority from doing anything or limits its powers in that respect; and

(b) is expressed in an enactment (whenever passed or made).

(3) The absence from any enactment of provision conferring any power does not of itself make that enactment a limiting provision ..."

Chronology of events

[9] As the Association criticise the Lord Ordinary's decision to sustain the Council's plea of *mora,* taciturnity and acquiescence, it is necessary to set out a chronology of events (provided in greater detail in item 4 "Timeline" at pp 17 *et seq* of the Appendix; and also in the Council's written submissions).

January 2006: The Council announced their intention to build the new school on Portobello Park.

April 2006: The Council were advised at a public meeting that the park was common good land. Their response was that there was no legal impediment to building the school on the park.

September 2006: The Council refused a Freedom of Information request for their legal opinion relating to the legality of building the school on the park.

October 2006: The Council carried out the statutory consultation procedure. The Association provided the Council with their legal opinion stating that the park was common good land.

21 December 2006: The Council decided that the park was their preferred site, and that, in principle, they should appropriate part of the park for the school provided that legal issues were resolved and replacement open space found. The Association's further Freedom of Information request for the Council's legal opinion was refused.

March 2007: The Association appealed to the Information Commissioner.

February 2008: The Council gave the Association their legal opinion, and maintained that the title conditions were no longer enforceable.

November 2008: The Council issued a press release stating that they had a legal opinion which indicated that they did not require to seek the court's permission to build on the park.

18 December 2008: At a meeting of the Council, it was decided to give the new Portobello School priority over other new schools subject to appropriate funding being confirmed in the following year. A deputation sent by the Association (i) advised the Council that the Association would go to court on the question of the land being common good land; and (ii) made a Freedom of Information request for the legal opinion referred to in the November 2008 press release (which request was refused).

February 2009: The Association requested a review of that refusal.

March 2009: The Council refused to provide their legal opinion.

July 2009: The Information Commissioner intervened.

27 August 2009: The Association received a copy of the Council's legal opinion.

January 2010: Senior counsel for the Association gave an opinion which did not accord with that of the Council.

11 March 2010: A revised approach to compensation for local residents was approved at a Council meeting, with the provision, or otherwise, of alternative open space being deferred for consideration at a future date. Potential budgetary difficulties were also identified A deputation sent by the Association confirmed their intention to go to court. That intention was repeated in a letter to the Council's Chief Executive in September 2010.

Summer 2010: Consultation was carried out on the Council's proposed planning application.

August -September 2010: The Association instructed solicitors to act on their behalf.

October 2010: The Council lodged their planning application.

October 2010 - February 2011: The Association received legal advice on the constitution, liability, title and interest of unincorporated associations.

23 February 2011: The Council were granted planning permission for the construction of the school on

Portobello Park.

February 2011: The Association requested the Council to enter a joint court action to resolve the legality of building the school on the park. That request was refused.

17 March 2011: The Association sent a letter to the Council's Head of Legal Services suggesting a joint court action.

11 April 2011: The Council confirmed that they had counsel's opinion, and stated:

> "The Council is of opinion that there is no requirement for it to obtain the court's consent for its proposed use of the park, in terms of the Local Government (Scotland) Act 1973 and there is not any mechanism for obtaining such consent in the circumstances currently envisaged. As such, we would not be willing to enter into any kind of joint approach to the courts in this regard."

6 April 2011: The Association sought legal advice on costs and on judicial review.

15 April 2011: The Association's solicitors provided such advice.

23 May 2011: The Association's solicitors instructed junior counsel, and sent a letter to the Council indicating that they were proceeding to court.

June 2011: The Association sought clarification about potential liability on the part of office-bearers for the expenses of litigation.

24 June 2011: In response to a reminder, the Council declined an offer of a joint approach to the court.

30 June 2011: A petition for judicial review became available.

6 July 2011: The Association sent the Council an e-mail advising that they were proceeding with a judicial review.

14 July 2011: The Association's solicitors sent a copy petition to the Council, asking for their undertaking not to commence building works. The petition was lodged with the Court of Session.

22 September 2011: The Council appointed Balfour Beatty as contractors, with the proviso that they could proceed only so far, in the light of the pending legal action. The Association circulated a statement indicating that they had (i) warned the Council about the impending legal action; and (ii) offered to make a joint application to the court.

4 and 11 October 2011: The Council placed advertisements (legal notices) in the Scotsman, intimating that they proposed to appropriate Portobello Park for the construction of the school building. The Association lodged objections.

22 December 2011: A Council report dated 22 September 2011 entitled "The New Portobello High School" was discussed at a meeting. Paragraphs 3.21-3.28 of the report confirmed the Council's intention to build on Portobello Park, and to contest the petition for judicial review. The implications of proceeding in the face of formal legal challenge were noted.

5-6 January and 1 February 2012: A legal debate took place before Lady Dorrian.

7 March 2012: Lady Dorrian issued an opinion (i) sustaining the Council's plea of *mora*, taciturnity and acquiescence and dismissing the petition; (ii) giving a view *obiter* about the merits of the

petition. The Association subsequently marked a reclaiming motion.

26 April 2012: The Council formally decided (i) to appropriate the land (as common good land) at Portobello Park for the proposed new school; (ii) in terms of section 20 of the Local Government in Scotland Act 2003, to advance the well-being of the area and persons within that area by appropriating the land at Portobello Park for the proposed new school; (iii) to enter into a construction contract conditional on the legal challenge being resolved in the Council's favour; and (iv) to approve the Council's response to the consultation exercise carried out in October 2011 in terms of the 1959 Act.

23-24 May 2012: The reclaiming motion was heard.

***Mora,* taciturnity and acquiescence**

Submissions for the Association

[10] Senior counsel submitted that the test was whether the Association had had an opportunity to oppose the building project, but had not availed themselves of it, thus permitting an inference of *mora,* taciturnity and acquiescence. In the present case, it was not clear at what point in time a challenge should have been made. The decisions of 21 December 2006, 18 December 2008, 11 March 2010, and 22 December 2011 were conditional or provisional. Planning permission was still required. If planning permission had been refused, any challenge would have been academic (and the courts always discourage debates on academic legal issues). The House of Lords authority *R (Burkett)* v *Hammersmith & Fulham London Borough Council and another* [2002] 1 WLR 1593 was entirely in point. By contrast, the facts in *Simson* v *Aberdeenshire Council* 2007 SC 366 were distinguishable. In that case only the execution of a single decision remained outstanding, whereas here there were four preliminary decisions, none of which could lead to appropriation as there was no planning permission and no compliance with the obligations imposed by the 1959 Act (until the adverts were placed in the Scotsman in October 2011). Also there had been no reference to *R (Burkett).* The guidance in *R (Burkett)* should be followed, and the Lord Ordinary's decision relating to *mora* overturned. In any event, the Council's recent decision of 26 April 2012 rendered the issue of *mora* less relevant. That decision was also challenged. As the Lord Ordinary had not had an opportunity to give a view about the decision of 26 April 2012, a remit to the Outer House might have to be considered.

Submissions for the Council

[11] Senior counsel submitted that by December 2008, the Council had taken a final decision. They had legal advice that they had the power to appropriate the park without an application to the court. December 2008 was therefore the appropriate starting-point for *mora*. *Esto* the court did not accept that contention, the Council's decision was final by March 2010 as the conditions attached to the December 2008 decision had been purified by that date. But for the decision to appropriate the park, taken in December 2008 (or in March 2010), the Council would not have appointed a design team, applied for planning permission, and selected a

contractor. The fifth decision - to appropriate - was essentially a formal or administrative step. It did not have the effect of postponing the start of the period during which *mora* applied. As for *R (Burkett),* there was nothing in Scots law to suggest that an objector could wait until a last, final, completing act. By March 2010, the Association had all that was required for a challenge. It was open to them to seek an interdict. The matter should have been raised at the earliest opportunity (*Somerville* v *The Scottish Ministers* 2007 SC 140; *Simson* v *Aberdeenshire Council* 2007 SC 366; *Hardy* v *Pembrokeshire CC* [2006] Env L R 28; *Keymed (Medical & Industrial Equipment) Ltd* v *Forest Healthcare NHS Trust* [1998] Eu L R 71; *R (on the application of Salford Estates)* v *Salford City Council* [2011] EWHC 2135 (Admin)). The Lord Ordinary's conclusion in relation to the plea of *mora* was correct. As for what occurred on 26 April 2012, the Council took three discrete decisions on that date. The plea of *mora* was not insisted upon in relation to (ii) the decision to advance well-being in terms of section 20 of the Local Government in Scotland Act 2003; but the plea was insisted upon in relation to (i) the decision to appropriate; and (iii) the decision to approve the Council's response to the consultation exercise.

Reply for the Association

[12] The Council had made the recent substantive decision of 26 April 2012. That decision was also challenged. That was a complete answer to a plea of *mora,* taciturnity and acquiescence. The plea was not a discretionary matter, thus *Hardy* v *Pembrokeshire CC* was of little assistance. *Keymed (Medical & Industrial Equipment) Ltd* had been decided before *R (Burkett),* and was of little help. The Association had made clear their opposition in December 2008 and March 2010.

Discussion and decision

[13] For the plea of *mora,* taciturnity and acquiescence to be sustained, all three elements must be present (*Somerville* v *The Scottish Ministers* 2007 SC 140 at paragraph [94]). The court must have regard to all the circumstances of the case (*Somerville,* paragraph [94]).

[14] Whether the passage of time amounts to *mora* is a question of fact and degree. As Lord Glennie noted in *United Co-operative Ltd* v *NAP,* 2007 SLT 831, paragraph [30]:

> "*Mora* simply means delay beyond a reasonable time. What is a reasonable time will depend on all the circumstances ... In assessing what is a reasonable time, account must, of course, be taken of the complexity of the matter, and the need to take advice, gather information, and draft proceedings. In some cases, this will require considerable time ..."

Similarly in *Somerville* v *The Scottish Ministers,* paragraph [92], it was explained that:

> "The plea [of *mora,* taciturnity and acquiescence] is necessarily protean and it must depend on the particular circumstances of the case whether or not its requirements are satisfied. There may be cases where the passage of time, as related to the surrounding circumstances, may be such as to yield the inference of acquiescence in the decision in question ... The petitioner may, however, be in a position to put forward an explanation for the delay sufficient to rebut the inference ..."

[15] Taciturnity has been defined (*United Co-operative Ltd,* paragraph [32]) as:

> " ... a failure to speak out in assertion of a right or claim when a reasonable person in that position would be expected to speak out ..."

[16] As for acquiescence, we again refer to *United Co-operative Ltd*, at paragraph [33]:

> "Acquiescence simply means assent to what has taken place. The enquiry is not a subjective one to be answered by looking into the mind of the petitioners. The test is objective. Acquiescence requires to be inferred from the petitioners' inaction and silence. The question is how the matter would have appeared to a reasonable person observing the petitioners' conduct, knowing of all the circumstances of which the petitioners knew or ought to have known when acting in the way they did."

[17] In the particular circumstances of this case we consider that the Association were, at the very least, entitled to await the outcome of the Council's application for planning permission before resorting to litigation. We gratefully adopt the reasoning of Lord Steyn in *R (Burkett)* v *Hammersmith & Fulham London Borough Council and another* [2002] 1 WLR 1593, paragraph 42 which we consider wholly apposite (even taking into consideration the particular context in that case, namely an English rule of court providing that an application for judicial review should be made "promptly"). As Lord Steyn said:

> "The core of the reasoning of the Court of Appeal is that 'the impugned environmental impact statement was as necessary to the resolution as to any subsequent steps [and] the logic of measuring time from the resolution seems inescapable'. In my view there is no such inevitable march of legal logic. In law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission. In these circumstances it would be curious if, when the actual grant of planning permission is challenged, a court could insist by retrospective judgment that the applicant ought to have moved earlier for judicial review against a preliminary decision 'which is the real basis of his complaint' (the *Greenpeace* case, at p 424). Moreover, an application to declare a resolution unlawful might arguably be premature and be objected to on this ground. And in strict law it could be dismissed. The Court of Appeal was alive to this difficulty and observed that 'an arguably premature application can often be stayed or adjourned to await events'. This is hardly a satisfactory explanation for placing a burden on a citizen to apply for relief in respect of a resolution which is still devoid of legal effect. For my part the substantive position is straightforward. The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he *must* apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with established principle that judicial review is a remedy of last resort."

[18] Lord Hope also observed:

> "61 As Lord Clyde and Denis Edwards, *Judicial Review* (W Green, 2000), para 13.14 point out, there is no specific time limit for the making of an application for judicial review in Scotland nor is it thought that there is any need for one
>
> ...
>
> 63 The principal protection against undue delay in applying for judicial review in Scotland is not to be found therefore in any statutory provision but in the common law concepts of delay, acquiescence and personal bar: see *Clyde & Edwards, Judicial Review*, para 13.20. The important point to note for present purposes is that there is no Scottish authority which supports the proposition that mere delay (or, to follow the language of CPR r 54.5(1), a mere failure to apply 'promptly') will do. It has never been held that mere delay is sufficient to bar proceedings for judicial review in the absence of circumstances pointing to acquiescence or prejudice
>
> ...
>
> 65 ... The question whether the delay amounts to acquiescence [relevant to a plea of *mora*, taciturnity and acquiescence] or would give rise to prejudice such as to bar the remedy [relevant to a plea of personal bar] is inevitably one of fact and degree ..."

[19] In the present case, if planning permission had been refused, the dispute between the parties would have

become at best premature, and at worst pointless and academic. The decisions taken by the Council on 21 December 2006, 18 December 2008, and 11 March 2010, were all of a preliminary and conditional nature, and depended *inter alia* on a valid planning application being made and approved. In our view therefore the Association were entitled not to lodge a petition for judicial review until the outcome of the Council's planning application of October 2010 was known. Moreover when considering all the circumstances of the case, the court is entitled to take into account the considerable difficulties faced by members of the public who wish to oppose a development which they contend is illegal. Litigation is expensive, time-consuming, and sometimes conducted at considerable personal cost. It is not therefore to be undertaken lightly: cf the observations of Lord Slynn of Hadley at paragraph 50 of *R (Burkett*). The Association and their office-bearers understandably sought extra-judicial solutions and also a joint approach to court by the Council and the Association which, disappointingly in our opinion, the Council refused to contemplate. Other circumstances which the court is entitled to consider include the reasons given for the Association's opposition to the construction of a new school on Portobello Park and the fact that those reasons were supported by counsel's opinions. The regular statements over the years of the Association's reasons for their opposition can scarcely be characterised as "taciturnity". Moreover, bearing in mind the conduct, letters, e-mails, and deputations noted in the chronology in paragraph [9] above, we are unable to accept that there were circumstances entitling the reasonable observer to draw any inference that the Association had at any stage acquiesced in the Council's proposed intention to construct a new school on Portobello Park. On the contrary, as was recognised in the Council's further provisional decision of 22 December 2011, there was a steady and unwavering opposition for the clearly articulated reason that the ground in question was inalienable common good land.

[20] In the result, even if the Council's decision on 26 April 2012 were left out of account, we are of the opinion that the plea of *mora,* taciturnity and acquiescence should not have been sustained.

[21] Turning to the decision taken on 26 April 2012, we do not accept that what occurred that day can properly be characterised as an administrative formality, or as comprising three discrete decisions. On the contrary, the decision was, in our view, a composite one, and represented the key substantive decision by the Council actually to appropriate the land for the purpose of constructing a new school. Without that decision, the Council could not proceed with the project. That decision was so significant and so recent (being only a few months old) that, if taken into account, any plea of *mora,* taciturnity and acquiescence must, in our view, inevitably fail.

Conclusion in relation to *mora*, taciturnity and acquiescence

[22] For the reasons given above, we have concluded that the Lord Ordinary erred in sustaining the Council's plea of *mora,* taciturnity and acquiescence.

The merits of the case

Discussion

(i) General

[23] This is, on any view, an anxious and difficult case. On the one hand, there is clearly a perceived need for the building of a new and improved Portobello High School in place of the existing institution. The Council's efforts in this direction have been supported by many members of the local community over an extended period, and plans have gradually progressed towards implementation. On the other hand these plans, as currently constituted, involve appropriation of much of the open southern section of Portobello Park which, since the land was acquired by the Council's predecessors in 1898, has been dedicated to the open space amenity and recreation of the community at large. It is a matter of concession by the Council that, on account of its nature and long-term use, the land in question not only forms part of the common good of the city but is clothed with the character of inalienability in that connection.

[24] As the Lord Ordinary (Lord Wylie) observed in *Waddell* v *Stewartry District Council* 1977 SLT n.35, at p. 36:

> "... 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."

That observation reflects the fact that the beneficial right in such common good land rests with the inhabitants of the locality and that, correspondingly, the local authority holds the heritable title subject to important fiduciary obligations.

[25] These principles are well settled. In *Sanderson* v *Lees* 1859 22D 24, a case concerning the proposed feuing of inalienable common good land forming part of the Musselburgh Links, the complainer's title, as an inhabitant, to resist such encroachment on community rights was upheld. At p.27, the position was summarised by LP McNeill as follows:

> "In the first place, the verdict establishes that for time immemorial the Links and the piece of ground in question have been possessed and used by the inhabitants for the purposes specified. That is established as a matter of fact. It appears to me that with that fact established, and looking to the terms of the verdict, the right of the complainer and the other inhabitants is not to be regarded as a servitude right at all. The magistrates held the property all along for the community, but the purposes for which it had admittedly been possessed by the inhabitants are not inconsistent with the right of property in the magistrates. These uses have been co-existent with the property from the first; and the property, as I look upon the case, was in the magistrates for the community, for the purposes in question as much as for other purposes; and I think that the possession contended for and established by the verdict was all along a quality of the right which the magistrates had in this property, and that the inhabitants are entitled to protect it from encroachment."

[26] Twenty years later, the well-known case of *Grahame* v *Magistrates of Kirkcaldy* 1879 6R 1066 concerned plans by the local authority, this time without disposal in favour of any third party, to build town stables on inalienable common good land which, through their own mismanagement and neglect, had become so unattractive for recreational purposes that it was not much used. Nevertheless, as a matter of legal right, the complainer as a local inhabitant was held entitled to take action to prevent the Council, in breach of their fiduciary obligations, from encroaching on the subjects to his prejudice. As LJC Moncrieff explained, at p.1073:

> "If this ground was by grant or ancient use appropriated, or, as English lawyers would say, dedicated, to the purposes of recreation, drying clothes, and the like, the magistrates were bound to see that it was kept in such order as to be suitable for these purposes. If it has been allowed to become unfit for these uses that only shews that to that extent the duty of the magistrates has been neglected. That the ground was anciently used for these purposes I can have no doubt. The possession of the ground as a drying-green has indeed been of late years much interrupted, and has in fact well nigh come to an end all together, owing chiefly to the neglect of the magistrates, to say nothing of their abuse of the ground by turning it into a public dung-stance. But there has been some possession as a drying-green even during more recent years, and there was ample evidence of the use given in 1854 in (an earlier case). Therefore, on the whole matter, though I cannot doubt that the corporation have acted in their judgment for the best interests of the community, I am of opinion that they were wrong in point of law, and that the community are entitled to vindicate their rights in this ground, however valueless those rights may be."

When the case reached the House of Lords, although for various reasons the remedy of interdict was withheld, the underlying legal principle was affirmed by Lord Watson (1882) LR 7 App Cas 547, at p.563 in these terms:

> "As a member of the community the appellant has an unquestionable title to vindicate the customary rights of the inhabitants to use the South Links for bleaching and other purposes....".

[27] More recent judicial observations along comparable lines may be found in *McDougal's Trs* v *Lord Advocate* 1952 SC 260 (esp. per LJC Thomson at p.266 and Lord Patrick at p.278), as subsequently affirmed by LJC Grant in *Glasgow Corporation* v *Flint* 1966 SC 108, at p.121. Indeed these observations went so far as to describe the common good as "... the property of the citizens" which it was the duty of elected representatives to administer "... not for themselves but for their constituents".

(ii) The 1973 Act

[28] To some extent at least, the old common law restrictions affecting a local authority's ownership of common good land have been overtaken by the enactment of statutory powers relative to both appropriation and disposal. Echoing similar provisions first enacted in the Town and Country Planning (Scotland) Act 1947, the Local Government (Scotland) Act 1973 provided (and still provides) *inter alia* sections 73-75 as set out in paragraph [6] above.

[29] The short point for determination in these proceedings is whether, as the Lord Ordinary has held in a brief *obiter* addendum to her sustaining of the Council's plea of *mora*, "... (the) power to appropriate (the affected) land remains unfettered", or whether, in the alternative, the former common law restrictions on appropriation to the prejudice of community rights still subsist. If the Lord Ordinary were correct, of course, members of the local community would no longer have any legal right or title to prevent such encroachment; so long as a local authority's plans involved a transfer of the land from one of their functions to another, they could proceed unhindered and at will; and for practical purposes the future of every piece of inalienable common good land in Scotland, notably public parks and other open space recreational and amenity provision, would be in jeopardy. Subject only to planning constraints, local authorities would be free to appropriate open space common good land, even if nominally inalienable, away from dedicated recreational or amenity use. They could construct over the land housing, offices, schools or slaughterhouses, or use it for sewerage or waste

disposal purposes. All or any of these would fall within the ambit of one or other of their statutory functions.

[30] Properly construed, do the relevant provisions of the 1973 Act have that result? In our opinion that question falls to be answered in the negative. By way of background, as acknowledged by the Lord Ordinary (Lord Maxwell) in *East Lothian District Council* v *National Coal Board* 1982 SLT 460, the relevant statutory provisions must be construed with due regard to the pre-existing fiduciary obligations of a local authority with respect to common good land, and the corresponding rights of the local community to prevent encroachment. A relevant general presumption in that connection is that a statute does not interfere with public or private rights without compensation, and where deprivation of common law rights is in issue a strict construction of statutory provisions will ordinarily be appropriate. Along similar lines, Parliamentary legislation is presumed not to alter the pre-existing common law unless that is the subject of clear provision. In our judgment there is no obvious reason why general considerations of that sort should not equally apply to the rights of members of the community in common good land which a local authority hold for their benefit. At the very least one would expect to find some express provision to divest local inhabitants of long-established and valuable rights.

[31] As regards the disposal of land, to begin with, the general power of a local authority is conferred by s.74(1). That power does not, however, stand alone. Section 75 contains discrete provisions which apply specifically to land forming part of a local authority's common good. In that context, subsection (1) extends the general power of disposal to such land "... with respect to which ... no question arises as to the right of the authority to alienate", and subsection (2) completes the picture by requiring the sanction of the court for any disposal of such land "... with respect to which land a question arises as to the right of the authority to alienate". In the *East Lothian District Council* case, at pp.467-9, Lord Maxwell found the precise meaning and scope of the latter clause to be somewhat elusive. What seems clear, however, is that under the express provisions of section 75(2) all issues concerned with the disposal of inalienable common good land are referred to the jurisdiction of the court which can, if it thinks fit, grant authority with or without imposing conditions. Taking subsections (1) and (2) together, therefore, and under the conditions there set out, all pre-existing common law rights and obligations *quoad* the disposal of common good land would appear to have been superseded.

[32] In sharp contrast, as it seems to us, are the provisions of the 1973 Act relative to appropriation. Along parallel lines to section 74(1), section 73(1) bears to confer on local authorities a general power to appropriate "... for the purpose of any functions, whether statutory or otherwise, land vested in them for the purpose of any other such function". As in the case of disposal, this general power does not stand alone. Section 75 contains special provisions where common good land is involved, thereby confirming the limited ambit of the general power, and in the context of appropriation the precise terms of that section are in our view of particular importance. As has already been seen, subsection (1) is expressly confined to circumstances where "... no question arises as to the right of the authority to alienate". In terms, that subsection applies to both appropriation and disposal alike. Thus, in any case where common good land is undoubtedly alienable, the relevant local authority may either appropriate or dispose of it by virtue of the extended powers derived from sections 73(1), 74(1) and 75(1) read in conjunction.

[33] Significantly, however, Parliament enacted no equivalent of section 75(2) relative to appropriation. The latter subsection covers disposal alone, and in the result the appropriation of common good land "... with respect to which ... a question arises as to the right of the authority to alienate" is simply not provided for. No statutory power to appropriate such land is conferred, nor has Parliament provided any mechanism whereby appropriation, with or without compensation, may be sanctioned by the court. There is thus nothing in the 1973 statute to remove, alter or diminish the relevant pre-existing common law rights and obligations as they apply to the appropriation of inalienable common good land.

[34] Before us, senior counsel for the Council sought to draw a contrary inference from the decision of the Lord Ordinary (Lord Drummond Young) in *North Lanarkshire Council*, *Petitioners* 2006 SLT 398, and from an unreported decision of the Inner House in *South Lanarkshire Council*, *Petitioners*, dated 11 August 2004. No opinions appear to have been issued in the latter case, but it was common ground that, although unopposed, both applications were simply refused as unnecessary under section 75(2) on the ground that the relevant plans involved no disposal of inalienable common good land. 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. Under section 75(2) it is only where disposal is in prospect that the court's jurisdiction arises; in any other situation the court has no statutory *locus* to intervene; and in the two cases cited this would appear to have been the sole basis of the court's ruling. In our view, therefore, neither of these decisions is of any assistance to the Council on the very different issue which arises here.

[35] With the foregoing considerations in mind we are, with great respect, unable to support the Lord Ordinary's reasoning and conclusions in this area. To our mind there is no question of a local authority's right to appropriate inalienable common good land (such as the southern section of Portobello Park) being unfettered. On the contrary, the true position would appear to be that, 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 the absence of clear authority requiring us to affirm such an apparently unreasonable state of affairs, we are not persuaded that we should go down that line. We therefore hold that, for present purposes, the Council can lay claim to no statutory power of appropriation under the 1973 Act.

(iii) The Council's alternative contention

[36] By way of what we understood to be a fall-back position, senior counsel for the Council sought to persuade us that her clients' proposals did not in any event involve a breach of their fiduciary obligations at common law. It was, she submitted, a question of fact and degree whether, in a given case, any unlawful alienation of

common good land was in prospect. By reference to *Paterson* v *Magistrates of St Andrews* 1881 LR 6 App 833, and especially the speeches of LC Selborne at p.843 and Lord Watson at p.851, only "substantial interference" could qualify, and in the Council's view their plans incorporated not only appropriate substitutional benefits, such as occasional use of the new school's swimming pool, but also qualitative improvement in certain respects. All-weather football pitches and pedestrian pathways would be created on part of the site; a small amount of free walking space would remain available near the south-eastern perimeter; and in the whole circumstances the dedicated open space amenity and recreational use of the land would not be exposed to "substantial interference". The 1898 destination was, after all, inspecific as regards particular activities and areas, with the result that modifications of the kind proposed might more readily be accommodated. The intended outcome, according to senior counsel, would be "... qualitatively no less" where the audited state of existing facilities was only fair.

[37] We do not agree. The destination in the 1898 title provided that the land should be used exclusively as a public park and recreation ground for the use of the community, and that (with the exception of houses for park staff or for other purposes appropriate to the aforesaid exclusive use) it should not be competent to nor in the power of the Council to erect or build houses or buildings of any kind whatsoever thereon. Notwithstanding these express restrictions, the Council's current plans involve constructing, on a large part of the southern section of the park, a significant High School for some 1400 pupils. The park will not remain unbuilt upon, nor will it in any realistic sense remain available for its dedicated use. The school buildings will obstruct public access to a sizeable proportion of what has, for more than a century, been open space amenity and recreational ground. The daily presence of 1400 pupils and staff during term time will radically alter the character of the parkland. The existing amenity of the area will be affected by the creation of artificial pitches and paths in place of open ground in its natural state. Against that background, as it seems to us, the belated offer of access to such artificial pitches and paths, with or without occasional use of the school's swimming pool, goes no distance towards eliding what is plainly a major encroachment on inalienable common good land.

[38] In this context we do not believe that the decision in *Paterson* v *Magistrates of St Andrews* is of assistance to the Council's argument. In that case a large tract of land was dedicated to the playing of the game of golf, and the magistrates' disputed plans involved the creation of a public access road around the perimeter of the golf course area. It was found as a fact that the road would not interfere in any way with the playing of golf, and might even enhance the challenge. We suspect that it might also have had the beneficial effect of discouraging residents and visitors from crossing the course. The creation of the road was thus in the nature of administration or management of the Council's property - in Lord Watson's words "... an alteration in the condition of the links" - and involved neither alienation nor any other infringement of dedicated community rights. As Lord Maxwell explained in the *East Lothian District Council* case, at p.467:

> "*Paterson* v *Magistrates of St Andrews* is important in that it makes it clear that there is a distinction in this matter between acts of management by the magistrates themselves where the magistrates retain control, which are permissible where they do not at least to any substantial extent interfere with the leisure use to which the land is put, and alienation in the sense of putting any part of the land out of

> the magistrates' control into the control of another. In that case the laying down of a road along the edge of the links at St Andrews was permitted on the ground that it would not interfere at all with the traditional use of the links for golf, that it was consistent with the inhabitants' other recreational uses of the links and that it was irrelevant that it would be of particular use to the owners of certain properties on the edge of the links..."

To our mind the circumstances of that case could hardly be more different from the present where, as discussed above, the construction of the new High School would physically obliterate a substantial proportion of the southern section of the park, and where the community's use of the park for open space amenity and recreational purposes would suffer grave and permanent encroachment. The Council's plans do not appear to us to concern the management or administration of Portobello Park for public recreation and amenity. On the contrary, they involve appropriation of the land to a different function altogether, namely the construction and operation of a school.

(iv) The 2003 Act

[39] Against that background, we can deal shortly with the Council's further reliance (for the first time in their decision of 26 April 2012) on the provisions of section 20(1) of the Local Government in Scotland Act 2003. It is true that, read literally and without regard to context, subsections (1) and (3) of section 20 bear to entitle a local authority to do "*anything*" which it considers likely to promote or improve the well-being of all or part of its area and/or some or all of the persons within it. Indeed subsection (4) appears to go even further in allowing the provision of benefits outside the area of the local authority to qualify. By virtue of section 22, moreover, the extent of that power can be restricted only by a "limiting provision", defined as meaning any prohibition or restraint expressed in an enactment, and for the avoidance of doubt subsection (3) provides that "...The absence from any enactment of provision conferring any power does not of itself make that enactment a limiting provision". Since the 1973 Act did not expressly bar the appropriation of inalienable common good land, so the argument ran, there was no "limiting provision" to disapply the wide power conferred by section 20(1) in the circumstances of this case. For present purposes, this was "...a power like no other"; any listed examples of its exercise were non-exhaustive; the Act had been passed after the fullest consultation; and the Council were accordingly justified in relying on it as a further ground for their decision to appropriate the park.

[40] With respect, that argument seems to us to be fundamentally misconceived even if, which is far from self-evident, the construction of a significant High School in a public park could be deemed a matter of "well-being". For one thing, the reference to "anything" in section 20(1) cannot in our view possibly be thought to mean what it appears to say. It cannot, for example, be understood as conferring on a local authority the right to act in breach of contractual or trust or title obligations, or to the detriment of established third party rights. It cannot constitute a blanket entitlement to disregard planning or other administrative constraints, or the general provisions of domestic or European law. By the same token, it is in our view inconceivable that section 20(1) can have been intended, while sections 73-75 of the 1973 Act remained in force, to sweep away all

fiduciary restraints on a local authority's ownership of inalienable common good land. Even section 75(2), expressed as enabling a local authority to obtain the authority of the court for any disposal of such land, seems to us to constitute no more than an implied restriction, and thus to fall outwith the definition of a "limiting provision" in section 22(2) of the 2003 Act. It cannot surely have been an intended (and unstated) effect of this legislation that, notwithstanding the provisions of section 75(2) of the earlier statute, a local authority in pursuit of "well-being" could henceforth bypass any need for sanction and dispose of inalienable common good land without recourse to the court.

[41] Consistently with that approach, section 20(2) sets out six ways in which the principal power may be exercised. In particular, that subsection envisages that local authorities may:

> "(a) incur expenditure,
> (b) give financial assistance to any person,
> (c) enter into arrangements or agreements with any person,
> (d) co-operate with, or facilitate or co-ordinate the activities of, any person,
> (e) exercise on behalf of any person any functions of that person, and
> (f) provide staff, goods, materials, facilities, services or property to any person."

Similarly narrow examples are given in the antecedent Policy Memorandum and in subsequent Guidance, and applying the *ejusdem generis* principle of construction it seems to us that section 20(2) serves to confirm the relatively limited ancillary nature of the primary power. If the disposal or appropriation of heritable property in breach of established fiduciary or other obligations was intended to be covered, it strikes us as astonishing that such matters should have been altogether omitted from the explanatory list.

[42] For these reasons we have no hesitation in concluding that, for present purposes, the 2003 Act confers no relevant power on the Council. The park is admittedly inalienable common good land; at common law it may not lawfully be encroached upon; the 1973 Act in our opinion provides the Council with no contrary power; and, consistently, we find that the 2003 Act does not do so either. Contrary to the Association's supplementary contention (and in agreement with the Council), we see no reason to remit this latter issue back to the Lord Ordinary for determination.

(v) Remedy

[43] In the result we consider that the petitioners are, at this stage, entitled to:

> (i) Declarator that the Council have no power, under the 1973 Act or otherwise, to appropriate for use as a school any part of the inalienable common good land at Portobello Park; and
>
> (ii) Reduction, as *ultra vires*, of the Council's decision of 26 April 2012 insofar as relating to the appropriation of inalienable common good land at Portobello Park for use as the site of the new Portobello High School and associated community facilities.

In our view, the circumstances of this case fall well short of the exceptional character which has, in rare cases such as *Grahame* v *Magistrates of Kirkcaldy*, been held to justify the withholding of legal remedies to which a party is otherwise entitled. And although the matter was not fully argued before us, the present dispute would also appear to fall outwith the scope of any relevant jurisdiction of the Lands Tribunal for Scotland under the

Title Conditions (Scotland) Act 2003. Thus, regardless of the Council's statutory powers of appropriation, an unresolved difficulty would be the continued existence of the title restriction quoted at paragraph [2] of this opinion.

Conclusion

[44] For the reasons given above, we shall allow the reclaiming motion; recall the interlocutor of the Lord Ordinary dated 7 March 2012; repel the respondents' first, second, third, fourth and eighth pleas-in-law; sustain the petitioners' first, second, and third pleas-in-law; and grant decrees of declarator and reduction as sought in the petition at statement 4(a), (e) and (f).