OUTER HOUSE, COURT OF SESSION

[2025] CSOH 4

P729/24

OPINION OF LORD SANDISON

in the petition of

GREGORY BROWN

Petitioner

for

Judicial review of a decision by Glasgow City Council to grant a certificate of lawful proposed use or development for the erection of a boundary fence to the sports pitch at Jimmy Johnstone Academy of Football, 835 Cathcart Road, Glasgow

Petitioner: Deans; Drummond Miller LLP for R & R Urquhart LLP
Respondent: Burnet KC, A Sutherland; Harper Macleod LLP

10 January 2025

Introduction

[1] In this petition for judicial review, the petitioner challenges a decision made on 14 December 2023 by the respondent, Glasgow City Council, to issue a certificate of lawful proposed use or development in relation to a fence which it is intended be erected around a football pitch in Cathkin Park, Glasgow. He seeks declarator that the issue of the certificate was irrational and predicated on material error of law, and reduction of the decision. The matter came before the court for a substantive hearing to determine the dispute.

Background

[2] This is not the first occasion on which planned fencing in Cathkin Park has been the subject of litigation in this court. The park, a pleasant municipal green space on the south side of Glasgow, is presently the location of an unfortunate conflict between groups with legitimate but quite different interests in its use. The park has strong historical associations with the playing of football and the pitch there, which occupies a considerable area of the park as a whole, is leased (subject to a requirement that public access for local community sport is maintained) by the respondent to the Jimmy Johnstone Charitable Trust, a charity that teaches children how to play football there. The petitioner and other local residents claim with some force that the park is a valuable community asset which has been put to extensive and good use by all manner of people for the benefit of their physical and mental health. The Trust, on the other hand, conceives that some users of the park engage in anti-social behaviour which spoils the pitch for its intended use, and accordingly wishes to enclose it with a fence so that it can better be preserved for its purposes. Positions on both sides appear to be quite entrenched and the respondent does not seem to see itself, as others might, as a suitable vehicle for the reconciliation of the different interests for the benefit of the community as a whole.

[3] In 2024, the petitioner sought judicial review of a decision by the respondent to grant planning permission for the erection of a 3-metre-high fence round the pitch. He obtained decree of reduction of that decision on the basis that, in granting planning permission, the respondent had failed to take into account its duty under section 13 of the Land Reform (Scotland) Act 2003 to assert, protect and keep open and free from obstruction any route or other means by which access rights might reasonably be exercised. Days after the institution of the previous petition proceedings, and apparently at the suggestion of the respondent, the

Trust applied for a certificate of lawful proposed use or development in terms of section 151 of the Town and Country Planning (Scotland) Act 1997 in relation to the erection of a sports or security fence of approximately 380 linear metres in length and a reduced height of 1.99m around the existing sports pitch. That was said to be lawful since a fence of that height falls within the provisions of class 7 of the first Schedule to the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 ("GPDO") and, it is claimed, represents permitted development in respect of which planning permission is automatically granted by the terms of that development order. The certificate applied for was granted on 28 May 2024 (which was before the substantive hearing or decision in the previous proceedings), apparently on that basis. Neither the making of that application nor its grant was disclosed in the course of those proceedings; the existence of the certificate was first discovered by the petitioner after his success in the previous proceedings, when the temporary fencing which had been erected round the pitch was not removed and it emerged that it was proposed to erect in its stead permanent fencing of the kind described in the certificate.

Relevant Statutory Provisions

[4] Section 21 of the Town and Country Planning (Scotland) Act 1972 provided:

> "**21.— Development orders.**
> (1) The Secretary of State shall by order (in this Act referred to as a *"development order"*) provide for the granting of planning permission.
>
> (2) A development order may either—
> (a) itself grant planning permission for development specified in the order, or for development of any class so specified; …
>
> (5) Without prejudice to the generality of subsection (4) of this section—
> …

(b) where planning permission is granted by a development order for development of a specified class, the order may enable the Secretary of State or the planning authority to direct that the permission shall not apply either in relation to development in a particular area or in relation to any particular development.

…

(7) For the purpose of enabling development to be carried out in accordance with planning permission, or otherwise for the purpose of promoting proper development in accordance with the development plan, a development order may direct that any enactment passed before 13th August 1947 or any regulations, orders or byelaws made at any time under any such enactment, shall not apply to any development specified in the order, or shall apply thereto subject to such modifications as may be so specified."

The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 1992/223 *inter alia* provides:

Article 3:

"**3.— Permitted development**

(1) Subject to the provisions of this Order … planning permission is hereby granted for the development or class of development specified in sub-paragraph (1) of any paragraph of Schedule 1 or where any such paragraph is not divided into sub-paragraphs in that paragraph."

Article 4:

"**4.— Directions restricting permitted development**

(1) If in relation to any area the Secretary of State or, in relation to the district of a general planning authority, that general planning authority, is satisfied that it is expedient that all or any development of all or any of the classes of Schedule 1 other than Classes 54 and 66 should not be carried out in that area or, as the case may be, that district or any particular part thereof, or that any particular development of any of those classes should not be carried out in such area or district or part, unless permission is granted on an application in that behalf, the Secretary of State or the planning authority concerned may direct that the permission granted by article 3 shall not apply to-

(a) all or any development of all or any of those classes in any particular area specified in the direction; or

(b) any particular development, specified in the direction, falling within any of these classes.

…

(3) Subject to paragraph (5), a direction by a planning authority under this article shall require the approval of the Secretary of State, and the Secretary of State may approve the direction, with or without modifications.

…

(7) A direction shall come into force on the date on which notice thereof is first published under article 5(1) or in a case where notice is served in accordance with article 5(4) when such notice is served on the occupier or if there is no occupier on the owner"

…

Schedule 1, Part 2, paragraph 7:

"Class 7.—

(1) The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

(2) Development is not permitted by this class if-

(a) the height of any gate, fence, wall or other means of enclosure to be erected or constructed within 20 metres of a road would, after the carrying out of the development, exceed one metre above ground level;

(b) the height of any other gate, fence, wall or other means of enclosure to be erected or constructed would exceed two metres above ground level …"

…

The Town and Country Planning (Scotland) Act 1997 contains *inter alia* the following terms:

"**150.— Certificate of lawfulness of existing use or development.**

(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful,

(b) any operations which have been carried out in, on, over or under land are lawful, or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act, uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason), and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

(3) For the purposes of this Act, any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—

(a) the time for taking enforcement action in respect of the failure has then expired, and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(4) If, on an application under this section, the planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall—

(a) specify the land to which it relates,

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 26(2)(f), identifying it by reference to that class),

(c) give the reasons for determining the use, operations or other thing to be lawful, and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

(7) A certificate under this section in respect of any use shall also have effect, for the purposes of the following enactments, as if it were a grant of planning permission—

(a) section 3(3) of the Caravan Sites and Control of Development Act 1960,

(b) section 5(2) of the Control of Pollution Act 1974, and

(c) section 36(2)(a) of the Environmental Protection Act 1990.

151.— Certificate of lawfulness of proposed use or development.

(1) If any person wishes to ascertain whether—

(a) any proposed use of buildings or other land, or

(b) any operations proposed to be carried out in, on, over or under land, would be lawful, he may make an application for the purpose to the planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(3) A certificate under this section shall—

(a) specify the land to which it relates,

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 26(2)(f), identifying it by reference to that class),

(c) give the reasons for determining the use or operations to be lawful, and

(d) specify the date of the application for the certificate.

(4) There shall be an irrefutable presumption as to the lawfulness of any use or operations for which a certificate is in force under this section unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."

The Land Reform (Scotland) Act 2003 provides:

"**1 Access rights**
(1) Everyone has the statutory rights established by this Part of this Act.

(2) Those rights (in this Part of this Act called *"access rights"*) are—
(a) the right to be, for any of the purposes set out in subsection (3) below, on land; and

(b) the right to cross land.

(3) The right set out in subsection (2)(a) above may be exercised only—

(a) for recreational purposes;
(b) for the purposes of carrying on a relevant educational activity; or
(c) for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.

…

2 Access rights to be exercised responsibly

(1) A person has access rights only if they are exercised responsibly.

…

3 Reciprocal obligations of owners

(1) It is the duty of every owner of land in respect of which access rights are exercisable—
(a) to use and manage the land; and
(b) otherwise to conduct the ownership of it,
in a way which, as respects those rights, is responsible.

…

13 Duty of local authority to uphold access rights

(1) It is the duty of the local authority to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised.
(2) A local authority is not required to do anything in pursuance of the duty imposed by subsection (1) above which would be inconsistent with the carrying on of any of the authority's other functions.
(3) The local authority may, for the purposes set out in subsection (1) above, institute and defend legal proceedings and generally take such steps as they think expedient.

…

14 Prohibition signs, obstructions, dangerous impediments etc.

(1) The owner of land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so—
(a) put up any sign or notice;
(b) put up any fence or wall, or plant, grow or permit to grow any hedge, tree or other vegetation;

…

(2) Where the local authority consider that anything has been done in contravention of subsection (1) above they may, by written notice served on the owner of the land, require that such remedial action as is specified in the notice be taken by the owner of the land within such reasonable time as is so specified.
(3) If the owner fails to comply with such a notice, the local authority may—
(a) remove the sign or notice; or, as the case may be,
(b) take the remedial action specified in the notice served under subsection (2) above, and, in either case, may recover from the owner such reasonable costs as they have incurred by acting under this subsection.

…

28 Judicial determination of existence and extent of access rights and rights of way
(1) It is competent, on summary application made to the sheriff, for the sheriff—
(a) to declare that the land specified in the application is or, as the case may be, is not land in respect of which access rights are exercisable;
(b) to declare—
(i) whether a person who has exercised or purported to exercise access rights has exercised those rights responsibly for the purposes of section 2 above;
(ii) whether the owner of land in respect of which access rights are exercisable is using, managing or conducting the ownership of the land in a way which is, for the purposes of section 3 above, responsible …"

Submissions for the Petitioner

[5] Counsel for the petitioner referred to the decision in the previous petition (*Brown, Petitioner* [2024] CSOH 76, [2024] SLT 1025) and noted that the principal argument was that the certificate of lawful proposed use or development fell to be reduced for the same reason as the grant of planning permission was reduced in the previous application, where I said at [36]:

> "The difficulty … is that neither the report to committee nor the determination of the application itself contain any material suggesting that any consideration at all, at any stage, was given to the potential impact of the section 13 duty on the decision-making process, nor was any submission made that it had nonetheless actually been taken into account. Had the respondent considered the potential application of that duty to the proper determination of the application and noted its conclusions - whatever they might have been - in relation to that matter, those considerations and conclusions could have been examined in order to determine whether they reflected any error of law, a question which might very well have resolved itself into whether they betrayed any sign of irrationality in the relevant sense. However, the apparent failure of the respondent to give any thought to the matter at all inevitably involves the conclusion that it failed to take account of a consideration of at least potential materiality to the decision which it was called upon to take. It is not possible to conclude that, had it considered the potential impact of the section 13 duty on that decision, there would have been no real possibility of a different decision - perhaps involving conditions calculated to produce a more even balance amongst the various community interests engaged in the park and the pitch - being made. It follows that this ground of challenge to the respondent's decision succeeds."

[6] In the present case, the respondent had equally not considered the potential impact of the section 13 duty on its decision, which should accordingly be reduced. The issue of the certificate was simply an attempt to side-step the difficulties encountered in obtaining the lawful grant of planning permission. No local planning authority acting rationally would have failed to consider the impact of section 13 in a case where a private organisation sought to exclude public access to public land.

[7] The respondent had issued a certificate of lawful proposed use or development for the erection of the fencing in terms of section 151 of the 1997 Act, subsection (2) of which required the provision of information satisfying it that the use or operations described in the application for such certificate would be lawful if instituted or begun at the time of the application. The consideration of lawfulness required by a local authority in terms of section 151(2) involved a consideration of all applicable statutory duties. The respondent's contention, that if the proposed use fell within the terms of the GPDO, then it was automatically lawful and a certificate of lawfulness must be granted, was unsound.

[8] Paragraph 7(2)(b) of Schedule 1 to the GPDO, read along with article 3(1), did not automatically authorise planning permission for the erection, construction, maintenance, improvement, or alteration of a gate, fence, wall, or other means of enclosure which was less than 2 metres above ground level. Those provisions did not trump any other statutory duty, such as that contained within section 13 of the 2003 Act. There were four reasons for that:

[9] Firstly, the GPDO was delegated legislation from 1992. It could not, without the clear expression of Parliamentary will to that effect, be taken to prevail over primary legislation. The GDPO did not provide expressly or impliedly that it was to prevail over the 2003 Act, nor did that Act itself contain any such indication.

[10] Secondly, the statutory provisions which enabled the GPDO to be made (and in particular section 21(7) of the Town and Country Planning (Scotland) Act 1972) allowed it, subject to positive Parliamentary resolution, to provide that it should prevail over legislation passed before 13 August 1947 and regulations made under such legislation. It followed that it could not under any circumstances prevail over the terms of other legislation, such as the 2003 Act. There would have been no need for a provision such as section 21(7) of the 1972 Act if the GPDO had been intended to be read as itself prevailing over any other applicable statutory provisions.

[11] Thirdly, there was a mechanism contained within Article 4 of the GPDO for the Secretary of State (now, in terms of section 117 of the Scotland Act 1998, the Scottish Ministers) or a planning authority to disapply the general grant of planning permission contained in the GPDO in respect of any particular area, district or development. The existence of a mechanism for planning authorities to disapply the terms of the GPDO to a district or development illustrated that it was not the case that a local authority was bound to authorise development should it fall within those terms.

[12] Fourthly, section 151(4) of the 1997 Act provided that once a certificate of lawful proposed use or development was issued, there was an irrefutable presumption that the operation in question was lawful unless there was a material change in any of the matters relevant to determining such lawfulness. If the respondent's interpretation was correct, and the only matter relevant to determining lawfulness was what the GPDO provided, the only circumstance which could amount to such a material change would be amendment of the GPDO. Plainly, section 151(4) could not have been intended to be so restrictive, referring as it did to "any of the matters relevant".

[13] Accordingly, the assessment of lawfulness which the respondent was required to carry out in terms of section 151(2) was not limited to the binary question of whether the proposed development fell within the terms of the GPDO. Elevating the GPDO to the status of the beginning and end of the question created manifest absurdity. For example, the GPDO authorised in Class 9C(1)(a) the extension or alteration of a school, college, university, or hospital building. Nothing within the relevant provisions would prevent an alteration which simply consisted of removing all the disabled access to a school or hospital. However, a local authority which rubber-stamped such a proposal on the basis that it fell within the GPDO would be in breach of its public sector equality duties as set out at section 149 of the Equality Act 2010. As a further example, if a development negatively impacted the conservation of biodiversity, a local authority could not ignore its obligations under section 1 of the Nature Conservation (Scotland) Act 2004 by pointing to the GPDO as conclusively deciding the question of lawfulness.

[14] The respondent argued that it had a duty as a public authority to comply with the GPDO and so requiring it also to comply with the 2003 Act would be inconsistent with that duty and thus was not required in terms of section 13(2) of the 2003 Act. That argument was misconceived for three reasons.

[15] Firstly, section 13(2) referred to inconsistency with any of the authority's other "functions" not with its other "duties". Those words were not synonyms. For example, the function of a court was to decide legal disputes. The court had a duty to be impartial, but impartiality was not the court's function. Similarly, the respondent's function in its capacity as a planning authority was to exercise proper planning control. Its duty was to comply with its statutory obligations, but that was not its function.

[16] Secondly, the respondent's function was to exercise proper planning control. The purpose of planning was defined by section 3ZA(1) of the 1997 Act as "to manage the development and use of land in the long term public interest." The consideration of public access rights was not inconsistent with that function; rather, it was a key part of that function.

[17] Thirdly, the respondent's assertion that it had a duty to comply with the GPDO went no further than a general statement that it had a duty to comply with its statutory obligations. The question for the court was, as a matter of statutory interpretation, whether it had done so. Where there was a conflict between secondary legislation from 1992 and primary legislation from 2003, it required to be resolved in favour of the later primary legislation. That was not a matter of inconsistency with other functions. It was a matter of properly interpreting how to carry out one function.

[18] The respondent acted unlawfully in issuing the certificate of lawfulness. It incorrectly and unlawfully asked itself only one question – did the proposed operation fall within the terms of the GDPO? The proper question was whether the proposed operation was lawful when all of the relevant statutory duties were concerned. In a case where the operations proposed would exclude access to a public football pitch, section 13 of the 2003 Act was clearly engaged and should not have been ignored.

[19] It might be the case that the position adopted by the petitioner would deprive the GPDO of its original purpose by introducing additional steps to the process of recognising generally permitted development. However, much legislation had been passed since the GPDO, and some of it imposed additional burdens on local authorities to consider a variety of matters in the exercise of their decision-making functions. Parliament could have, but did not, exclude the operation of the GPDO from these obligations. Until it did, the exercise of

planning functions required the GPDO to be read along with the statutory duties introduced by primary legislation, such as the Equality Act 2010 and the 2003 Act. To do otherwise would be to overrule primary legislation. A local authority could not circumvent obligations imposed by primary legislation by simply pointing to the GPDO. If the terms of the GPDO envisaged such an approach, it required to be read down to comply with later Acts of Parliament.

[20] The petitioner did not have a relevant alternative remedy in terms of section 28 of the 2003 Act. As I stated in the previous case at [35],

> "The petitioner wishes this court to determine whether the respondent's grant of planning permission was lawful or not; a matter in respect of which the Sheriff has no jurisdiction whatsoever. He does not wish a determination of the nature and extent of any public access rights which might subsist in relation to the pitch as and when the permission for the erection of the fence is implemented by its erection. This court has had to form a view as to the incidence of the access rights currently enjoyed by the public in relation to the pitch in order to form a view as to whether the section 13 duty is engaged, but it was (I think rightly) not submitted on behalf of the respondent that the competency of an application to the Sheriff for a declaration as to access rights operated as a general exclusion of the jurisdiction of this court to determine that matter as an incident of the exercise of its own powers. The present application is entirely competent."

[21] In any event, given the terms of section 151(4) of the Town and Country Planning (Scotland) Act 1997, it would be necessary to reduce the certificate of proposed lawful use or development prior to seeking any remedy from the Sheriff Court, because of the irrefutable presumption as to the lawfulness of the operation which that subsection created. The mechanism provided for by section 28 of the 2003 Act only envisaged a declarator that land was or was not land in respect of which access rights were exercisable. Such a declarator did not overrule an irrefutable presumption that the erection of a fence was lawful. The respondent's argument on alternative remedy was inherently contradictory of its other arguments. If it contended that a declarator that access rights were exercisable over the

sports pitch was a matter relevant to determining the lawfulness of the proposed operation in terms of section 151(4), then it was bound to consider access rights as part of its determination of lawfulness. It did not do so.

[22] The petitioner also advanced the supplementary argument that the certificate of lawfulness fell short of the statutory requirements for such a certificate. Section 151(3)(c) stated that the certificate was required to give the reasons for determining the use or operations to be lawful. The certificate in question did not do so; it was defective and so should be reduced.

Submissions for the respondent

[23] Senior counsel for the respondent moved the court to dismiss the petition. In determining an application under section 151 of the 1997 Act, the planning authority was concerned with rights, not merits, and faced a binary question: was the proposal lawful in terms of planning law? If it was satisfied as to lawfulness, it was bound to issue a certificate under section 151. Not doing so would be inconsistent with its functions under, *inter alia*, the 1997 Act. A certificate dealt only with lawfulness in terms of planning law, and did not preclude other action in relation to access rights.

[24] I was invited consider the structure of the 1997 Act. Parts I and II established and defined the jurisdiction of planning authorities and the function of development plans. Part III dealt with control of development, and section 26 defined "development" as meaning the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 28(1) was the general provision that development as so defined required planning permission. Section 29(1) provided that planning permission could come by way of a

development order or could be granted by a planning authority upon application being made to it. In the present case, the grant of planning permission had come via a development order, in the form of the GPDO. Part VI of the 1997 Act dealt with enforcement of planning restrictions, with section 123 providing the general rule that development without required permission constituted a breach of planning control. Sections 150 and 151, which dealt respectively with certificates of the lawfulness of existing and proposed use and development, were part of the enforcement regime. Importantly, "lawfulness" in this context meant lawfulness for the purposes of the 1997 Act and (in the case of a certificate issued under section 150) the three further statutes named in subsection 150(7) only. That could be seen from the discussion of the equivalent provisions in English law in *Cusack* v *Harrow London Borough Council* [2013] UKSC 40, [2013] 1 WLR 2022, [2013] PTSR 921 at [24] – [25]. Section 150(2) provided that use and operations were lawful at any time if no enforcement action might then be taken in respect of them. The grant of a certificate under sections 150 or 151 did not involve the exercise of any judgment or discretion on the part of the planning authority, merely the recognition of pre-existing lawfulness, as witnessed by the mandatory words used in sections 150(4) and 151(2). The issue of a certificate conferred no benefit outwith the planning control enforcement context. In particular, it had no bearing on any issue arising under the 2003 Act. There was no need for a developer to obtain a certificate if the development in question already had planning permission, whether automatically in terms of a development order or by way of its grant by the planning authority. The issue of the certificate effected no actual change in the lawful status of the development.

[25] As tenant of the football pitch at Cathkin Park, the Jimmy Johnstone Charitable Trust made the application for a certificate under section 151 on 26 March 2024, describing the

development or operations in question as "To erect approximately 380 linear metres of 1.99-metre-high sports/security fencing around an existing sports pitch." The application stated that the Trust understood that the fencing would not require planning permission due to falling under permitted development rights. The respondent issued a certificate in respect of the Trust's application on 28 May 2024.

[26] The respondent was required to consider whether the information contained in and submitted with the application satisfied it, as planning authority, that the erection of the fencing would be lawful in planning law terms if begun on 26 March 2024, the time of the application. That required consideration of whether the proposed operations were of a type specified in Schedule 1 to the GPDO.

[27] The respondent's Report of Handling stated that it had assessed the application against Schedule 1 – Part 2 Sundry Minor Operations (as amended) to the GDPO, quoted paragraph (or class) 7 of Schedule 1, and concluded that the proposal to erect a fence around the perimeter of the football pitch at Cathkin Park was considered to be in accordance with the requirements of class 7, and that therefore a planning application for the proposal was not required. The recommendation was that the proposal should be certified as lawful. Having been satisfied as to the lawfulness of the operations, the respondent issued the certificate in terms of section 151(2). The argument that the respondent was required to consider the application in line with any other relevant statutory duties incumbent upon it, including its statutory duty in terms of section 13(1) of the 2003 Act, was not correct. The respondent was required to consider the lawfulness of the fencing in planning law terms only: *Secretary of State for Transport, Local Government and the Regions* v *Waltham Forest LBC* [2002] EWCA Civ 330, [2002] JPL 1093 at [17]. That required consideration of whether the fencing fell within paragraph 7 of Schedule 1. That was a purely factual question. No

exercise of planning judgment was involved. In determining whether to issue a certificate, a planning authority did not have regard to the development plan and other material considerations (as it would require to do if it had been asked itself to grant planning permission in terms of sections 25(1) and 37(2) of the 1997 Act). The statutory regime governing permitted development rights was distinct. There was no basis for the petitioner's claim that consideration of lawfulness included a consideration of wider statutory duties. The planning authority was faced with a binary question: was the proposal lawful in terms of planning law? If the answer was yes, it was bound to issue a certificate. It was not entitled to exercise planning judgment and decline to do so. It did not assess the merits of the proposal. In addressing what evidence should accompany an application under the equivalent provision in England and Wales, Blundell & Dobry's Planning Applications, Appeals and Proceedings, 5th ed., (1996) noted at page 246:

> "The evidence should address both establishing the factual position and proving the lawfulness in planning terms. It is important to note that the planning merits of the use or operations described in the application are irrelevant in determining whether or not a certificate should be issued. The applicant does not therefore need to provide evidence on the planning merits."

[28] *Macintyre* v *Scottish Ministers* [2021] CSIH 10, 2021 SC 223, 2021 SLT 262 was authority that, in determining whether to issue a certificate, the planning authority applied the law to the facts and did not exercise planning judgment. It was concerned with rights, not with merits. That case was concerned primarily with the interpretation of 'resident' in paragraph 9 of Schedule 1. Delivering the opinion of the court, Lord Menzies stated at [27]:

> "The reporter was correct to note […] that in this case the appeal is not assessed on its planning merits, but rather on whether the intended use would be lawful. She was also correct to identify the determining issue in this case as being whether the proposed use, to accommodate four children living together but cared for on a 24-hour basis by non-resident care workers, falls within the terms of use class 9. The determination of that issue involves a proper construction of class 9 of the [GPDO], applied to the facts of the present case. This does not appear to us to be an exercise

> involving planning judgement. It involves the interpretation of the law, and the application of it to the facts found by the reporter to be established."

[29] Regard had to be paid to the limited purpose of the certificate. It certified the lawfulness of the fencing in terms of planning law only. Assuming no material changes, it precluded the planning authority from taking enforcement action under section 127 of the 1997 Act. It did not certify that the fencing and all consequences flowing from its erection were lawful for all purposes. A planning authority might take enforcement action if it appeared that there had been a breach of planning control and that it was expedient to issue an enforcement notice, having regard to the development plan and to any other material considerations. Certificates were concerned with enforcement action. Enforcement action was concerned with breaches of planning control only.

[30] Section 13 of the 2003 Act made it clear that, as the relevant local authority, the respondent had a duty to uphold access rights. It was also the planning authority. Two points fell to be made. First, if the respondent were required not to issue a certificate in pursuance of its duty to uphold access rights, that would be inconsistent with the carrying on of its functions as planning authority. The consequence of the statutory regime was that, if the planning authority determined that a proposal would be lawful, it was bound to issue a certificate. An applicant's right to erect fencing in accordance with the GPDO could not be elided, or rendered nugatory, by the planning authority's duty to uphold access rights. Secondly, the 2003 Act empowered the respondent, in upholding access rights, to "institute and defend legal proceedings and generally take such steps as they think expedient" (section 13(3)). It could require an owner of land to take remedial action and, if such action was not taken, take it itself (sections 14(2) – (3)). It could require an owner of land to take action calculated to remove the risk of injury resulting from the construction of a fence or

wall (section 15(2)). The respondent had been granted powers to uphold access rights. While it could not seek to uphold access rights by taking enforcement action in terms of the 1997 Act in respect of fencing certified as lawful in terms of planning law by the certificate, that did not preclude other action, such as under section 14(2). Nor did it preclude the petitioner from making an application to the Sheriff under section 28 of the 2003 Act. The issuing of a certificate under section 151 for the erection of a fence and lockable gate did not necessarily unjustifiably impede the exercise of access rights. If, upon erection of the fence and lockable gate, the petitioner considered that the responsible exercise of access rights (to the extent that such access rights were exercisable) was being curtailed, he had an alternative remedy in terms of section 28 of the 2003 Act. A landowner might have a defence to the application if it was seeking reasonably to manage or protect the land in question: see, for example, *Tuley* v *Highland Council* 2009 SC 456, 2009 SLT 616 and *Forbes* v *Fife Council* 2009 SLT (Sh Ct) 71. It would be incompetent and premature for the respondent, acting as planning authority, to pre-judge the outcome of any such disputes as to the exercise of access rights by refusing to issue a certificate for the erection of a fence which benefited from permitted development rights under the GPDO.

[31] A certificate stated that it was issued solely for the purpose of Section 151 of the Town and Country Planning (Scotland) Act 1997 and certified that the use/operations/matter described and taking place on the land specified would have been lawful on the specified date and thus would not have been liable to enforcement action under section 127 of the 1997 Act on that date. It did not certify lawfulness in relation to, or remove the need to comply with, other statutory provisions such as, for example, licensing regimes: *Averbuch* v *City of Edinburgh Council* [2023] CSOH 35, 2023 SLT 665. Paragraphs 2 and 3 of Annex F to the Scottish Government's Circular 10/2009: "Planning Enforcement" noted that the purpose

of a certificate was to provide a mechanism for establishing the planning status of land; i.e., whether an existing or proposed use or development was considered lawful for planning purposes; and to provide a mechanism for obtaining from the planning authority a statutory document certifying the lawfulness, for planning purposes, of existing operational development. It is also noted that the grant of a certificate might be a prerequisite for an application for a licence for various uses. The certificate did not certify that an applicant had already complied with its statutory duty under other legislative provisions. Paragraph 2 of the Scottish Government's Circular 2/2024: "Non-Domestic Permitted Development Rights" referred to such rights as pertaining to forms of development which were granted planning permission through legislation, meaning they could be carried out without a planning application having to be submitted to (and approved by) the local authority. Such rights could provide certainty to developers and save the time and expense associated with applying for planning permission. They could also reduce burdens on planning authorities, allowing them to focus resources on more complex and strategic cases. However, paragraph 5 of the Circular made it clear that the fact that a particular development might benefit from permitted development rights did not remove any requirement to comply with other legislation. For example, any engineering works in the vicinity of the water environment would still need to comply with the Water Environment (Controlled Activities) Scotland Regulations 2011. Any waste material would need to be managed in accordance with the Waste Management Licensing (Scotland) Regulations 2011.

[32] The statutory regime governing permitted development rights was intended to be a practical one. Paragraph 3 of the Scottish Government's Planning Circular 2/2015: "Consolidated Circular on Non-Domestic Permitted Development Rights" (updated 2021): noted that considering applications for planning permission for minor and uncontroversial

developments was not an effective or efficient way of regulating development. Permitted development rights were granted so that some types of development (for example, small alterations, extensions or works associated with existing development) could be carried out without the need to submit an application for planning permission. This petition was concerned with a permitted development right in terms of the GPDO, article 3(1) of which, subject to certain exceptions, provided for the automatic grant of planning permission for the classes of development specified in the first Schedule to the Order. The GPDO had been amended numerous times since the 2003 Act came into force, but nowhere was that Act mentioned. Parliament could have chosen to exclude from the GPDO's ambit proposals which could potentially affect access rights. It had not done so. Put shortly, there was no conflict between (i) the respondent's duties under the 1997 Act and the GPDO and (ii) its duty under the 2003 Act, and the former were not subordinate to the latter. Conflict arose only due to the petitioner's mistaken interpretation of section 151 as requiring consideration of wider statutory duties. In issuing the certificate, the respondent was concerned solely with the lawfulness of the fencing in terms of planning law. It required to determine whether the fencing was lawful by asking whether, as a matter of fact, it fell within the terms of the GPDO. If it did, there was, as per article 3(1), planning permission for it. The respondent was not then required to embark on consideration of the fencing's potential impact on access rights and reconsider.

[33] The earlier petition had held that the respondent's duty to uphold access rights might be a material consideration capable of affecting a determination to be made in terms of sections 25(1) and 37(2). The same could not be said of a determination to be made in terms of section 151(2). That was a purely factual question, involving no exercise of planning judgment and no weighing of material considerations. The question of whether

the fencing was lawful as a matter of planning law fell to be determined by applying the terms of the GPDO to the facts. Nothing further was required in what was intended to be "a simple procedure to enable the planning authority to certify that a specified use or operation, existing or proposed, could be carried on without breaching planning control" (Rowan Robinson et al, *Scottish Planning Law and Procedure* (2001), para 5.218). The certificate stated: "The evidence submitted has satisfied the planning authority that the proposed use or operation would be lawful. Therefore, a planning application is not required." Having answered the purely factual question in that way, the respondent was bound to issue the certificate. No other course was open to it. Far from being unlawful, for it not to have done so would have been contrary to section 151(2). There was no material error of law. The respondent had not failed to comply with its duty to uphold access rights.

[34] A further, more practical, difficulty with the petitioner's argument was that it was impossible to know with any certainty what, if any, effect a proposal would have on the exercise of access rights. The respondent was able to determine the lawfulness of the fencing in terms of planning law. It was in a position to make that determination. The petitioner suggested that it was then incumbent on the respondent, given its duty to uphold access rights, to consider whether, even if it would be lawful in terms of planning law, the fencing might affect the exercise of access rights. Determining that issue would require consideration of the extent of access rights over the land and the extent to which the land was being managed in a responsible way. If the petitioner was concerned that there had been an unreasonable interference with his and others' access rights, his remedy was a summary application to the sheriff in terms of section 28 of the 2003 Act. The sheriff could consider the situation on the ground and grant such declarators as deemed necessary. It was not open to the respondent to decline to issue the certificate on the basis that the fencing

might unlawfully affect the exercise of access rights. In practice it would be the locking of the gates, rather than the erection of the fence, that might interfere with any access rights the petitioner might have. The 2003 Act was not intended to make it effectively impossible for fences to be erected in accordance with planning law.

[35] The decision to issue the certificate was not irrational. The Trust was entitled to apply for it. It was the tenant of the football pitch. It had discussed the application with the respondent, as both landlord and planning authority. It had an interest in protecting the football pitch and was entitled to seek certification that fencing falling within paragraph 7 of Schedule 1 to the GPDO would be lawful. It had the right to erect fencing falling within that paragraph.

[36] The respondent gave adequate reasons for its decision to issue the certificate, certifying explicitly that the operation in question would have been lawful within the meaning of section 151 of the 1997 Act in a form complying with the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013. Schedule 1 to the certificate described the proposal found to be lawful under reference to the documents identified in it, including the plan of the type of fence submitted in support of the application. The certificate did not certify the lawfulness of any other type of fence. It stated that a planning application was not required. That was a correct assessment as a matter of law because in terms of the GPDO the proposal had been granted planning permission. The respondent would not have been entitled to reach any other conclusion and the petitioner had not been prejudiced by any inadequacy in the reasons given in the certificate. There was no real possibility that, if the certificate were reduced because of a failure to give adequate reasons in terms of section 151(3)(c), the outcome on reconsideration would be different. If the court was not satisfied that the respondent gave adequate reasons for its decision, it

should exercise its discretion not to reduce the certificate on that ground: *Bolton Metropolitan Borough Council* v *Secretary of State for the Environment* [2017] PTSR 1063, (1991) 61 P & CR 343.

Decision

[37] It is not difficult to understand the rationale for the petitioner's view that the application for and grant of a certificate under section 151 of the 1997 Act was a ruse to sidestep the difficulties which might attend the grant of planning permission by the respondent for a fence of rather greater height, particularly given the timing of the application when compared with the institution and progress of the previous proceedings. A two-metre-high fence will just as effectively prevent the exercise of such public access rights as may exist in relation to the pitch at Cathkin Park as would one a metre higher and the height difference is thus, from the point of view of those asserting such rights, immaterial. However, the question raised by the petition must be answered by consideration of the import of the statutory provisions applicable to the grant of such certificates rather than by reference to the different provisions governing the grant of planning permission by the respondent.

Section 151 in Context

[38] Section 151(2) of the 1997 Act provides that a planning authority shall issue a certificate of the kind in issue if provided with information which satisfies it that the use or operations described in the application for the certificate would be lawful if instituted or begun at the time of the application. It is not contended that that language permits of any residual discretion to decline to issue a certificate if the authority is so satisfied; rather, the

argument turns on the meaning of "lawful" in the subsection. The key to answering to that question is to be found in section 150(2), which provides that uses and operations are lawful at any time for the purposes of the 1997 Act as a whole if *inter alia* no enforcement action may then be taken in respect of them. That definition performs at least two functions relevant for present purposes. Firstly, it gives content to the exercise which the planning authority has to undertake in determining whether use or operations would be lawful for the purposes of the decision which is called for in terms of section 151(2); secondly, it indicates what is actually meant by the irrefutable presumption set up by section 151(4), that uses or operations for which a relevant certificate is in force are lawful in the absence of material change before they are begun.

[39] Dealing with the first of those functions, one reason why no enforcement action might be capable of being taken in respect of a particular development is that it benefits from planning permission granted by dint of a development order such as the GPDO. The respondent had to consider that question in determining whether the proposed operation, being the construction of a fence less than two metres in height, fell within the terms of the GPDO. It concluded that such an operation did fall within the bounds of the kind of development described in class 7 of Schedule 1 thereto, that it therefore enjoyed the automatic planning permission granted by Article 3, that planning enforcement action against it would accordingly not be possible and that it thus met the definition of "lawful" provided by section 150(2). That was the sum and substance of the exercise which it required to perform, and it involved no exercise of discretion or of planning judgment: *Waltham Forest*; *Macintyre*. The question which required to be resolved was a mixed question of fact and law (hence the reference to the "matters relevant" to the determination of lawfulness in section 151(4)), and the respondent's decision on it could be challenged on the

basis that it erred in law or that it reached a conclusion of fact which no reasonable fact-finder could have arrived at, but the current challenge – that it was an error of law not to consider the impact of the 2003 Act on the matter of "lawfulness" – is not well-founded, since the concept of lawfulness in this context is defined and limited by section 150(2).

[40] A consideration of the second function performed by section 150(2) explains why the petitioner's arguments that the GPDO cannot be read as overriding primary legislation are misplaced. All that the GPDO does is grant planning permission to the types of development described in its first Schedule. It does not confer on any such development any quality of lawfulness. That is left to primary legislation in the form of the 1997 Act, and in particular for present purposes, section 151(4). Further, the quality of lawfulness which that subsection confers is simply lawfulness for the purposes of the 1997 Act. That can be seen from the terms of subsections 150(2) and 151(4) read together, and from the discussion in *Cusack* about the provisions in English law which mirror sections 150 and 151 and which were introduced by the same statute as introduced those sections into Scots law, namely the Planning and Compensation Act 1991, implementing recommendations made in the 1989 Carnwath report on planning enforcement, "Enforcing Planning Control". If a development is lawful by dint of the operation of section 151 for the purposes of the 1997 Act, that betokens precisely nothing as to the question of its lawfulness for other purposes, including the 2003 Act, the Equality Act 2010, and so on.

[41] Considering the 2003 Act in particular, section 13(2) thereof provides that a local authority is not required to do anything in pursuance of its section 13(1) duty to assert, protect, etc., access rights which would be inconsistent with the carrying on of any of its other functions. The other function of the respondent in issue here is the issuing (or refusal to issue) certificates of proposed lawful use or development. In performing that function,

its duty is to consider the lawfulness of the proposed use or development within the meaning of section 150(2). Were it to attempt also to carry out its duty under section 13(1) of the 2003 Act in the context of performing its function under section 151 of the 1997 Act, that would involve it in exceeding the restrictions on the exercise imposed by section 150(2), which would be inconsistent with the proper carrying on of that function. While I agree with the petitioner's submission that, at least in the abstract, "function" and "duty" can be separate concepts, with "function" being a description of an activity carried out by the respondent consistent with the reasons for its existence, and "duty" being a description of the obligations incumbent upon it in carrying out such activities, it is not clear to me either that that potential distinction advances the petitioner's position, or indeed that the Scottish Parliament was quite so fastidious in its choice of language in section 13(2) which, after referring to the duty to assert and protect access rights, then refers to the authority's "other functions", thus strongly implying that it saw the duty as itself representing one of the authority's functions. In any event, section 13(2) provides no support for the petitioner's position.

[42] In accordance with powers given by section 21(5) of the 1972 Act, Article 4 of the GPDO allows for a planning authority or the Scottish Ministers to derogate from its terms, effectively in whole or in part, by way of direction, in respect of particular districts, areas or developments. However, no direction of the kind contemplated by Article 4 which might touch upon the erection of the fence has been made. Although interesting issues may arise as to how far a planning authority, or the Ministers, can or should be making directions about types of development which might cut across the kind of generalised statutory duties now more commonly incumbent on them, that was not the basis of the petitioner's case, and no decision about such issues could in any event be made in the absence of the Ministers

from process. The mere fact that derogations can in theory be made by or with the consent of the Ministers does not in itself support the argument for the petitioner.

The Reasons Challenge

[43] The operative text of the certificate issued by the respondent was as follows:

> "Glasgow City Council hereby certify that on 27 March 2024 the use/operations/matter specified in Schedule 1 in respect of the land specified in Schedule 2 and edged red on the plan attached to this certificate would have been lawful within the meaning of Section 151 of the Town and Country Planning (Scotland) Act 1997 for the following reason(s).
>
> 01. The evidence submitted has satisfied the planning authority that the proposed use or operation would be lawful. Therefore, a planning application is not required."

[44] It is difficult to conceive of how the requisite reason could have been stated more succinctly or sparsely, depending on one's point of view. The primary answer to the question "Why would this proposed development be lawful?" is, in effect, "Because the evidence submitted satisfies the planning authority that it is." The final statement that a planning application is not required appears simply to be a conclusion drawn from that rather in specific primary answer rather that constituting a free-standing reason on its own.

[45] It is, however, necessary to judge the adequacy of the stated reason in the applicable legal context. Counsel agreed – I think correctly – that that context is to be found most clearly articulated in *South Buckinghamshire District Council* v *Porter (No 2)* [2004] 1 WLR 1953, [2005] 1 P & CR 6, per Lord Brown of Eaton-under-Heywood:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was … Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law … But such adverse inference will not readily be drawn … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. ..."

[46] In the present case, the issue that the respondent had to decide when the application for a certificate was made to it was a straightforward one; if the proposed fence were to be erected, would it be susceptible to planning control enforcement (again, harking back to the definition of "lawful" in this context provide by section 150(2) of the 1997 Act)? As has already been seen, that was not an exercise which involved the weighing up of various factors or the exercise of any planning judgment or discretion, but rather called only for a simple answer. The answer which the certificate provided to that question was, unfortunately, the wrong way round; instead of saying that the erection of the proposed fence would be lawful and therefore did not require planning permission, it should have said that the proposed fence did not require planning permission and therefore its erection would be lawful. Nonetheless, the statement that planning permission was not required for the proposed development was clearly made. That was a correct statement and – just – sufficed to explain and justify the issue of the certificate. It would have been much more helpful, and not at all onerous, for a few more words of explanation to have been given, such as an explicit reference to the class in Schedule 1 to the GPDO which was engaged, but the applicable legal test is merely whether the reason stated was stated intelligibly and was adequate. In my opinion, in the very particular circumstances of this case, it was. The petitioner (or at least those advising him) appear to have experienced no significant difficulty in understanding what the reason for the issue of the certificate actually was, which may be as good a "rule of thumb" test of adequacy as any. I accordingly reject the petitioner's reasons challenge.

[47] Had I considered that the reason stated was inadequate, and that the statutory requirement set out by section 151(3)(c) was thus not met, I would not have concluded that

the judicial approach to failure to take into account a material consideration described in *Bolton*, especially per Glidewell LJ at [2017] PTSR 1072 – 1073, (1991) 61 P & CR 352 – 353 could properly be applied to such a situation, and would not, on that or any other ground, have exercised any equitable jurisdiction to withhold the remedy of reduction from the petitioner.

Conclusion

[48] The petitioner's challenge to the issue of the certificate fails for the reasons which have been set out. In the course of argument, the respondent's counsel referred to section 28 of the 2003 Act, not as operating as an alternative remedy which would render this application to the supervisory jurisdiction incompetent, but rather to point out that the petitioner and those supporting him may not be without an adequate remedy should the operation of section 151 of the 1997 Act have an adverse effect on access rights in relation to the pitch and park. Although at first blush section 151(4) supplies an irrefutable presumption as to the lawfulness of the erection of the certificated fence, it follows from the discussion above that in point of law that lawfulness is only for the purposes of the 1997 Act itself, and operates purely to prevent planning control enforcement in terms of that Act. It is in no way necessary for the certificate to be reduced in order for an application under section 28 of the 2003 Act to be made to, and substantively ruled upon by, the Sheriff.

[49] Questions might also arise (though not before the Sheriff) about the apparent failure of the respondent to take action under section 14(2) of the 2003 Act and about the position in which it has placed itself as both the authority with the power and duty to enforce rights of access and the landlord of the entity wishing to restrict such rights, as well as to its apparent role in encouraging the making of the section 151 application and the consistent position

which it has taken in these litigations that the complete enclosure of part of a public park by a fence either two or three metres high is not *per se* an interference with such public access rights as may exist in relation to the area so enclosed, and that the matter depends on the Trust's attitude to locking and unlocking that enclosure – a position which is difficult to understand, let alone agree with. More substantive issues may arise as to the linked questions of whether such public access as has been taken has been exercised responsibly and whether the erection of a fence would be a responsible and proportionate reaction to any irresponsible usage. Those are, however, matters for another day – a day which, it is to be hoped, may be avoided if a more balanced approach to recognising and giving effect to the competing legitimate interests in the beneficial use of Cathkin Park can be found, as undoubtedly it should be.

Disposal

[50] I shall repel the petitioner's pleas-in-law, sustain the respondent's fifth plea, and refuse the prayer of the petition.