FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 50
P206/19

Lord President
Lord Menzies
Lord Malcolm

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

MARK GUILD AND ANOTHER

Petitioners and Reclaimers

against

ANGUS COUNCIL

Respondents

for

Judicial Review

_____

Petitioners and Reclaimers: Dunlop QC; Burness Paull LLP
Respondents: J Finlay QC, Garrity; Morton Fraser LLP

19 August 2020

[1] I agree entirely with the opinion of Lord Menzies, to whom I am grateful for setting out the facts, the submissions of the parties and the three issues which require to be determined. My view may be summarised as follows.

[2] First, unless structures which are built on the land are held under a separate title, they will be regarded as having acceded to that land and thus become part of it and the title

which relates to it. That accords with the principle, which stems from the Roman Law, which is laid down by the Institutional Writers, (Stair: *Institutions* II.i.40; Erskine: *Institute* II.i.15; Bell: *Principles* (10th ed para 937) and with precedent (*Brand's Trs* v *Brand's Trs* (1876) 3 R (HL) 16, Lord Cairns LC at 20, Lord Chelmsford at 23). This principle applies to common good land (*Magistrates of Banff* v *Ruthin Castle* 1944 SC 36, Lord Mackay at 49). The Lochside Leisure Centre is therefore part of the common good land. The accounting practices of the respondents and their intentions are irrelevant to this issue.

[3] Secondly, section 104 of the Community Empowerment (Scotland) Act 2015 applies when a local authority is considering "disposing" or "changing the use" of common good property. The question is what "disposing" means within this particular statutory context. Although one attractive approach would be to regard it as the equivalent of "disponing" by way of sale, gift, or perhaps even lease, ultimately that interpretation would not accord with the intention behind the statutory provisions. That intention, broadly stated, is to require consultation when an important decision is to be taken about the continued use of common good land.

[4] Prior to the introduction of the procedures in the 2015 Act, a local authority was not entitled to demolish buildings which formed part of the common good without the authority of the court (*Crawford* v *Magistrates of Paisley* (1870) 8 M 693, LP (Inglis) at 696, Lord Deas at 697). It ought to, and does, follow that the authority should not be entitled to demolish buildings without complying with the consultation provisions under the 2015 Act. The reasoning in *Waddell* v *Stewartry District Council* 1977 SLT (notes) 35 (Lord Wylie at 36) to this effect is persuasive. Disposal includes demolition of a substantial building.

[5] Thirdly, even if such demolition did not constitute a disposal, it would constitute a change of use. "Material change of use" is a term which is familiar in planning legislation in

so far as it amounts to "development" which, along with any building operation, generally requires permission (Town and Country Planning (Scotland) Act 1997, s 26(1)). Demolition is a building operation (*ibid* s 26(4)) which generally requires permission (see Town and Country Planning (Scotland) (Demolition which is not Development) (Scotland) Revocation Direction 2011 (SEDD Circular 4/2011)). This may only be of some limited assistance. The phrase "change of use" ought to be given a broader meaning which is consistent with the intention of the 2015 Act.

[6] At present, the building is, as its name suggests, a leisure centre. It encompasses substantial indoor sports, catering and toilet facilities. The proposal is to return the area upon which the building is located to open ground within the general Country Park. Although the indoor activities in the Leisure Centre and the outdoor perambulations and sports in the Park might both be described as recreational, they are, looking at the matter broadly and as one of fact and degree, different in nature. For the purposes of section 104(1)(b) of the Act, the difference is of such a degree as constitutes a change of use.

[7] The reclaiming motion should be allowed and reduction granted as concluded for.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 50
P216/19

Lord President
Lord Menzies
Lord Malcolm

OPINION OF LORD MENZIES

in the reclaiming motion

in the cause

MARK GUILD AND ANOTHER

Petitioners and Reclaimers

against

ANGUS COUNCIL

Respondents

for

Judicial Review

_____

Petitioners and Reclaimers: Dunlop QC; Burness Paull LLP
Respondents: J Findlay QC, Garrity; Morton Fraser LLP

19 August 2020

Background

[8] Forfar Country Park forms part of the common good lands owned and managed by the respondents. It is adjacent to Forfar Loch and is used for the recreation and enjoyment of the people of Forfar and the surrounding areas. There is a picnic area, a cricket ground, a football ground, a caravan park, a play area, tennis courts and recreation ground within the

park. In the 1970s the Council erected buildings on part of Forfar Country Park, comprising the Lochside Leisure Centre. Defects in the buildings eventually manifested themselves, and the buildings are no longer used. The respondents wish to demolish them.

[9] The petitioners and reclaimers are interested in purchasing the buildings from the respondents. They are each residents of Forfar, and argue that there is public support for the retention of the buildings. They submit that the provisions of section 104 of the Community Empowerment (Scotland) Act 2015 apply, and that the respondents have failed to comply with these. In these proceedings for judicial review the petitioners and reclaimers seek *inter alia* reduction of the respondents' decision to demolish the Lochside Leisure Centre, and interdict against the commencement of demolition.

[10] The respondents argue that although the leisure centre stands on common good land, the buildings do not form part of the common good. Moreover, they are not considering disposing of any property which is held by them as part of the common good, or changing the use to which any such property is put, so section 104 of the 2015 Act does not apply. They accept that if these submissions are not well founded, they have not complied with the provisions of section 104.

[11] The matter came before the Lord Ordinary for discussion at a substantive hearing, at which these issues (and several other issues which were not insisted upon before this court) were debated. By interlocutor dated 13 February 2020 the Lord Ordinary refused the petition, for the reasons given in her opinion of even date. The petitioners now reclaim against that decision.

The statutory provision

[12] Section 104 of the Community Empowerment (Scotland) Act 2015 provides as follows:

> "104 Disposal and use of common good property: consultation
>
> (1) Subsection (2) applies where a local authority is considering –
>
> (a) disposing of any property which is held by the authority as part of the common good, or
>
> (b) changing the use to which any such property is put.
>
> (2) Before taking any decision to dispose of, or change the use of, such property the local authority must publish details about the proposed disposal or, as the case may be, the use to which the authority proposes to put the property.
>
> (3) The details may be published in such a way as the local authority may determine.
>
> (4) On publishing details about its proposals under subsection (2), the local authority must –
>
> (a) notify the bodies mentioned in subsection (5) of the publication, and
>
> (b) invite those bodies to make representations in respect of the proposals.
>
> (5) The bodies are –
>
> (a) where the local authority is Aberdeen City Council, Dundee City Council, the City of Edinburgh Council or Glasgow City Council, any community council established for the local authority's area,
>
> (b) where the local authority is any other council, any community council whose area consists of or includes the area, or part of the area, to which the property mentioned in subsection (1) related prior to 16 May 1975, and
>
> (c) any community body that is known by the authority to have an interest in the property.
>
> (6) In deciding whether or not to dispose of any property held by a local authority as part of the common good, or to change the use to which any such property is put, the authority must have regard to –
>
> (a) any representations made under subsection (4)(b) by a body mentioned in subsection (5), and
>
> (b) any representations made by other persons in respect of its proposals published under subsection (2)."

The Lord Ordinary's decision

[13] The Lord Ordinary considered the effect of section 104 of the 2015 Act at paragraphs 42-52 of her opinion. She concluded that neither section 104(1)(a) or (b) applied to the respondents' decision in the present case. She dealt with the petitioners' argument regarding disposal as follows:

> "[45] I deal first with the question of disposal. By its decision of 7 February 2019 to demolish the building, the respondent was not deciding to dispose of common good property. The respondent determined not to sell, and there was no decision to dispose of the land by sale. The common good property in this case is the land, and not the building. Demolition of the building will not result in disposal of the land."

[14] The Lord Ordinary was referred to *Waddell and Others* v *Stewartry District Council* 1977 SLT (Notes) 35, but distinguished that case from the present because in *Waddell* there appeared to have been no dispute that the town hall formed part of the common good, whereas the leisure centre in the present case did not. She also concluded that the respondents' decision would not result in a change of use for the purpose of section 104(1)(b), because the common good land is presently used for leisure purposes, and that will remain the case after the building has been demolished.

Submissions for the petitioners and reclaimers

[15] Senior counsel for the petitioners and reclaimers adopted the whole of his note of argument, but concentrated his submissions on grounds 1(c) and 1(d). These may be summarised as follows:

> 1(c) The Lord Ordinary erred in holding (at [45]) that while the land in question is common good land, the buildings thereon are not. The buildings accede to the land and accordingly form part of the common good land. The fact that the respondents'

accounts treat matters differently is irrelevant. That being so, the decision to demolish the building was a decision to "dispose" of it, such that section 104 was engaged.

1(d) The Lord Ordinary erred in holding (at [48]-[50]) that the proposed demolition would not involve a change of use of the land. The comparison was properly between land with indoor sporting, toileting and catering facilities on the one hand and bare land on the other. The fact that the building was used for leisure purposes and after demolition the land would be used for leisure purposes did not mean that there would be no change of use.

Section 104 applies to the disposal of any property held as part of the common good, not just to land. The Lord Ordinary erred in law in stating (at para [45]) that "the common good property in this case is the land, and not the building". All property of a Royal Burgh or a Burgh of Barony not acquired under statutory powers or held under special trusts forms part of the common good – *Magistrates of Banff* v *Ruthin Castle* 1944 SC 36. Indeed, the respondents admit that the land forms part of the common good in this case. This applies equally to accessions to the original property endowments, which accessions "when accepted fall into and form part of the common good" (*ibid* per Lord Mackay at page 49). It is not possible to own land and yet not to own the buildings thereon – *inaedificatum solo, solo cedit*; Stair Institutions, II, 1 40; *Brand's Trustees* v *Brand's Trustees* (1876) 3 R (HL) 16 at 23. If land is part of the common good, and if a building is erected on that land, the building becomes part of the common good too. As Lord Mackay observed in the *Magistrates of Banff* (at page 49), accessions (such as buildings) form part of the common good and do not form a species of property apart.

[16] As the buildings which form the Lochside Leisure Centre are part of the common good, demolition of those buildings is a disposal thereof – *Crawford* v *Magistrates of Paisley* (1870) 8 M 693; *Waddell and Others* v *Stewartry District Council*. Section 104(1)(a) was therefore engaged. The respondents do not explain how it can be that they own land as part of the common good yet own buildings erected on it in a different capacity. There is no authority to support treating buildings and land differently in this manner. All that is said by the respondents is that for accounting purposes they treat the building and the land differently, but such internal arrangements are nothing to the point. The respondents' submissions would result in a building erected on common good land forming a species of property apart, of some third category – a proposition roundly rejected by Lord Mackay in the *Magistrates of Banff* case.

[17] The respondents' argument would circumvent the restrictions on common good property and result in what Lord Mackay described as "that very dangerous form of alienation which is exemplified here, *viz.* making a commercial tack for money of long term". By the simple expedient of building on common good land, the local authority creates an asset that does not form part of the common good, which then becomes alienable and allocated, for accounting purposes, to a fund other than the common good fund. This is contrary to principle. It is similar to the argument which was peremptorily rejected by the court in *Portobello Park Action Group* v *Edinburgh City Council* 2013 SC 184, per Lady Paton at paragraph [35].

[18] The concept of "disposal" is wider than just sale or transfer, and is habile to include (in appropriate circumstances) demolition. On any ordinary use of English, to demolish something involves "disposing" of it. The building which presently exists and forms part of the common good will cease to exist. It will have been disposed of. Senior counsel founded

strongly on the reasoning in *Crawford* v *Magistrates of Paisley* and *Waddell and Others* v *Stewartry District Council*. The Lord Ordinary's conclusion on section 104(1)(a) was accordingly founded on an error of law.

[19] In the event that the court was not with him on ground 1(c), senior counsel turned to his ground 1(d), namely change of use. He submitted that the proposal to demolish the building and leave the land bare involves a clear proposed change of use of the land. "[T]he demolition of part of a building and the retention and re-roofing of the remainder of it might seem *prima facie* to be making a material change in its use" – *Glasgow District Council* v *Secretary of State for Scotland* 1980 SC 150 at 163. The Lord Ordinary's analogy between changing a tennis court to a basketball court, which she suggested would not result in a change of use, was a false analogy. A closer analogy would be a proposal to demolish Murrayfield Stadium; the fact that the proposal was thereafter to allow the playing of rugby on the bare land left after demolition could not seriously be argued as meaning there was no anticipated change of use.

[20] It was to be noted that, by contrast with planning legislation, there is no mention of materiality in section 104 of the 2015 Act. The demolition of a leisure centre without any intention to reinstate involves the change of use of the land as a matter of ordinary English, and accordingly statutory interpretation. At present, the land is used to house a building which contains indoor sporting, toileting and catering facilities. The proposal to demolish the building and leave the land bare involves, counsel submitted, a clear proposed change of use of the land. The character of the use of the land will alter from one that has a leisure centre on it to one which is bare ground. The concept of change of use ought to be viewed in a common sense fashion, particularly given the present context in which the question is

whether there should be public consultation before a local authority embarks on a particular course of action.

Submissions for the respondents

[21] Senior counsel for the respondents submitted that the Lord Ordinary was correct to find that section 104 of the 2015 Act was not engaged in these circumstances. The decision in question did not relate to any disposal or change in use of the common good fund, but rather the demolition of the non-operational leisure centre that sits upon land forming part of that common good fund. Put simply, the land in question is part of the common good fund, but the building constructed upon it never has been. Each was held on different accounts and a notional "rent" was paid to the common good fund. Senior counsel referred us to Ferguson, *Common Good Law* (2nd ed 2019) at chapters 1, 3, 4 and 5, including the statement that:

> "(T)he common good fund – which of course includes all its assets such as land and buildings – is, in asset management terms, a sealed unit. No new common good assets are in general being created and the only income to the fund apart from interest on money invested arises from lease rentals, either to external organisations or to other departments of the authority where a notional "rental" is transferred between the individual service budget and the common good fund."

[22] In the present case it was clear from the minutes of the meeting of the respondents on 7 February 2019 (in which the discussion about Lochside Leisure Centre as an additional item, and the five options for consideration, is minuted at paragraph 8) that the Provost ruled that the Lochside Leisure Centre was not held on the common good account. As the respondents aver at answer 6 to the petition, the land upon which the leisure centre and adjacent caravan park, car parks, all weather tennis courts, play park and football pitches are situated is held by the respondents as common good land, and recorded as such in the

common good asset register and balance sheet but the buildings and other uses thereon are held as assets in the Council's general fund asset register land balance sheet and have been since at least 2008. In the respondents' answer 27 they reiterate that the leisure centre building and the common good and upon which it sits are treated differently. The Lord Ordinary correctly understood the respondents' position and noted it at paragraph [14], where she also observed that the petitioners did not at the substantive hearing dispute the respondents' position about this matter. Senior counsel submitted that it was too late to take the point now.

[23] The reclaimers' ground 1(c) proceeded on the misunderstanding that the property law principle of accession applies in the present circumstances so as to categorise a building as part of the common good fund, when (a) that building has never formed part of the common good fund in question, and (b) the actings of the respondents clearly demonstrate that they have never considered the building to be part of the common good fund. The rules relating to accession only apply when two different parties are involved. The argument for the reclaimers would, if correct, cause significant difficulties for the management of common good land, because not only would section 104 of the 2015 Act apply, but permission would also be required from the court in terms of section 75 of the Local Government (Scotland) Act 1973. Senior counsel sought to support the respondents' position that the buildings did not form part of the common good by reference to *Ferguson* (*op cit*) at pages 34, 46, 47 and 50, and the observations of the Lord President (Hope) in *City of Aberdeen District Council* v *Secretary of State for Scotland* 1990 SLT 291 at 295. It was important that the respondents kept these funds separate – they had no intention of donating to the common good by building the leisure centre on this land. Their approach that the land only was part of the common

good, and that a "notional" rent was paid to that fund for the building erected on it, was the correct one.

[24] Senior counsel went on to refer us to Mr Ferguson's work at section 5.2, in which between pages 74 and 81 the author considers the case of the *Magistrates of Banff* v *Ruthin Castle*. The concluding paragraph of this passage suggests that the case presents some difficulties, and challenges for the conveyancer, and also runs against what appears to be the understanding of many burghs in so far as their accounting practices do not disclose the vast majority of burgh property to be held on the common good account.

[25] The Lord Justice Clerk (Cooper) observed in the *Magistrates of Banff* that:

> "the different categories of property which a chartered burgh may competently hold, and the distinguishing characteristics of the special category known as common good, can hardly be said to have been anywhere defined with mathematical precision."

Scots law recognises the ability of different parties to own and/or lease different strata of land (and indeed of airspace); the respondents submitted that it was equally possible for land to be classified as common good land, but for any building thereon not to be classified as part of the common good fund. Different heritable interests in the same piece of land might or might not form part of the common good fund – for example, prior to feudal abolition it was possible for a feudal superiority to form part of the common good fund, separate from the *dominium utile*. Whilst the basic proposition from the *Magistrates of Banff* v *Ruthin Castle* was accepted, this required to be placed in context of the historical development of common good law. At all material times the respondents have been the legal owners of both the land and the buildings on it, but with different hats on – the common good fund has not been the occupier/operator of the building. The principle of accession does not assist as to whether a building erected under statutory powers on

common good land necessarily becomes part of the common good fund thereafter. There is no reason why the respondents cannot hold both the land and the buildings on a different basis. For these reasons, the demolition of the leisure centre cannot amount to a disposal of the land on which it sits, and section 104 is not engaged. The decision to demolish the leisure centre is not a decision about the common good fund at all.

[26] Turning to ground 1(d), if the court does not accept the respondents' primary position that the decision to demolish the leisure centre is not a decision relating to the common good fund, senior counsel submitted that the provision relating to change of use must be read in the context of the corresponding powers contained in section 75 of the Local Government (Scotland) Act 1973. The reclaimers' reliance on *City of Glasgow Council* v *Secretary of State* (*supra*) is misplaced – that was a planning law case, in which Lord Robertson (whose opinion is relied on by the reclaimers) was the only member of the court who contemplated that demolition might constitute a material change of use – but did not answer what is meant by use in this context. Mere demolition of a building does not involve the change of use of the land upon which it rests in planning law; this will depend upon what use is made of the land/building before and what use is made of the land afterwards. Senior counsel submitted that the respondents' position was supported by the policy memorandum on the Community Empowerment (Scotland) Bill, particularly at paragraphs 84 to 93; the Explanatory Notes to the Bill, particularly at paragraphs 276-282; the SPICe briefing on the Bill (at pages 24/25); and *Portobello Park Action Group Association* v *City of Edinburgh Council*, particularly at paragraphs [31]-[37].

[27] Senior counsel submitted that the reasoning of the Lord Ordinary with regard to change of use, at paragraphs 49/50 of her opinion, was sound. The question is a mixed question of fact and law which will require to be considered on the basis of the facts and

circumstances arising in any particular case. The Lord Ordinary held that the common good land is presently used for leisure purposes, and that will remain the case after the building has been demolished. She was correct to do so. It followed that her decision was sound with regard to both paragraphs (a) and (b) of section 104(1), and the reclaiming motion should be refused.

Discussion and decision

[28] When considering the proper construction of section 104 of the Community Empowerment (Scotland) Act 2015 it is, I think, important to bear in mind the underlying purpose of the legislation (as indeed it is in any exercise of statutory construction). Part 8 of the Act, which deals with common good property, is concerned (as the title of the Act suggests) with empowering communities. Section 102 requires a local authority to establish and maintain a common good register, and before establishing it, to publish a list of property that it proposes to include in it, which must be notified to the relevant community council and other community bodies, and the local authority must have regard to any representations made by any community council, community body and other persons. Section 104 requires the local authority to publish details about any proposed disposal of, or as the case may be, the use to which the authority proposes to put the property, and on publishing details about its proposals to notify the relevant community council and other community bodies. Again in deciding whether or not to dispose of any property held as part of the common good or to change the use to which any such property is put, the local authority must have regard to representations made by the relevant community council, other community bodies, and other persons.

[29] The aim is transparency, and encouragement of community involvement. As the policy memorandum to the Bill put it at paragraph 87:

> "the aim of Part 6 of the Bill is to increase transparency about the existence, use and disposal of common good assets, and to increase community involvement in decisions taken about their identification, use and disposal".

and again at paragraph 92:

> "The requirement for consultation before common good property is disposed of or its use is changed will similarly increase transparency about common good assets, and fits with the general aim of ensuring that communities are fully involved in decisions that matter to them."

[30] What the 2015 Act is <u>not</u> about is prohibiting, preventing or regulating the actual disposal of, or appropriation of, common good property: that is dealt with elsewhere, by the common law, or by section 75 of the Local Government (Scotland) Act 1973, and the requirement to apply to the court for authority. Section 104 is all about publication and consultation at an earlier stage, before any decision has been taken by the local authority to dispose of or change the use of property held as part of the common good, and when the local authority is only considering disposing of or changing the use of such property.

[31] The fact that this relatively new statutory provision is about transparency and encouragement of community involvement, and not (or at least not directly) about the identification of common good property or about the authority to dispose of or appropriate such property may mean that a broader interpretation of some of the terms used in it than would be applied in different contexts is appropriate.

[32] In deciding whether section 104 is engaged in the circumstances of the present case, I consider that it is helpful to consider three issues:

(1) Are the buildings of the leisure centre held by the respondents as part of the common good?

(2) If so, is demolition of those buildings encompassed within the term "disposal of any property"? and

(3) If the answer to (1) is yes, and the answer to (2) is no, does demolition of the buildings and returning the land to open parkland amount to changing the use to which the property is put?

I shall consider these in turn.

Issue (1): Are the buildings of the leisure centre held by the respondents as part of the common good?

[33] The principle that the owner of land is also the owner of buildings erected thereon by accession is one recognised by the institutional writers. Stair states (Institutions II.i.40):

> "It is a rule in the Roman law, which we follow, *inaedificatum solo cedit solo*; for thereby all buildings of houses, walls, wells, dykes etc and generally all things fixed to the ground, or walls, are accounted as parts of the ground and pass therewith (though not expressed) to all singular successors".

See also Erskine, Institute II.i.15; and Bell's Principles (10th ed) para 937: "The property of the ground carries that of buildings, fixtures or trees united to the soil."

[34] This is consistent with the decision of the House of Lords in *Brand's Trustees* v *Brand's Trustees*, per Lord Chelmsford at 23:

> "The law as to fixtures is the same in Scotland as in England. The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim '*quicquid plantatur solo, solo cedit*'." (see also Lord Chancellor Cairns at page 20).

[35] These principles were applied in the particular context of accessions to common good land by the Inner House in *Magistrates of Banff* v *Ruthin Castle*. In that case Lord Mackay carried out a wide-ranging review of the law of common good, and accessions to it,

with which the Lord Justice Clerk (Cooper), Lord Wark and Lord Jamieson agreed. Lord Mackay observed (at page 49):

> "It must, lastly, be said that the ancient authorities make it clear that 'accessions' to the original property endowments, whether emanating from the sovereign or from the wealthy landowners who set up the burgh of barony in their lands or other endowers, were contemplated. It is matter of the clearest assumption in decision after decision that such 'accessions' are contemplated, and when accepted fall into and form part of the common good. They do *not* form, and have never been even pleaded before this time to form, a species of property apart, of some third category. If they were now allowed so to do, there would, in my opinion, be an end for practical purposes of the careful statutory provisions against alienation, and particularly that very dangerous form of alienation which is exemplified here, *viz*, making a commercial tack for money of long term."

[36] That is a clear statement of the law which is binding on this court. It is consistent with principle. In the present case there is no dispute that the land on which the leisure centre was built forms part of the common good of the local authority. It follows that the leisure centre also forms part of the common good. The Lord Ordinary erred in law in stating (at paragraph [45]) that the common good property in this case is the land, and not the building.

[37] The respondents argue that when the leisure centre was constructed, the local authority had no intention of donating the building to the common good. That may be, but in this respect intention seems to me to be neither here nor there. There have been many cases in which it appears that the builder of a building, or the attacher of a fixture, to land has not intended to donate it to the owner of the land, but the court has held that it forms part of the land by accession, on the principles noted above. The respondents also argue, relying on *Ferguson*, that although they own both the buildings and the land, they do so wearing different hats, and that in their internal accounting procedures they account for the buildings separately from the land. This may be prudent accounting practice, and I note

that the passages in *Ferguson* relied on by the respondents appears in a section of the work dealing with common good and best value use of common good funds, concerning financial scrutiny of local authorities. I am not suggesting any impropriety in the respondents' accounting practices, but it does not appear that these provide support for their contention that the buildings do not form part of the common good. The argument that there is a "notional tenancy", with the respondents paying a "notional rent" to the common good fund, appears to me to be very similar to what Lord Mackay described as "that very dangerous form of alienation which is exemplified here, *viz*, making a commercial tack for money of long term." Such a practice would permit a local authority to let out land to itself, under a notional tenancy, and permit the erection of buildings thereon, thereby avoiding constraints as to the alienation or appropriation of common good land. Scots law has been zealous in the protection of common good property, even in cases in which the local authority proposed to put common good land to what was *prima facie* a reasonable and productive community use – see eg *Grahame* v *Magistrates of Kirkcaldy* (1879) 6 R 1066, where the court held that the ground was vested in the magistrates for the common use and enjoyment of the inhabitants, and that neither previous encroachments, nor its neglected condition (as a public dung stand) nor the fact that it was of little or no value to the public, entitled the magistrates to apply it to any purpose inconsistent with such common use and enjoyment – even as town stables. See also *Portobello Park Action Group* v *City of Edinburgh Council*. If the respondents' argument is sound, these cases could have been circumvented by the local authority simply leasing the land under a "notional tenancy" to itself to enable buildings to be erected thereon in the public interest.

[38] For these reasons I am not persuaded that, because of the respondents' internal accounting procedures, the general rule that buildings erected on land form part of that land

does not apply when the land forms part of the common good. I would answer the first issue above in the affirmative; the leisure centre buildings are property held by the respondents as part of the common good.

Issue (2): If so, is demolition of those buildings encompassed within the term 'disposing of any property'?

[39] Disposing of property is a wide term, capable of use in a wide variety of circumstances. One may dispose of rubbish, or anything unwanted, or something cherished by means of a gift to a loved one, one may dispose of goods that have been damaged, or moveable or heritable property by sale, exchange, or gift. Disposing of something is a wider term than disponing, transferring, alienating, demolishing or destroying, but, depending on the context, it is capable of encompassing all of these.

[40] In the context of the present case there is no suggestion of the respondents considering disposing of the land. What is in issue is whether they are considering disposing of the buildings, which comprise "any property" for the purpose of section 104(1)(a).

[41] The demolition of the leisure centre will have the result that the inhabitants of the Burgh will no longer have indoor sports facilities, toilet facilities and café facilities on this site. Bearing in mind that section 104 is concerned with involving the community and making such decisions more transparent by requiring publication and notification, I consider that when the respondents are considering demolition of the leisure centre they are indeed considering disposing of it. If the decision is implemented, the leisure centre will have gone; the public will no longer enjoy the use of such an asset on this site, and it will have been disposed of. Before taking any decision to demolish it, the respondents required to publish details about the proposed disposal.

[42] In *Crawford* v *Magistrates of Paisley* the magistrates were of opinion that a steeple, the property of the Burgh, was unsafe and without judicial authority proceeded to take it down whereupon an inhabitant of the Burgh presented a note of suspension and interdict. Lord President (Inglis) observed that:

> "This steeple is not only the public property of the burgh, but it is inalienable property. They could not sell it, and most unquestionably they could just as little pull it down without judicial authority, unless the immediate risk was so imminent as to entitle them, for the safety of the community, to do so".

Lord Deas (at page 697) agreed: "This steeple was part of the inalienable property of the burgh, which they could not sell, and could not take down, except on necessity". This is high authority for the proposition that a local authority cannot demolish buildings which form part of the common good without the authority of the court.

[43] In *Waddell and Others* v *Stewartry District Council,* Lord Wylie stated as follows:

> "*Prima facie*, to dispose of land is to make it over to someone else. Whether or not that involves a transfer of ownership as well as possession and control will depend on the context in which the transaction takes place. It is clear from the authorities to which I have referred that property of this nature is extra commercium. It could not be sold, without the authority of the court, because that would be to deprive the community of something which, as a community, they were entitled to have. It follows that it could not be alienated by donating it and as the same result would follow so far as the community is concerned, it would seem logical that its demolition, for example for road widening purposes, would likewise be an *ultra vires* act. ... I have accordingly come to the view that 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. In the context of the deed itself, the object of the grant being the declared purpose of providing a town hall, I consider that a similarly wide construction falls to be placed on the words 'dispose of' and these words would accordingly comprehend the action contemplated by the defenders."

[44] I find this logic compelling. Like Lord Wylie, I consider that a wide construction must be given to the words "disposing of any property", particularly in a statute which is concerned with improving transparency and encouraging community participation in such decisions. I would answer the second issue in the affirmative.

Issue (3): If the answer to (1) is yes, and the answer to (2) is no, does demolition of the buildings and returning the land to open parkland amount to changing the use to which the property is put?

[45] In light of my conclusions on the first two issues, this issue does not arise. However, as the point was the subject of submissions, I give my views on it. The Lord Ordinary dealt with this point at paragraphs [48]-[50] of her opinion. I agree with her observation that whether a particular decision as to the use to which property is put amounts to a change of use will engage section 104 is a mixed question of fact and law which will require to be considered on the basis of the facts and circumstances arising in any particular case. I also agree that it is doubtful whether Parliament intended that every type of change of use – for example the substitution of a tennis court in a park with a basketball court – would engage section 104. The issue needs to be approached with the application of that dangerous commodity, common sense. I am not sure that Mr Dunlop's analogy of demolishing Murrayfield Stadium and allowing rugby to be played on the bare land takes matters much further, but it does serve to underscore the point that a change of use may occur even when the present use and the proposed use both fall under the general heading of "leisure purposes" or "leisure and recreation". That will not in my view do. If a local authority wished to demolish a sports and leisure centre containing a swimming pool, squash courts, keep fit area and other indoor sports facilities, and replace it with an opera house, concert hall or cinema, both the existing and the proposed uses might be described as use for leisure

purposes, but I consider that the proposal would involve a change of use. Certainly it is a proposal for change about which one might expect the residents of Forfar to have views. In my view such a proposal would fall within the ambit of section 104(1)(b), and one would expect that in order to promote transparency and community involvement in such decision-making, there would be publication of such a proposed use.

[46] In the present case the Lochside Leisure Centre contains indoor sporting facilities, toilet facilities and café facilities (although it is currently disused). The proposal is to demolish it and reinstate the ground beneath to extend the park. I have not found reference to decisions on planning law to be helpful in this context. In the context of the 2015 Act, I consider that that does indeed amount to a change of use, and I suspect that most of the inhabitants of Forfar would take the same view. Accordingly I answer the third issue in the affirmative too.

[47] For these reasons I would allow the reclaiming motion and grant reduction of the decision to demolish the leisure centre, as sought in condescendence 4(1) of the petition.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 50
P216/19

Lord President
Lord Menzies
Lord Malcolm

OPINION OF LORD MALCOLM

in the reclaiming motion

in the cause

MARK GUILD AND ANOTHER

Petitioners and Reclaimers

against

ANGUS COUNCIL

Respondents

for

Judicial Review

_____

Petitioners and Reclaimers: Dunlop QC; Burness Paull LLP
Respondents: J Findlay QC, Garrity; Morton Fraser LLP

19 August 2020

[48] The question in this reclaiming motion is – does the proposal to demolish the Lochside Leisure Centre amount to either a disposal of property "held by (Angus Council) as part of the common good", or to a change in the use of such property, all within the meaning of section 104(1) of the Community Empowerment (Scotland) Act 2015? I agree with the Lord Ordinary that the answer is no. Using statutory powers the centre was

erected by the council on part of Forfar Country Park. It has been in disuse for some time because replacement facilities have been built elsewhere in the town. The country park is part of the Forfar common good and is dedicated to use by local inhabitants for leisure and recreation. The council's intention is to return the site to parkland. The petitioners want to take it into private ownership. Much of the discussion has turned on whether the bricks and mortar of the centre are properly regarded as being held by the council as part of the common good. In my view they are not, but even if they are, it does not follow that section 104 is engaged by the proposed demolition. On the view I take, the public consultation duty would apply only if the community had a right to the retention of the building as a leisure centre. In other words, section 104 was designed to march with the pre-existing common law and statutory restraints on an authority's power to deal with common good, and in particular the controls on its alienation. Even if it is common good, demolition of the centre is not subject to those controls. The broad interpretation of the provisions favoured by your Lordships would extend statutory consultation duties to management decisions concerning common good, something unlikely to have been intended given the potential for delay and interference in essentially administrative matters. It can be remembered that common good is not limited to land, but includes moveable property and financial assets.

[49] In *Capacity Building Project* v *City of Edinburgh Council* [2011] CSOH 58, at paragraph 40 I drew together certain general principles emerging from the case law on common good land. For present purposes the following can be mentioned. Common good land consists of grants of territory made to the community in the original charter of a burgh or by subsequent grant or dedication prior to abolition of the burghs. It does not include subjects acquired under statutory powers or held under special trusts. A limitation on the use to which common good may be put can be imposed in the charter or grant, or it can arise

from ancient or immemorial usage which demonstrates that the subjects have been appropriated or dedicated to a particular purpose. Common good which was necessary for the proper administration or trade of a burgh, or for the convenience of its inhabitants, is inalienable. It is a pertinent or adjunct to an authority's title to common good that each citizen can enforce any conditions under which it is held, the proprietor being a steward or guardian of the public interest in the maintenance of this state of affairs.

[50] Section 75(2) of the Local Government (Scotland) Act 1973, as amended, provides:

> "Where a local authority desire to appropriate or 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 appropriate or dispose of the land …"

Previously the subsection gave the court no power to sanction an appropriation, only a disposal; but this was remedied by an amendment made by section 77 of the Land Reform (Scotland) Act 2016. (It is apparent that in section 77 "change of use" and "appropriation" are considered to be interchangeable.) In the 1973 Act the term "alienate" appears only in section 75. Section 73 makes it clear that an authority "appropriates" common good land when it uses it for a different purpose, for example from leisure to housing or education. A "disposal" requires to obtain best value (section 74) and covers any transaction by which the authority loses ownership, control, or beneficial occupation; sales or leases being obvious examples. In Ferguson *Common Good Law* 2nd ed. at page 94 the author contrasts the term "disposal" with that of "alienation". In the context of common good the latter connotes "interfering with the rights of the inhabitants of the burgh and not whether or not a third party is necessarily gaining rights". On this analysis a disposal will always be an alienation, but an alienation need not be a disposal. The author notes that there is a question as to whether section 75(2) permits the court to approve an alienation which is not also a disposal.

Later in the work there is a discussion of demolition of inalienable common good property as an example of such a case.

[51] An authority can manage common good land. Thus the construction of a road over the famous St Andrews golf links was "an act of fair and reasonable administration" which was within the discretion of the magistrates (*Paterson v Magistrates of St Andrews* per LJC Moncrieff, (1880) 7R 712 at 725/6). The construction of the Lochside Leisure Centre could be similarly described. It was, in a sense, a change in the use of this part of the park, but it was consistent with its dedication to the community for leisure and recreational purposes. It was not a disposal, alienation, or appropriation of common good land. There was no need for approval in terms of section 75. The facilities having been replaced, in my view the same comments can be made in respect of the desire to restore the site to parkland. Neither the construction nor the demolition deprives the community of that to which it is entitled, namely the retention of the park for leisure and recreation. That right does not intrude upon active management decisions made to address changing needs and circumstances.

[52] Reverting to section 104(1) of the 2015 Act, in agreement with the Lord Ordinary (paragraph 50 of her opinion), I doubt that Parliament intended a consultation exercise every time a structure was to be removed or there was a proposed change of use in a broad sense of common good land or property. A wide variety of scenarios could be contemplated to illustrate how disruptive that might be. There will be occasions when a sensible council will consult even if under no obligation to do so, and in certain cases there may be public law remedies. But if section 104 is engaged there is no discretion, and illegality would flow from any mistake. No doubt a precautionary approach would be adopted.

[53] For my part, I understand section 104 to be linked with and supplementary to the pre-existing controls on an authority's powers over common good. It was designed to

ensure a voice for the community if a proposed decision would interfere with rights flowing from the dedication of land in its favour. The steeple considered in *Crawford* v *Magistrates of Paisley* (1870) 8M 693 was described at 696 as "not only the public property of the burgh, but it is inalienable property." It was part and parcel of the grant to the burgh, and, except in emergency for public protection, it could not be pulled down without judicial authority. The decision supports the proposition that the demolition of common good subjects can be an alienation; but it is not authority for all removals of common good subjects being challengeable as adverse to the legitimate interest of the local inhabitants. Similar comments can be made in respect of the town hall demolition addressed in *Waddell* v *Stewartry District Council* 1977 SLT (Notes) 35. Lord Wylie spoke (page 36) of a liberal approach whereby an alienation would include anything which "effectively deprives the community of something which, by custom or dedication by direct grant, they are entitled to have." That cannot be said about the leisure centre. His Lordship expressed no opinion as to whether a similar broad view should be taken to the term "disposal" in section 75 of the 1973 Act. It might well be that disposal there envisaged only a "commercial" act. Likewise in the present case it is not necessary to make a ruling on the point. However, with regard to "disposal" as used in section 104(1)(a) of the 2015 Act, if it is correct to emphasise the community interest as the underpinning factor, it would be reasonable to interpret the term as comprehending any demolition, or other alienation short of loss of control, which deprives the local people of their inalienable entitlement; with the statute "empowering" the community by ensuring that in such circumstances it has a voice. Retention of the leisure centre not being part of that entitlement, its demolition is not a "disposal" for these purposes.

[54] My opinion does not turn on the question of whether the common good includes the centre or only the land on which it stands. Even assuming the former, its demolition would

not involve a disposal or a change in the use of common good property in terms of section 104(1). It is true that the language of the subsection does not follow exactly the labels used in section 75 of the 1973 Act, but I am persuaded that no real difference was intended when it comes to identifying when the community has a right to consultation. "Change of use" is more readily understandable than "appropriation". And "alienation" has an old-fashioned ring, so it is perhaps no surprise that different terminology was adopted. However the overall sense remains of giving the community a say when something is afoot which interferes with its vested rights; in other words an alienation of inalienable common good. Thus, as in section 77 of the Land Reform (Scotland) Act 2016, a "change of use" is the equivalent of an appropriation; which is putting the land to a different purpose or function requiring court approval under section 75(2) of the 1973 Act. "Disposal" would include a transaction with a third party which needs judicial sanction under the same provision. Earlier I expressed the view that the term "disposal" as used in section 104 extends to conduct not involving a transfer of ownership or control to another, so long as it amounts to an alienation; in other words when it is inconsistent with the dedication of the subjects for public purposes. Returning the disused and redundant leisure centre to parkland does not have any of these characteristics. It is a management or administrative act of the steward of the common good, and does not trigger a statutory right to community consultation.

[55] I am fortified in this by the terms of the background explanatory material to the legislation. With regard to common good and the introduction of a duty to consult, the discussion is set in the context of the rules governing the use and disposal of common good. For example reference can be made to paragraphs 86-92 of the bill's policy memorandum. The latter passages use "disposal" as a synonym for "alienation", and "change of use" as the equivalent of "appropriation". The explanatory notes to the bill refer to restrictions as to

how certain items of common good are allowed to be used and whether the authority can dispose of them. Paragraphs 276–282 are couched in terms of community involvement when there are restraints on an authority's decision-making powers with regard to common good; not imposing public consultation when there are no such fetters. Part 6 of the SPICe briefing on the bill refers to "the complex common law rules as to whether common good property is alienable … i.e. able to be disposed of (i.e. sold/leased) or used for a different purpose." The next passage is headed "The disposal or appropriation of common good property" and includes a discussion of the terms of section 75 of the 1973 Act and the limits placed on local authorities "disposing of common good or appropriating it (i.e. changing its use)". None of this would be necessary or appropriate if the community consultation provisions were also aimed at decisions falling within the untrammelled discretion of an authority and in respect of any and all common good.

[56] This material reinforces the view, which in any event I would have taken in respect of the wording in section 104(1), namely that the terms "disposal" and "change of use" are linked to the notion of an alienation of common good property, in the sense of something done which interferes with the rights vested in the local inhabitants. Absent such interference, no question as to alienability arises. Given that the people of Forfar have no right to insist on the retention of the leisure centre, its demolition does not engage the duties in either section 75 or section 104. Even if it is properly to be regarded as part of the common good, it is not inalienable simply because it was constructed on inalienable common good land. There would only be a "change of use" within the meaning of subsection 1(b) if the demolition was part of a decision to appropriate this part of the park to some other purpose, for example housing or a school. Demolition alone is not a "disposal" in terms of subsection 1(a) because no third party is involved and no part of any grant or

dedication is being disturbed or removed. There is no destruction of property appropriated to the common good. In short, a management decision of this nature does not create a duty to consult.

[57] As mentioned, the above does not turn on whether the centre is or is not common good; however, given its importance for local government administration, I will express my view on this issue. Is the centre, as opposed to the land on which it stands, part of the common good? My answer is, in a sense yes, but fundamentally, no. It will have been built using statutory powers. It was not paid for out of the common good fund. Once it was built, of course it belonged to the owner of the park, namely the council. This would be so whoever constructed it and however it was financed. Until recently it was the chosen method of the steward of the common good for the use of this part of the park for the recreation of the local people. While it remains standing it is subject to the same conditions which apply to the council's title to the park, and to the legitimate interests of the community in the preservation of the park for their leisure and enjoyment. Thus, for example, any appropriation of the centre for some alternative purpose would be challengeable and require court approval. So in a sense it is part of the common good. However all of this flows from the aforesaid pertinent or adjunct to the council's title to the park, which derives from the original gift or dedication of the park; not from anything concerning the centre itself.

[58] I consider it more in line with the law and the facts to say that the common good is the park, and does not include the bricks and mortar of the centre. The centre was the result of a management decision taken by the council. There was no separate dedication or endowment of it to the former burgh in the manner comprehended by the term common good property. Common good consists of property held by "a royal burgh or a burgh of

barony not acquired under statutory powers or held under special trusts" – Lord Wark in *Magistrates of Banff and Others* v *Ruthin Castle Limited* 1944 SC 36 at 60. Even if the centre had been built before the abolition of the burghs (the petition says it was completed in 1977) it would not fall within this description, it having been the result of the exercise of statutory powers. I do not accept the proposition that since the centre was built on common good land, it must also be "held by the authority as part of the common good". If it was sold, only a fraction, perhaps a relatively small part of the consideration would belong to the common good fund. The separate accounting treatment of the centre, in terms of both capital and revenue expenditure, has been explained, and will no doubt be mirrored in similar circumstances by local authorities throughout Scotland. A "notional rent" was paid by the council to the common good fund, and while the idea of a tenancy is a useful construct to understand the accounting treatment, and what I would suggest is the underlying reality of the situation, it is entirely notional. There is no lease, nor could there be. There are no horizontal ownership boundaries here, but perhaps some comfort can be drawn from the absence of any prohibition on such in our law of heritable property. (By way of analogy, it may not be wholly irrelevant to remember that feudal theory permitted separate ownership interests in one plot of land.) In *Magistrates of Banff* at page 43 LJC Cooper observed that the different categories of property which a chartered burgh may competently hold, and the distinguishing characteristics of the special category known as common good, "can hardly be said to have been anywhere defined with mathematical precision". The same could be said today. It has even been asserted that the concept of local authority ownership of common good property could be seen as controversial, Ferguson (work cited) page 15.

[59] The key distinguishing feature of common good, and in particular inalienable common good such as Forfar Country Park, is the particular interest and rights of the

intended beneficiaries, the inhabitants of the former burgh. This might almost be seen as a separate tenement of the kind discussed in chapter 7 of Gordon and Wortley *Scottish Land Law* volume 1 (3rd ed.), or perhaps something equivalent to a right of servitude. One might classify inalienable common good land as a type of property *extra commercium,* in the sense that here the park, and the park alone, is held in a form of public ownership. All that said, it is probably *sui generis* (of its own kind). But however this feature of the council's title as proprietor is defined or categorised, it attaches only to the park in terms of its original dedication, not to every particular usage happening from time to time; something which would be recognised by excluding the centre itself from the common good properly so called, (or at least from "property held by the authority as part of the common good" as specified in section 104).

[60] For the proposition that the centre is common good, reliance has been placed on a passage in the opinion of Lord Mackay in *Magistrates of Banff* at page 49, and in particular the reference to common good arising from "accessions". I do not understand his Lordship to have been using that term in the sense of buildings and fixtures acceding to the owner of the *solum*. Rather it was said in the context of additions to the original property endowments of a burgh, "whether emanating from the Sovereign or from the wealthy landowners ---- or other endowers ---." This was no more than an echo of the Lord Ordinary's mention of "additional grants" supplementing the original grants made when the burgh was created – see page 42. The determination was that the gift of Duff House and its lands was not in the nature of a trust, but was an early 20th century endowment to the common good of each burgh. The law concerning heritable fixtures played no part in the decision. In agreement with the view of the Lord Ordinary, I consider that the centre can

legitimately be excluded from the common good of Forfar, but not the part of the park on which it is built.

[61] To some it was a surprise that common good lived on after local government re-organisation and the abolition of the burghs in the 1970s. Over the years the case law has concentrated almost exclusively on common good land which has been, or is asserted to have been, set apart for public uses, and the ability or otherwise of the populace to restrain an authority's decision-making powers over it. I consider that in respect of common good the underlying intention of the 2015 Act was to "empower" or facilitate the exercise of such rights by the community, not to enlarge its sphere of influence to property over which, previously, it had no special entitlements.

[62] For the above reasons I would uphold the decision of the Lord Ordinary and refuse the reclaiming motion.