OUTER HOUSE, COURT OF SESSION

[2025] CSOH 35

P369/24

OPINION OF LORD RICHARDSON

in the Judicial Review by

(FIRST) DAVID MILLAR; (SECOND) SHELAGH MAIRI MILLAR; (THIRD) GORDON LAWRENCE SINCLAIR TAYLOR; (FOURTH) RITA TAYLOR; (FIFTH) MICHAEL JOHN ROBERT JONES; and (SIXTH) KATHLEEN MARGARET JONES

Petitioners

against

SOUTH AYRSHIRE COUNCIL

Respondent

Petitioners: O'Carroll; Morton Fraser MacRoberts LLP
Respondent: Byrne KC; Clyde & Co (Scotland) LLP

4 April 2025

Introduction

[1] This case concerns a dispute about the development of the grounds of Coodham House in Symington, South Ayrshire. Coodham House was built in 1831. It is a category 'A' listed building. It is set within parkland and overlooks Coodham Lake.

[2] The petitioners are, together, the heritable proprietors of Coodham House. On 2 March 2004, the respondent granted planning permission for the development of the estate and grounds of Coodham House under reference 02/00790/FUL (the "2004 permission").

[3] By letter dated 9 February 2024 to a developer, Hallbar Homes, David Clark, a Supervisory Planner employed by the respondent, advised that the 2004 planning permission remained extant by virtue of works to Coodham House having commenced. The letter stated:

> "Having considered the planning history of the site and also discussed the matter with the Council's Legal Services, it is considered that planning permission 02/00790/FUL remains extant by virtue of works to Coodham House having commenced."

[4] In the letter, Mr Clark also stated:

> "While the principle of residential development within the estate remains contrary to the provisions of the Development Plan, the extant planning permission (02/00790/FUL) for the Coodham Estate is a significant material consideration that outweighs some of the principles of the Development Plan in this instance and is considered to establish the principle of residential development at this site."

[5] The letter was headed "Pre-application enquiry for proposed residential development" and the author expressly described the letter as being "pre-application advice". The letter included an annex setting out various notes. Paragraph 2 of the annex provided as follows:

> "The comments and advice in this letter are made at officer level only and are strictly without prejudice to the eventual decision of the Council as Planning Authority with regard to any future applications (for this site)."

[6] In the present proceedings, the petitioners contend, first, that the letter dated 9 February 2024 constituted a decision by the respondent and, second, that the decision was unlawful for a number of reasons. For its part, the respondent submits, first, that the letter

dated 9 February 2024 is not a justiciable decision; and, second, that, in any event, the petitioners' grounds of challenge are ill founded.

Background

[7] By the end of the 20th century, Coodham House had fallen into disrepair. On 9 July 2002, planning permission under reference 02/00790/FUL was sought for the following development:

> "Change of use and extension to Coodham House to form 12 residential units, erection of 41 houses within estate grounds, formation of access roads and road layouts and associated works."

[8] It is apparent from the respondent's report of handling of the application that it was controversial and raised a number of complex issues. The report of handling recommended refusal. However, on 2 March 2004, planning permission was granted by the respondent subject to 26 conditions. The first condition was the following:

> "(1) that the development to which this permission relates must be begun within five years from the date of this permission to comply with Section 58 of the Town and Country Planning (Scotland) Act, 1997."

A number of the conditions imposed requirements which required to be fulfilled "prior to the commencement of the development" (see conditions 8, 9, 11, 13, 15 and 18). The grant of planning permission also included a number of conditions which were to be fulfilled following the commencement of the development (see conditions 5 and 7). Condition 4 provided that no development, other than the refurbishment of Coodham House, was to take place until a scheme relating to the A77, by which access was to be obtained to the site, had been implemented to the satisfaction of the Planning Authority. The grant of planning permission also expressly did not approve either the proposed additions to the east wing of

Coodham House or the design of two proposed lodge houses at the western entrance to the estate.

[9] On 29 July 2004, a planning application under reference 04/01015/FUL was made seeking a change of use of Coodham House to form 9 residential units, the erection of 3 new residential units and the realignment of the existing estate road. This application was granted by the respondent on 15 April 2005 (the "2005 permission"). This grant was subject to 14 conditions. None of the conditions in the 2005 permission required to be satisfied prior to the commencement of the development. The 2005 permission also did not refer to or include any equivalent to conditions 5 and 7 of the 2004 permission.

[10] An application for building warrant was made in February 2005. Thereafter, during the period 2005 to 2009, development works were carried out to Coodham House. Following the completion of those works, the nine residential units which had been formed were sold.

[11] During 2009 and 2010, four separate planning applications were granted for the development of residential housing within the estate grounds. These applications each related to developments which were materially different from that which was the subject of the 2004 permission. The four applications were each granted conditional planning permission. However, no works were carried out to commence any of these developments and the parties are agreed that the permissions have lapsed.

[12] The development of three residential units within the grounds of Coodham House was also permitted by a further grant of planning permission by the respondent on 29 March 2011 under reference 11/00166/APP. Notably, in the report of handling in relation to this application, the respondent's case officer had stated that the 2004 permission remained extant. Two of those units have been constructed, completed and sold. The third

unit is partially constructed. These three units have been constructed on land identified for the development of 6 of the units which were the subject of the 2004 permission.

[13] In 2022, the Coodham House estate was marketed for sale as a development opportunity. In 2023, Hallbar Homes submitted a pre-application inquiry to the respondent. That pre-application inquiry led to the issuing of the letter dated 9 February 2024 which is the subject of these proceedings.

[14] The petitioners became aware of the letter dated 9 February 2024 in April 2024. As a result, solicitors acting on behalf of the petitioners entered into correspondence with the respondent's planning service. By letter dated 19 April 2024, the petitioners' agents requested an explanation from the respondent as to "the basis upon which the Planning Authority have determined (as recorded in the letter dated 9 February 2024) the [2004 permission] is extant." The petitioners' agents also raised a number of additional queries in respect of which the respondent's responses were sought. By email to the petitioners' solicitors dated 3 May 2024, Mr Clark replied as follows:

> "…
>
> The Planning Authority has thoroughly reviewed the matter, taking into account all relevant information, including the planning history of the Coodham Estate, planning case law, Mr. Bogie's note, Mr. Iles's correspondence, and the Planning Authority's pre-application advice to Hallbar Homes.
>
> Upon careful consideration, the Planning Authority maintains its view that planning permission 02/00790/FUL is extant. Planning permission 02/00790/FUL permitted the erection of 41 new residential units within the estate grounds as enabling development to the renovation of the A listed Coodham House. The permission is considered to be extant by virtue of the renovation of Coodham House and the delivery of a range of infrastructure and ancillary works already completed on site.
>
> …
>
> In conclusion, the Planning Authority stands by its decision regarding the extant status of planning permission 02/00790/FUL."

The petitioners' arguments

Is there a justiciable decision?

[15] The position of the petitioners was that the letter dated 9 February 2024 contained a standalone administrative decision as to the status of the 2004 permission. That decision was separate from the pre-application advice contained in the respondent's letter. The letter itself made clear that the respondent's decision in respect of the 2004 permission had been reached following consideration of the planning history of the site and in light of the commencement of the works to Coodham House.

[16] The decision in respect of the 2004 permission which the petitioners sought to challenge was quite separate from any decision which might be reached by the respondent in relation to any future planning application.

[17] It was also apparent from later correspondence from the respondent and, in particular, the email dated 3 May 2024 (see [14] above) that it considered that the views expressed in the letter dated 9 February 2024 were a considered decision.

[18] In any event, if there were any doubt about it, counsel for the petitioners emphasised that the authorities made clear that one ought not to take too formalistic an approach to pinning down an identifiable decision (see *Elmford Ltd* v *City of Glasgow Council (No 2)* 2001 SC 267 at paragraph 8; *Wightman* v *Secretary of State for Exiting the European Union* 2019 SC 111 at paragraph 67 per Lord Drummond Young)

[19] Furthermore, the respondent's decision as to the status of the 2004 permission had an immediate legal effect. The decision meant that the 2004 permission would impact immediately upon the petitioners. The respondent's decision could be relied upon by a developer to mobilise bulldozers to commence construction work immediately. For example, it would affect the value of the petitioners' properties.

[20] Counsel for the petitioners accepted that it would have been open to the developer, Hallbar Homes, to have applied for a certificate of lawfulness of proposed use or development in terms of section 150 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"). However the existence of this alternative did not alter the fact that the developer could and did take comfort from the respondent's decision in the letter dated 9 February 2024.

Is the respondent's decision unlawful?

[21] In the petition, the petitioners challenge the respondent's decision on four grounds: namely, that was unreasonable, irrational, based on errors of fact and law, and that the respondent had failed to take into account material considerations and had taken into account immaterial considerations. Essentially, the petitioners' arguments appeared to turn on two issues. First, the respondent had failed to take into account that there was no lawful commencement of the development prior to the 2004 permission lapsing in 2009. Second, the respondent had failed to take into account that the 2004 permission was not capable of implementation.

No lawful commencement

[22] In reaching the conclusion that the 2004 permission remained extant, the respondent's decision relied on the fact that works to Coodham House had commenced. Counsel for the petitioner accepted that very little required to be done to satisfy the requirement that the development works had begun (see section 27 of the 1997 Act and *William Grant & Sons Distillers Limited* v *Moray Council* 2018 SLT 525 at paragraph 34). However, the critical question was whether the development had been lawfully

commenced. There was no evidence that the suspensive conditions to which the 2004 permission was subject had been fulfilled.

[23] It was clear that, as a matter of law, planning permission was controlled and subject to the conditions in terms of which it was granted. If operations contravened those conditions, they could not properly be described as commencing the development authorised by the permission. This was the well-recognised *Whitley* principle (see *Whitley & Sons* v *Secretary of State for Wales and Clwyd County Council* (1992) 64 P&CR 296 at 302 per Woolf LJ (as he then was)).

[24] Counsel for the petitioners submitted that the conditions in the 2004 permission ought to be construed in line with the approach of the UK Supreme Court in *Trump International Golf Club Scotland Limited* v *Scottish Ministers* [2015] UKSC 74 at paragraph 34 per Lord Hodge:

> "When the court is concerned with the interpretation of words in a condition in a public document such as a sec 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

[25] The *Whitley* principle had been the subject of detailed consideration in *Greyfort Properties Limited* v *Secretary of State for Communities and Local Government* [2010] EWHC 3455 (Admin). Counsel for the petitioner submitted that in the present case, the relevant conditions in the 2004 permission were clearly conditions precedent and "went to the heart of the planning permission" (*Greyfort* at paragraph 36). As an illustration, counsel referred to condition 15 of the 2004 permission which provided:

> "that no development or site clearance shall commence until a performance bond covering the estimated costs of the approved landscape scheme has been submitted to and approved by the Planning Authority."

The wording of this condition was clear. It was designed to ensure that, before any works began, a performance bond was procured which would ensure that funds were available in the event of the insolvency of the developer. Subsequent events had shown the need for this condition as the original developer, Goldrealm Properties Limited, had gone into insolvent administration in 2016.

[26] There was no evidence that this condition had ever been complied with. The respondent had confirmed that it had no information on file in respect of a performance bond. The same could be said in respect of the all of the other conditions contained in the 2004 permission which required to be fulfilled "prior to the commencement of the development". Counsel submitted that when one considered the correspondence from the respondent to the petitioners, it was apparent that there was no dispute that the conditions in question had not been fulfilled. The respondent's position was, rather, that the conditions did not "go to the heart" of the 2004 permission. However, such a construction of the conditions was simply wrong and ignored the very great concerns which had been voiced during the planning process which culminated in the 2004 permission.

[27] Accordingly, on the basis that the pre-conditions had not been satisfied, the petitioner submitted that the development had not been lawfully commenced.

[28] Separately, the petitioners submitted that the evidence demonstrated that the works carried out in respect of Coodham House that were relied upon by the respondent were more consistent with having been carried out pursuant to the 2005 permission. The 2005 permission was quite different from the 2004 permission. The 2005 permission was not presented as a variation of the earlier grant. The petitioners submitted that the purpose of applying for the 2005 permission had plainly been to develop Coodham House without the need to fulfil the conditions to which the 2004 permission had been subject. In any event,

whatever the relationship between the 2004 and 2005 permissions, the fact remained that the 2004 permission could not be lawfully commenced without the necessary conditions being fulfilled.

Implementation

[29] The petitioners submitted that the 2004 permission can no longer be fully implemented following the construction of houses under the 2011 permission (see [12] above) and relied upon the decision of the UK Supreme Court in *Hillside Parks Limited* v *Snowdonia National Park Authority* [2022] 1 WLR 5077. That case had dealt specifically with the relationship between successive grants of planning permission for development on the same site and, in particular, the effect on one planning permission of implementing another planning permission relating to the same site. The *Hillside* case was authority for the proposition that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (at paragraph 45 per Lord Sales and Lord Leggatt JJSC). In *Hillside,* the court had also concluded that where planning permission was granted for the development of a site, such as a housing estate, comprising multiple units, it was unlikely to be the correct interpretation of the permission that it was severable (see paragraphs 50 and 71).

[30] Applying *Hillside* to the present case, counsel for the petitioners submitted that the 2004 permission, even if lawfully commenced, could not be lawfully implemented as a result of the physical alteration of the land brought about by the construction of the houses in terms of the 2011 permission.

The respondent's arguments

Is there a justiciable decision?

[31] Senior counsel for the respondent emphasised that the present proceedings were for the judicial review of the respondent's decision contained in the letter dated 9 February 2024. Senior counsel noted that the letter was addressed to the developer Hallbar Homes and not the petitioners.

[32] In short, the respondent's position was that the letter dated 9 February 2024 could not be relied upon, did not crystallise legal rights on the part of the petitioners and would not found legitimate expectations.

[33] As a starting point, it was important to note that the letter dated 9 February 2024 was addressed only to Hallbar Homes. It was not addressed to others including the petitioners. The procedural context was important because if the letter bound the respondent then it would plainly have been unfair to freeze out other interested third parties. However, the letter did not bear to be a decision of the respondent. It bore instead to be a pre-application response letter from one of the respondent's supervisory planners. That was consistent with the express caveat the letter contained (see [5] above) and the respondent's clearly publicised position in relation to the handling of pre-application enquiries (which was published on its website).

[34] Senior counsel submitted that the email dated 3 May 2024, which was addressed to the petitioners' agents, ought, from a judicial review perspective, to be treated as a new decision that was separate from that contained in the letter of 9 February 2024. On a point of detail, senior counsel submitted that the reference in the email to the Planning Authority maintaining its view that the 2004 permission was extant was not a reference to the letter dated 9 February 2024 but to the report of handling in respect of the 2011 permission

(see [12] above). The petition did not seek to reduce any decision contained in the email dated 3 May 2024. The email was a response to the petitioners' agents which considered new and broader information than that which had formed the basis of the letter dated 9 February 2024. Even were the letter of 9 February 2024 to be reduced, it would not necessarily affect the email dated 3 May 2024 (*cf Robertson, petitioner* [2022] CSOH 45 at paragraph 16).

[35] Senior counsel contrasted the position of both the letter dated 9 February 2024 and the email dated 3 May 2024 with the statutory procedure provided by sections 150 and 151 of the 1997 Act whereby an application could be made to a planning authority to ascertain the lawfulness of an existing or proposed use or development. In this regard, senior counsel referred to the House of Lords decision in *R (Reprotech Limited)* v *East Sussex County Council* [2003] 1 WLR 348 which dealt with the then extant analogous English provision: section 64 of the Town and Country Planning Act 1990. Lord Hoffman had contrasted statements of opinion by planning officers with a juridical act following a process determined by statute involving the involvement of third parties (at paragraphs 27 and 28).

[36] In relation to legitimate expectations, senior counsel drew attention to the decision of the UK Supreme Court in *Re Finucane's Application for Judicial Review* [2019] HRLR 7. Lord Kerr's judgment had authoritatively reviewed the case law in respect of legitimate expectations. On this basis, it was apparent that a claim to legitimate expectations could only be based on a promise which was "clear and unambiguous and devoid of relevant qualification" (at paragraph 64, see also paragraphs 67 and 69). Neither the letter dated 9 February 2024 nor the email dated 3 May 2024 satisfied these conditions.

[37] It followed from senior counsel's submissions that the respondent was not bound by the views expressed in either the letter dated 9 February 2024 nor the email dated 3 May

2024. The respondent might take a different view when reaching its ultimate decision on any future planning application.

Is the respondent's decision unlawful?

[38] Senior counsel stressed that the present proceedings sought judicial review of the purported decision in the letter dated 9 February 2024: namely, judicial review in the planning context (*R (Mansell)* v *Tonbride and Malling Borough Council* [2017] EWCA Civ 1314 at paragraphs 41 and 42). These proceedings were not an appeal (*R (Campaign Against Arms Trade)* v *Secretary of State for International Trade* [2019] EWCA Civ 1020 at paragraphs 53 to 56). Accordingly, the petitioners required to identify either an irrational decision – one that flew in the face of logic – or one which demonstrated an error of law.

[39] Senior counsel noted that the petitioners did not challenge the reasoning of the letter dated 9 February 2024. In this regard, beyond stating that, as a result of the commencement of the works to Coodham House, the 2004 permission was extant, the letter did not engage with the arguments being advanced by the petitioners. However, there was also no suggestion that the letter ought to have said more.

No lawful commencement

[40] Even if the letter dated 9 February 2024 constituted a justiciable decision, senior counsel submitted that there was no error of law in the approach of the respondent and it could not be described as being irrational or perverse.

[41] As a starting point, the petitioners had recognised that the threshold for commencement was very low (see [22] above).

[42] On the question of the *Whitley* principle, senior counsel drew attention to the approach of Mr Justice Sullivan in *R (on the application of Hart Aggregates Ltd)* v *Hartlepool BC* [2005] EWHC 840 (Admin) who had considered that it was important to bear in mind that the principle was not a statutory provision but a judicial creation and that the court should be wary of applying the principle in unduly rigid a fashion (at paragraphs 40 to 41). Senior counsel noted further that in *Hart,* Mr Justice Sullivan, in considering the condition precedent in that case, had noted the following:

> "Condition 10 is a 'condition precedent' in the sense that it requires something to be done before extraction is commenced, but it is not a 'condition precedent' in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years, or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful." (at paragraph 59)

[43] Mr Justice Sullivan went on to develop this point at paragraph 65:

> "For the reasons set out above, I believe that the statutory purpose is better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular facts, and the outcome may well depend upon the number of conditions that have not been complied with."

[44] In *Hart,* Mr Justice Sullivan also considered the application of the *Whitley* principle in a situation in which development has been made in breach of planning control, but enforcement action cannot be taken by the planning authority. This situation had been addressed by Mr Justice Ouseley in *R (on the application of Hammerton)* v *London Underground Ltd* [2002] EWHC 2307. Mr Justice Sullivan agreed with the approach taken in *Hammerton* and, in particular, quoted the following paragraph of Mr Justice Ouseley's opinion:

> "However, if after the expiry of the five year period, it is possible to conclude that enforcement action is not lawfully possible, I see no reason why the development which cannot be enforced against should not be regarded as effective to commence development. The role of enforcement, and the statutory flexibility which it brings, cannot be left wholly out of the picture when reaching a conclusion on a matter about which the Act is not explicit—can development in breach of planning control ever be effective to commence a planning permission? This is itself a judicial interpolation into the statutory code. It too arises from the application of public law principles as to the legal consequences of unlawful though not criminal acts. No sound distinction can be drawn for these purposes between development which cannot be enforced against because there has been no breach of planning control and development which cannot be enforced against because such action would itself be unlawful. If, in language which the post Carnwath Report enforcement regime has made redundant, development in breach of planning control is immune from enforcement control, it should be regarded as effective to commence development. Such an approach flows from my analysis of the *Whitley* line of cases."
> (paragraph 130 of *Hammerton*, quoted at paragraph 79 of *Hart*)

[45] In *Greyfort,* the Court of Appeal had, insofar as it was relevant to the case before it, approved Mr Justice Sullivan's approach in *Hart* (at paragraph 19). The Court of Appeal, having reviewed the case law, had also recognised that although exceptions to the *Whitley* principle were limited, one such exception existed in circumstances such as those which arose in *Hammerton* (paragraph 19).

[46] Senior counsel submitted that consideration of the planning conditions in the context of the permission was properly characterised as the exercise of planning judgment and, therefore, was only challengeable on the grounds that it was irrational or perverse (*Tesco Stores* v *Dundee City Council* [2012] UKSC 13 at paragraph 19). First, it was a question of planning judgment to determine whether the conditions in question went to the heart of the planning permission. Secondly, consideration of the exceptions to the *Whitley* principle also raised questions of planning judgment.

[47] For example, in relation to condition 15, which had been emphasised by counsel for the petitioners in argument, senior counsel submitted that it was a question of planning judgment as to whether this condition truly went to the heart of the 2004 permission as a

whole or whether, in fact, it was related to the erection of 41 houses within the estate grounds which had not taken place. In any event, the respondent could no longer take enforcement action as a result of the passage of time (section 124 of the 1997 Act). After 20 years of habitation, it would be irrational for the respondent to take enforcement action.

Implementation

[48] The respondent's primary response in respect of the petitioners' implementation argument was straightforward. The letter dated 9 February 2024 simply said nothing at all about whether the 2024 permission could be implemented.

[49] Further, and in any event, the *Hillside Parks* case made clear that the continuing authority of a planning permission was not dependent upon exact compliance with that permission such that any departure, however minor, had the result that no further development was authorised. The judgment of the court emphasised that requiring exact compliance would involve adopting an unduly rigid and unrealistic approach. This would involve putting an unreasonable construction on a document granting planning permission particularly where such permission was for a large multi-unit development. The court concluded that the ordinary presumption must be that a departure will only have such an effect if it is material in the context of the scheme as a whole (see paragraphs 69 and 70).

[50] On this basis, senior counsel submitted that it was apparent that a degree of planning judgment was involved in determining whether any such departure was material. Approached in this way, it could not be said that the respondent's decision, if it were such, showed any reviewable error.

Decision

Is there a justiciable decision?

[51] The first issue which requires to be resolved is whether, as the petitioners contend, the letter dated 9 February 2024 from the respondent to Hallbar Homes contains a decision relating to the 2004 permission which can properly be the subject of judicial review proceedings.

[52] The petitioners' position is, in essence, that the statements in the letter relating to the 2004 permission (see [3] and [4] above) represent a complete decision which is separate from the pre-application advice also contained in the letter. The petitioners point to the fact that the view expressed in relation to the 2004 permission is said to have been made following consideration of the planning history and following discussions with legal services. The petitioners contend further that this decision in respect of the 2004 permission has had an immediate legal effect impacting on the petitioners.

[53] I do not accept the petitioners' position. I agree with the respondent that the statements contained in the letter cannot be relied upon by the petitioners, did not affect their legal rights, and would not found legitimate expectations. It appears to me that the petitioners' argument requires the statements made by the respondent in the letter dated 9 February 2024 concerning the 2004 permission to be divorced from their proper context in two respects.

[54] First, the letter dated 9 February 2024 was addressed to Hallbar Homes and was expressly stated to be written in the context of Hallbar Homes' pre-application enquiry. As noted above, the letter was expressly caveated as containing comments and advice made at an officer level and "strictly without prejudice to the eventual decision of the Council as Planning Authority with regard to any future applications (for this site)" (at [5]).

[55] This context is strongly indicative of the fact that the statements relating to the 2004 permission are not, as the petitioners contend, a binding decision as to the status of that permission which would directly affect not only Hallbar Homes but also the petitioners who are not even an addressee of the letter. Rather, this context shows that these statements merely represent the respondent's view as to the planning background to Hallbar Homes's pre-application enquiry.

[56] Second, the petitioners' argument involves divorcing the actions of the respondent from the broader statutory context provided by the 1997 Act. The petitioners' arguments essentially elevate the respondent's statements relating to the 2004 permission into an extra-statutory certificate of lawfulness of proposed use or development. As such, the petitioners' argument fails for similar reasons to those which led Lord Hoffman to reject Reprotech's arguments in that case. Where a statutory procedure has been established, it is not open to the planning authority and an applicant simply to agree on some form of extra-statutory alternative (at paragraph 29). Accordingly, as the views of the respondent as to the 2004 permission contained in the letter dated 9 February 2024 had not been issued pursuant to the statutory procedure provided for certificates of lawfulness, it is reasonable to conclude that they were neither intended nor ought to have the same effect as a certificate issued following that procedure.

[57] Furthermore, I consider the petitioners' contention that the statements contained in the letter dated 9 February 2024 have an immediate legal effect is not correct. The legal effects which the petitioners point to arise not from what was said by the respondent in its letter but rather from the 2004 permission itself. It is the 2004 permission itself which, if extant, would have the effects pointed to by the petitioners. The petitioners' contention presupposes that the letter of 9 February 2024 had the effect of in some way reviving the

2004 permission. Whereas, properly understood, the views contained in the letter do not, in themselves, alter or affect whether the 2004 permission is or is not extant.

[58] In that regard, I accept the respondent's argument that the letter dated 9 February 2024 falls a long way short of setting out a sufficiently clear and unambiguous promise or undertaking on the part of the respondent as would give rise to a legitimate expectation on the part of Hallbar Homes (see *Finucane* at paragraphs 64, 67 and 69). Ultimately, I did not understand the petitioners to argue otherwise.

[59] For completeness, and in light of the submissions made on behalf of the petitioners, I do not consider that the reasons for which I have rejected the petitioners' arguments are based on "procedural niceties" or that the approach I have adopted would in some way represent an obstruction to the proper enforcement of the rule of law (*cf Wightman* at paragraph 67 per Lord Drummond Young). On the contrary, it is precisely because the petitioners' argument seeks to isolate the statements contained in the letter dated 9 February 2024 from their proper legal context of both the pre-application enquiry and the certificate of lawfulness procedure in terms of sections 150 and 151 of the 1997 Act that I reject it.

[60] I also consider that the factual situation considered by Lord Clarke in *Elmford (No. 2)* was quite different. In that case, the petitioners were unable to identify a formal decision on the part of the local authority but there was no question that the local authority had both denied and refused to recognise the rights asserted by them. In those circumstances, his Lordship concluded that the actions of the local authority denying the petitioners' rights were susceptible to judicial review (see paragraphs 7 and 8). In the present case, the petitioners have identified a decision letter – namely, the letter dated 9 February 2024. The petitioners' difficulty is that, unlike in *Elmford*, the purported decision has had no legal effect.

[61] The final aspect to this first issue is whether the statements contained in the respondent's email dated 3 May 2024 in any way alter or affect this analysis. In short, I do not consider that they do. I reach this conclusion for two principal reasons.

[62] First, I do understand that the petitioners claimed otherwise. The petitioners' case, as I understood it, was quite clear in founding on the letter of 9 February 2024. It is that letter which is identified within the petition as being the "decision letter". The email dated 3 May 2024 was relied upon by the petitioners as evidence that a decision had been taken by the respondent in its letter dated 9 February 2024 rather than as forming part of that decision. Given the fact that the issues addressed in the email were clearly not identical to those considered in the letter – the email responded to correspondence from the petitioners' agents (see [14]) – the petitioners' position is entirely understandable.

[63] Secondly, and in any event, I consider that the reasons I have found that the letter dated 9 February 2024 does not constitute a justiciable decision apply equally to the email. The email provides an explanation of the reasoning of the respondent in reaching the view expressed in the letter relating to the 2004 permission and, as such, cannot be divorced from that context. Further, I also consider that the points made in relation to both the broader statutory context (at [56]) and the absence of any legal effect (at [57] and [58]) apply to the statements contained in the email just as they do to the letter dated 9 February 2024.

The petitioners' remaining arguments

[64] My decision that the letter dated 9 February 2024 contains no decision susceptible to judicial review is sufficient to dispose of the petition. However, lest I am wrong on the first issue and in light of the submissions I have heard, my views on the petitioners' two remaining arguments are as follows.

No lawful commencement

[65] As a starting point, I agree with the submission of senior counsel for the respondent that there is a degree of artificiality in the petitioners' criticisms because the letter dated 9 February 2024 simply does not go into detail in respect of the challenges advanced in these proceedings on behalf of the petitioners. I consider that this observation reinforces my conclusion on the first issue: the letter dated 9 February 2024 was not a decision on this point and was intended to be no more than an expression of the respondent's view.

[66] However, on the assumption that the statements made in the respondent's letter dated 9 February 2024 concerning the 2024 permission are justiciable, I would not have been persuaded that the respondent's view demonstrated either an error of law or the required degree of irrationality.

[67] There was no dispute, as I understood it, that, as matter of fact, the threshold for beginning the development had been crossed as a result of the carrying out of works at Coodham House. The thrust of the petitioners' argument in respect of lawful commencement was that, standing the absence of confirmation that the conditions which required to be fulfilled "prior to the commencement of the development" had, in fact, been fulfilled, the respondent had erred in concluding that development in terms of the 2004 permission had been lawfully commenced consistent with the *Whitley* principle.

[68] Assuming for the sake of the argument that these conditions were not fulfilled and simply looking at the six conditions in the 2004 permission (conditions 8, 9, 11, 13, 15 and 18) which all contain some variant of the "…prior to the commencement of the development…" wording, I can see the force of the petitioners' argument that they constitute conditions precedent. Certainly, such a reading would be consistent with the natural and ordinary meaning of the words used (*cf Trump International* at paragraph 34).

[69] However, as Mr Justice Sullivan explained in *Hart,* the *Whitley* principle is a judicial creation designed to fill a gap so as to give effect to the underlying purpose of the legislation. As such, as he noted, the court should be wary of applying the principle in an unduly rigid fashion (at paragraphs 40 and 41). Although these remarks were strictly *obiter,* the approach was subsequently endorsed by the Court of Appeal in *Greyfort* (at paragraph 19). Consistently with that endorsement of the approach, Lord Justice Richards also recognised that a number of exceptions to the *Whitley* principle had been identified in the case law.

[70] Two of those exceptions are relevant to the petitioners' argument.

[71] The first is the distinction drawn by Mr Justice Sullivan in *Hart* between, on the one hand, whether a condition is formally drafted in such a way as to constitute a "condition precedent" and, on the other hand, whether a condition "goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years, … must be regarded as unlawful." (at paragraph 59). In this regard, Mr Justice Sullivan highlighted the fact that the English 1990 Act (like its Scottish equivalent), draws a clear distinction between development without planning permission and development in breach of condition – see section 171A(1)(a) and (b) of the 1990 Act and section 123(1)(a) and (b) of 1997 Act (at paragraph 55).

[72] It is apparent that determining whether a condition does indeed go to the heart of the planning permission requires the exercise of planning judgment. This can be inferred from the approach of the Court of Appeal in *Greyfort* to the challenges to the inspector's view in that case that a condition did go to the heart of the planning permission. Lord Justice Richards stressed that the court ought to be very cautious about interfering with the views

of the inspector given that he was plainly in a better position than the court to assess this issue (paragraph 41).

[73] The second exception is that which can be traced to Mr Justice Ouseley's decision in *Hammerton* and addresses situations:

> "where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development".
> (paragraph 127 of *Hammerton* quoted at paragraph 11 in *Greyfort*)

[74] Were either or both of these two exceptions to apply to the 2004 permission, the respondent's view of that permission would be justified. Considering the statement by the respondent in the letter dated 9 February 2024 relating to the 2004 permission in context and against the proper legal background, I am not persuaded it can be said to be either in error or irrational.

[75] In respect of the first exception, the petitioners pray in aid the undoubtedly controversial background to the grant of the 2004 permission and assert, against that background, that the conditions upon which they rely went to the heart of the permission. However, the background and, in particular, the inter-relationship between the works to Coodham House itself and the development of houses in the estate grounds (in respect of which the conditions founded on by the petitioners relate), emphasise the role of planning judgment in assessing the conditions in question. Beyond their assertions, the petitioners provided no basis for concluding that the first exception to the *Whitley* principle could not apply.

[76] The position in respect of the second exception is more straightforward. The petitioners again simply provided no basis either for challenging the conclusion that no enforcement could now be carried out by the respondent in respect of any failure to comply

with the conditions in the 2004 permission (see section 124(3) of the 1997 Act) or, as a result, for the application of the *Hammerton* exception.

[77] In light of my conclusions in respect of these arguments, I do not consider I need to venture further into the question of whether, in fact, the conditions in the 2004 permission upon which the petitioners rely were unfulfilled. Albeit, I observe that on the basis of the submissions made to me by the respondent together with the terms of the communications made by the respondent to the petitioners, I did not understand the respondent to dispute this in any meaningful way.

[78] Finally, for completeness, I do not consider that the petitioners' arguments in relation to the 2005 permission make any material difference. The petitioners argue that the development works carried out at Coodham House were "more consistent" with the 2005 permission than the 2004 permission. Leaving to one side the fact that a building warrant was applied for to carry out works at Coodham House prior to the 2005 permission being granted, the problem for this argument is it implicitly recognises that the development carried out was also consistent with the 2004 permission. This is unsurprising given the close inter-relationship between the two permissions. The petitioners provide no basis – legal or factual – for what must be the hidden premise of this part of their argument – namely, that the development at Coodham Hall could not constitute commencement in respect of both the 2004 permission and the 2005 permission. In the absence of any such basis, I reject this part of the petitioners' argument.

Implementation

[79] I consider that the petitioners' arguments in respect of the letter dated 9 February 2024 based on whether the 2004 permission can be implemented are capable of a shorter answer.

[80] The fundamental difficulty for the petitioners is that on no view does the letter dated 9 February 2024 say anything about this. The fact that, in the respondent's view, the 2004 permission was extant is legally distinct from the separate question as to whether the 2004 permission can still be implemented. Accordingly, even had I considered that the respondent had made a justiciable decision in its letter dated 9 February 2024, I would have rejected the petitioners' arguments challenging that decision based on implementation.

Disposal

[81] As a result of my conclusion on the first issue, I will refuse the petition. I will reserve all questions of expenses meantime.