



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 23
XA52/23

Lord President
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND

in the appeal under section 58 of the Planning (Listed Buildings and Conservation Areas)
(Scotland) Act 1997

by

WEISS DEVELOPMENT COMPANY LIMITED

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: Jonathan Weiss (lay representative)
Respondents: N McLean (sol adv); Scottish Government Legal Directorate

2 August 2024

Introduction

[1] This appeal challenges a decision by a reporter appointed by the respondents to refuse an appeal against the inclusion of a building in the list of buildings of historic and architectural interest.

Background

[2] The appellants purchased the City Sawmills at 124 Craighall Road, Port Dundas, Glasgow on 30 August 2013.



In May 2022, the appellants applied for planning permission from Glasgow City Council to demolish the building and erect 60 flats on the site. The same month, Mr Paul Sweeney MSP

applied to Historic Environment Scotland to have the building designated as a listed building, with a view to having it preserved from demolition. HES is the executive non-departmental public body with responsibility for preserving Scotland's historic environment.

[3] HES proceeded to carry out a full assessment of the special architectural and historic interest of the building. On 5 September 2022, they found that the building met the criteria for listing, but declined to designate it as such, due to the advanced stage of the appellants' development proposals. HES observed that there was a significant level of public interest in the case and that GCC had "noted" the possible service of a Building Preservation Notice. In paragraph 3.3 of their report HES referred to their policy on development proposals and designation; they stated that where plans for the development of the site or place were particularly advanced, they would not normally decide to make a listing. The following month, GCC issued a BPN in relation to the building, and asked HES to reconsider it for listing. HES duly did so. This time they decided to designate the building as a category C listed building, owing to the fact that they considered it to be a good surviving example of a late 19th century commercial office building and therefore of special architectural or historic interest in terms of section 1 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

[4] The appellants appealed this decision to the Scottish Ministers under section 5B. The Ministers appointed a reporter to consider the appeal. The reporter issued her decision on 11 October 2023. She dismissed the appeal and upheld HES's designation decision.

Relevant provisions of the 1997 Act

[5] Section 1 requires HES to compile or approve a list of buildings of historic or architectural interest. This is done with a view to providing guidance for planning authorities in the performance of their functions under the 1997 Act. The effect of listing a building is that

it may not be altered, extended or demolished without authorisation (section 6). Authorisation must be sought under section 7.

[6] Section 5A enables HES, upon receipt of an application by any person, to issue a certificate stating that it does not intend to include a building in a list compiled under section 1.

Where a certificate is issued, the effect is that:

- “(2) ...
- (a) [HES] may not for a period of 5 years from the date of issue exercise in relation to the building any of the powers conferred on it by section 1, and
 - (b) a planning authority may not for that period—
 - (i) serve a building preservation notice in relation to the building, or
 - (ii) affix [a temporary listing] notice under section 4(1).”

A person submitting an application to HES for a certificate must, at the same time as submitting it, give notice of the application to the planning authority within whose district the building is situated (section 5A(3)).

HES’s first decision

[7] In relation to the architectural interest of the building, it had been designed by Clarke and Bell of Glasgow in 1893. The firm was renowned for its high quality works. The exterior used industrial brick, but with a high degree of detailing. There was special design interest in this. The interior of the building retained a detailed entrance stairway, public meeting rooms, and a corridor of office rooms reflecting its function as a place of business. High quality timber detailing had been retained; this advertised the fact that it had been used by nationally-recognised timber merchants. The building had been substantially unaltered since the 19th century and was a good surviving example of an industrial office building from that period. It retained good quality detailing to its exterior and interior. It had a high level of authenticity.

As for the setting of the building, though its immediate surroundings had changed significantly, the site was the last remaining part of the former City Sawmills estate, which had once occupied fourteen acres. It retained its historic relationship with the canal.

[8] When considering the historic interest of a building, its age and rarity, its social historical interest, and any association between it and people or events that had had a significant impact on Scotland's cultural heritage were all relevant considerations. Many office buildings in Glasgow of an age similar to the building had been lost, repurposed, significantly altered or did not have distinguishing architectural detail. The building was a rare surviving recording of the former timber industry in the Port Dundas Forth and Clyde canal area, which had been an important centre of Scottish industry from the late 18th to mid-20th centuries, and in Scotland as a whole. It contributed to an understanding of how people lived in the past. City Sawmills had been the largest Scottish firm of timber merchants in the late 19th century, and the quality and finish of the building's customer-facing spaces reflected the firm's success. For these reasons, the building was of special architectural or historic interest.

[9] The firm had been founded by Mr James Brownlee in 1848. Mr Brownlee was awarded the Gold Medal of the Institute of Engineering and Shipbuilders in Scotland for a paper entitled, "The Action of Water When Flowing Through a Nozzle", and met weekly with other industrialists with an interest in science, such as James Thompson, Professor of Engineering at the University of Glasgow, Robert Napier, ship designer, and the Bell brothers, who worked in shipping. There was some interest in the building's association with Mr Brownlee; however, that interest was not of national importance.

[10] The building's importance justified a category C listing; this category applied to buildings of special architectural or historic interest which are representative examples of a period, style or type. However, the implications of designating the building on any

development proposals had to be considered. Since the appellants' development proposals were at an advanced stage, the building would not be listed.

HES's second decision

[11] GCC had issued a BPN in relation to the building, and had asked HES to reconsider the building for listing. Since the first assessment, the building's designer was identified as George Bell II of Clarke and Bell architects. Further information about the style of the building's design had also come to light. However, none of the new information had a bearing on the overall decision, which was that the building was appropriate for designation as a category C listing, and that the building should now be so designated.

[12] The second decision referred to HES's policy on BPNs and noted that in urgent cases planning authorities may consider serving a BPN if it appeared to them that a building was of special architectural or historic interest and was in danger of demolition or alteration which would affect its character. This was a form of temporary listing. Once a BPN had been served HES had six months to assess the building for listing. HES might list a building in these circumstances even if there were development proposals at an advanced stage.

The reporter's decision

[13] As a preliminary issue the appellants had questioned the legality of the listing on the basis that HES had determined not to list the building; therefore the building could not be designated for the next five years. HES had confirmed that a certificate of intention not to list under section 5A(1) had not been issued. Accordingly, section 5A(2) did not apply and HES were not prevented from listing the building. The reporter, therefore, proceeded to determine the appeal.

[14] To be designated as listed, a building required to meet the criteria of special architectural or historic interest as set out in the 1997 Act. HES's "Designation Policy and Selection Guidance" (2019) provided details of the matters taken into account in deciding whether a building should be listed. The guidance provided a framework within which professional judgement should be applied in making a listing decision. Each individual case required to be considered on its own merits. Architectural interest included the design, designer, materials, setting and the extent to which such characteristics survived. Historic interest took account of the age and rarity, social historical interest and association with people or events that have had a significant impact on Scotland's cultural heritage. A building was eligible for listing if one or more of the selection criteria was demonstrated.

[15] The appellants contended that the building had been refitted in its entirety prior to 1922, and that it was therefore merely a high-quality replica of a Victorian era structure. They pointed to recent works, including the replacement of the roof, the addition of skylight windows and the installation of new, reinforced sash windows in support of this. The appellants submitted that, for those reasons, the building was not of special architectural or historical interest. However, despite the works, the original design and architectural detailing of the building were evident. The new roof was finished in natural slate of a size, format and appearance that was consistent with a building of this age. The replacement windows were in keeping with its historic character. The skylights were unobtrusive and did not detract from the building as a whole. There had been alterations and subdivisions inside the building, but the original floor plan and form of the building remained legible. In some places the timberwork had been altered or replicated. HES had assessed the timberwork as being late 19th century and had provided examples of similar timberwork from that period. HES were specialist advisers to the Scottish Government on the historic environment and weight ought to be given to their

analysis. Taking account of that and all of the evidence, the appellants' contention that all or much of the timberwork was a reproduction was not supported. Lowered, false ceilings had been installed in parts of the building; however, the work was of a temporary, lightweight construction and there was evidence that original cornicing remained in place above it. There was insufficient evidence to demonstrate that the building had been entirely refitted. While there had been a number of alterations to the building, mostly to the interior, its original design, form and function remained legible. The quality of the remaining features reflected the original function of the building as an office of some status dating from the late 19th century. In any event, the listing of a building was not predicated upon individual features, but on its overall architectural and historic interest. The alterations undertaken did not detract from the overall architectural interest of the building.

[16] As to the setting of the building, the parties did not dispute that the building was the only surviving remnant of the extensive timber business associated with the canal. It had a historic, functional relationship to the canal and was the last remnant of the nationally important sawmill which had existed there. The building contributed to the understanding of its historic setting.

[17] Turning to the historic interest of the building, HES had advised that many similar office buildings had been lost to redevelopment. Of those which survived, a significant number had been materially altered, or lacked distinguishing architectural detailing. The parties had referred to no other examples of similar buildings. The building was a good surviving example of a 19th century industrial office building. It retained high quality design details and features reminiscent of that period. The appellants had submitted that HES had based its decision to list the building upon its being the headquarters of the City Sawmills company. They contended that, in fact, the firm's headquarters had been located at 127 Craighall Road. HES's report did

make reference to the building being the principal office of the firm, but the designation was not predicated upon it being the headquarters of the firm. It was founded upon its wider architectural and historic interest. HES had accepted that the building's association with James Brownlee was not of national importance. The historic connection of the building to the timber business and canal at this location was without doubt. The building contributed to society's understanding of the social, economic and cultural history of the area.

[18] The appellants had raised various concerns regarding the decision-making process, including the fact that HES had originally decided not to list the building; that the potential for listing the building and issuing a BPN was not identified at an earlier stage of the planning process and the costs to the appellants associated with that process; and that the involvement of a local MSP in the listing process meant that the process was not independent. However, the appeal related only to whether the building was of architectural or historic interest, as set out in the 1997 Act. Consequently concerns regarding the listing process and planning application were not relevant. The decision on the appeal did not preclude a future application for listed building consent for alteration, or even demolition, of the building.

Submissions

Appellants

[19] The appeal was not based on the arguments made about the architectural and historic interest of the building before the reporter.

[20] HES's first decision constituted a certificate under s 5A. Once HES had issued its determination not to list the building in September 2022, no BPN could be served on the property for a period of five years. Even if GCC's BPN had been properly served in the correct format, it was void. Section 5A of the Act set out a clear definition of a certificate. A certificate

cleared a building from potential listing, whether temporary or permanent, for five years.

HES's first decision had granted the building immunity from threat of becoming listed or being made subject to a BPN for that period.

[21] The respondents' contention that HES would only issue a certificate of intention not to list a building where it had determined that the building was not of special architectural or historic interest was contrary to HES's Guidance at Annex 2. There it was stated that HES may proceed not to list a building even where it had been found to meet the listing criteria. The respondents' contention that a certificate would take the form of a letter from HES to the applicant, as well as to the owner, occupier and tenant of the building in question was refuted. A certificate took the form of a report of handling. The respondents were to put a strict explanation as to the point of a decision not to list if it were the case that a local planning department could immediately serve a BPN following such a decision. A certificate was simply a written assurance given by a public official. It could take the form of a letter. Reference was made to *Cook v Ziff Colored Masonic Lodge No 119* (80 Ark. 31; 96 S.W. 618, a decision of the Arkansas Supreme Court dated 23 July 1906) and to *Kay-Vee Realty Co. Inc. v Town Clerk of Ludlow* (355 Mass. 165; 243 N.E.2d 813, Spalding J at 168; a decision of the Supreme Judicial Court of Massachusetts). The appellants had a legitimate expectation that HES, as a public authority, would act in accordance with and would honour their original decision not to list the building.

[22] In his oral submissions Mr Weiss expanded on his note of argument. Even if the decision of 5 September 2022 did not amount to a certificate for the purposes of section 5A, the appellants nonetheless had a legitimate expectation that HES would not list the building in circumstances where there had been no change in any of the material circumstances of the case. The service of the BPN after the first decision made no difference. It was merely a means by

which the planning authority could draw the attention of HES to what they contended was the historic or architectural significance of the building. Further, in reversing its original decision HES had acted contrary to the Scottish Regulators' Strategic Code of Practice and in a manner which infringed the appellants' rights under Article 1 of the First Protocol to the European Convention on Human Rights. Finally, Mr Weiss submitted that the BPN was, in any event, invalid since it had not been served on the owners of the building, a company with its registered office in Hong Kong.

Respondents

[23] Under section 58 of the 1997 Act, an appellant could challenge the validity of a decision on the grounds that it was not within the powers of the Act, or that any relevant requirements had not been complied with in relation to it. A decision by the respondents would be regarded as outwith their powers under the Act if they had: improperly exercised the discretion conferred on them; made a material error of law going to the root of the question for determination; taken into account an irrelevant consideration; failed to take account of relevant and material considerations; proceeded on a fact for which there was no evidential basis; or reached a decision which no reasonable person could have reached (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347- 348). Under section 58, the court was concerned only with the legality of a decision, not with its merits, or with the planning judgement exercised.

[24] The appeal did not advance a relevant ground of appeal, nor explain how the reporter had erred on one of the grounds identified in *Wordie Property*. Before the reporter, the appellants had questioned the legality of the listing of the building under section 5A. The reporter had been satisfied that that provision did not apply. Having disposed of that

preliminary issue, the reporter had proceeded to determine whether the building was of special architectural or historic interest. She was correct to do so, exercising her planning judgement, and based on the material before her.

[25] In any event, as explained in HES's "Certificate of Intention Not to List Guidance", HES would only issue a certificate of intention not to list following receipt of an application requesting a certificate of intention not to list and where it had found that a site or place was not of special architectural or historic interest. No such application was received by HES from anybody, including the appellants, in the present appeal. A certificate took the form of a letter from HES to the applicant and the owner, occupier and tenant of the building in question. HES publishes a list of certificates on its website. The appellant was not sent a letter from HES, nor was the appellants' property listed on the HES website as being subject to a certificate of intention not to list.

[26] The appeal raised a single ground of challenge concerning whether a certificate under section 5A had been issued. Insofar as the appellants' submissions extended beyond that issue, the court should not entertain them. In any event, they were without merit.

Decision

[27] The first ground of challenge to the reporter's decision can be disposed of briefly. Section 5A(1) of the 1997 Act empowers HES to issue a certificate stating that it does not intend to include a building in a list compiled or approved under section 1. The sub-section says that this power can be exercised "on the application of any person". This can only mean on the application of any person for such a certificate. It does not mean on the application of any person for the exercise of some other power conferred by the 1997 Act, such as the power to include a building in a list compiled or approved under section 1. The power to issue a

certificate under section 5A is a stand-alone power requiring as a precondition of its lawful exercise the making of an application for the issuing of a certificate. The issuing of a certificate has the important consequences set out in sub-section (2): the building may not be listed for a period of 5 years from the date of the certificate being issued and the planning authority may not for that period serve a BPN in relation to the building. As HES's guidance explains, the certificate is a form of legal guarantee and provides certainty for owners and developers considering work to buildings.

[28] HES did not receive an application from any person for a certificate. They did receive an application from Mr Sweeney requesting that the building should be listed under section 1 of the 1997 Act. They determined that application by their decision of 5 September 2022. There is no basis for holding that the decision not to list the building amounted to or constituted a certificate under section 5A. The two types of decision – whether to list and whether to issue a certificate - are entirely distinct from one another. They arise under different statutory provisions. There is no read-across between them. The first ground of challenge to the reporter's decision is misconceived and must be rejected.

[29] Mr Weiss attacked the reporter's decision on somewhat broader grounds in his oral submissions. While it is true that these were not precisely focussed in his grounds of appeal, there was no suggestion by Mr McLean, who appeared for the respondents, that he was unable to respond properly to them, which he did robustly in the course of his submissions at the oral hearing. Essentially, these grounds resolved into a complaint of a failure by the reporter to address the appellants' concern that the second HES decision amounted to an unexplained and unjustified *volte face*. Mr McLean submitted that this matter had not been raised in the appeal under section 5B and was not before the reporter. In the course of the hearing we were provided with the appellants' letter of 26 April 2023 in which they set out their various grounds

of challenge to what they described as HES's "shocking decision" to list the building. The letter is detailed and contains a number of complaints about the merits of the decision and the procedure leading up to it. As well as rehearsing the history of the case it refers to the original decision not to list due to the "advanced submitted building proposals". It goes on to make reference to the issuing of the BPN and the second decision by HES in which they decided to list the building. It says that if GCC was unhappy with the initial decision by HES they should have appealed against it. It claims that GCC was "pressurised" into serving a BPN. Looking at the appellants' letter as a whole and reading it fairly (and bearing in mind that it was not drafted by a lawyer) it is clear that the appellants were concerned to challenge the decision to list because it represented an unexplained and unmerited change of front on the part of HES.

[30] In paragraphs 21 and 22 the reporter makes brief reference to what she describes as "other matters" raised by the appellants. She mentions, amongst other points, the original decision not to list in the knowledge that GCC intended to issue a BPN and the appellants' criticism of GCC's failure to serve a BPN at an earlier stage. The reporter does not, however, engage with any of the concerns raised by the appellants about the fairness and transparency of the process and, in particular, with the change of front on the part of HES. Her view appears to have been that such issues were not within the proper scope of the appeal, which related only to whether the building was of architectural or historic interest "as set out in the Act". She considered that the concerns regarding the listing process were not relevant to her determination of the appeal.

[31] The court considers that in the particular circumstances of the present case the reporter took too narrow a view of her role. While a reporter must not, of course, embark on a frolic of her own by seeking out and founding upon information not placed before her (*Taylor v Scottish Ministers (No. 2)* 2019 SLT 681, LP (Carloway), [34] and [35]), it ought to have been obvious to

the reporter in this case that the appellants entertained profound concerns about the fairness, transparency and legality of the processes that had been followed. At the root of the appellants' concerns was the seemingly remarkable reversal by HES of their original decision not to list the building in circumstances where nothing of any material relevance had altered in the short interval between the two decisions. While GCC had issued a BPN in the immediate aftermath of the first decision, the significance and effect of this are not explored by the reporter. In their second decision HES did not explain why the BPN made any difference to their approach. They did no more than record that it had been issued, referring in general terms to their policy regarding BPNs. They did not suggest that there was anything of urgency in the circumstances of the case such as to justify the serving of a BPN.

[32] In these unusual circumstances the court considers that the reporter erred in law by failing to engage with a key aspect of the appellants' concerns about the overall fairness of the procedure followed by HES. She ought to have addressed the issue of whether there was any legitimate basis for the decision by HES to change their view on listing so fundamentally and so soon after their first decision without there being any material change in the circumstances of the case. Having regard to the material produced to her there was no basis on which the reporter could conclude that such a dramatic reversal of the original decision was justified. There was, in particular, no reason to think that the reasoning deployed by HES in their first decision did not continue to apply, for example in regard to their policy not to list where development plans were particularly advanced.

[33] The court considers that the flaw in the reporter's reasoning is essentially one of a failure to address a central issue in the appeal, namely the complaint about the unexplained change of view on the part of HES. The reporter was bound to consider why HES's policy, of not listing buildings pending determination of development proposals, should have been inexplicably

disregarded. Although a BPN required a consideration of listing, that had already been done in this case. Mr Weiss submitted that the appellants had a legitimate expectation arising from the first decision by HES that the building would not be listed due to the advanced stage of the development proposals; it was accordingly unfair of HES to depart from their original decision where nothing relevant had changed. Whether it is correct to regard the first decision as one which created a legitimate expectation in a public law sense is not a question to which the court requires to give a definitive answer. The more important point is that the thrust of the appellants' concerns was that they had been treated unfairly by HES. The reporter should have recognised that this was an important issue to which she had to give full consideration. She erred in law by failing to do so. The appellants' various other submissions add nothing of substance to this analysis and need not be separately considered.

[34] The court will allow the appeal and quash the reporter's decision of 11 October 2023. The appeal should be reconsidered by a different reporter in the light of the views expressed by the court in this judgment.