EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 35
XA54/23

Lord Pentland
Lord Doherty
Lord Armstrong

OPINION OF THE COURT

delivered by LORD PENTLAND

in the appeals under section 58 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and section 239 of the Town and Country Planning (Scotland) Act 1997

by

SAQIB DEEN, trading as Apex Services

Appellant

against

THE SCOTTISH MINISTERS

Respondents

Appellant: Whitaker; Drummond Miller LLP (for Campbell & McCartney, Glasgow)
Respondents: Maclean (sol adv); SGLD

24 October 2024

Introduction

[1] The Court has before it appeals against two decisions by a Scottish Government planning reporter. The City of Edinburgh Council served enforcement notices on the appellant, who appealed these notices to the Scottish Ministers. They appointed a reporter. The reporter decided against him. The appellant says the reporter made errors of law and

asks us to quash his decisions. The Scottish Ministers say the reporter decided correctly. Who is right?

Background

[2] The appellant is sole director and shareholder of Edinburgh Leith Guesthouse Limited, which is the tenant of 11 Pilrig Street, Edinburgh. That property comprises the ground, first and second (attic) floors of a Category B listed semi-detached villa. The basement floor of the villa, 11A, is a residential flat which is in separate ownership and occupation. The neighbouring villa, 13 Pilrig Street, is also a Category B listed semi-detached villa. Numbers 11 and 13 are mirror images of each other. In or around June 2022 the appellant carried out refurbishment works, which included subdividing the two largest rooms of number 11 into separate bedrooms. From about August 2022, the appellant offered the property for short-term lets.

[3] In December 2022 the appellant applied (retrospectively) for listed building consent for the internal alterations and for a change of use from "Class 9 residential flats" to a "Class 7 guesthouse". In line with usual procedure the planning authority, the City of Edinburgh Council, consulted Historic Environment Scotland. HES considered the alterations to the two principal rooms to be "particularly harmful", their subdivision limiting the "understanding and appreciation" of the listed building and advised that the application be refused.

[4] On 13 February 2023, the council refused listed building consent:

> "The works fail to preserve the character of the two principal rooms and have an adverse impact on the character of the listed building as a whole and are contrary to statutory requirements, and therefore are unacceptable in regard to Section 14 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997."

Ten days later it refused the change of use application:

> "The proposal causes loss of residential amenity contrary to LDP Policy Hou 7, due to the increased noise and disturbance associated with guest house use and the close proximity of the property to a residential flat."

The appellant took no steps to restore the original layout and continued offering the property for short-term lets.

[5] On 22 June 2023 the council served the enforcement notices subject to this appeal. One was under section 127 of the Town and Country Planning (Scotland) Act 1997 ("the planning notice"). The planning notice stated that the appellant had breached planning control by undertaking a material change of use from residential dwelling to a Class 7 guesthouse and required him to "cease the use of the residential property addressed as 11 Pilrig Street, Edinburgh, as a guesthouse." The other enforcement notice was under section 34 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 ("the listed building notice"). The listed building notice required the appellant to remove the partition walls and doors and to restore 11 Pilrig Street to its previous condition. Both notices allowed 3 months for compliance.

[6] The appellant appealed the notices to the respondents.

The listed building notice appeal

[7] Section 35(1)(a)-(k) of the listed buildings Act specifies grounds upon which the respondents (or a person appointed by them) may set aside a decision. The appellant stated that he was relying upon section 35(1)(c): "that [the matters alleged to constitute a contravention]…do not constitute such a contravention." In the section of the form inviting him to set out his arguments in support of his grounds of appeal, he wrote:

> "…when we took over the property it was in a place [sic] of total disrepair and partial sub divisions were in place. We have just kept the rooms how we found them. We would point out the wall divisions are changeable and temporary. They do not affect the structure but more the layout. During our renovation we haven't replaced anything just repaired. Therefore we would argue no contravention is [sic] occurred and building consent is not required."

The appellant suggested that the reporter undertake an accompanied interior site visit. In due course the reporter chose not to accede to the appellant's suggestion; instead he elected to carry out an unaccompanied external inspection of 11 Pilrig Street, but did not go inside. He had floor plans showing the property before and after the subdivision. He also had internal photographs of the rooms which had been subdivided. .

[8] On 16 October 2023 the reporter refused both appeals.

The reporter's decision on the listed building notice

[9] The reporter noted that the protection of listing applies equally to the interior as to the exterior of a building. He had regard to HES's guidance "Managing Change in the Historic Environment: Interiors"; specifically its advice that the arrangement and division of a building's interior spaces are key components of its character and that the proportions of a building's rooms are part of "the integrity of its design". The two rooms which the appellant had subdivided had been the largest rooms in the property. They had had ample proportions in terms of length, width and height, and had notable original features such as cornices, fireplaces and double windows, and one of the rooms had a distinctive ceiling rose. The effect of the appellant's alterations was to turn two large rooms into four "disproportionately long and narrow" rooms. The subdivision of the ground floor room had cut through the decorative ceiling rose and compromised the symmetry of the cornicing. The status of the rooms had been diminished, compromising the layout of the

building. The reporter concluded that the partitions were a recent alteration and certainly post-dated listing in 1970. In any event, unauthorised alterations to listed buildings did not become immune from enforcement action by the passage of time.

The planning notice appeal

[10] Section 130(1)(b) – (g) of the planning Act sets out specified grounds upon which the respondents may set aside a planning decision. The appellant relied upon section 130(1)(f):

> "that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;"

The appellant highlighted that there were "around 14" other guesthouses on Pilrig Street of long operation. It was "not logical" to suggest one more would significantly impact amenity. The planning department was inconsistent: a similar property nearby had obtained permission for class 7 use. 11 Pilrig Street provided jobs for four people and it accommodated two employees. Guests used local amenities in Leith. These were demonstrable local economic benefits. Refusal of permission would cause "significant financial hardship" to staff during a cost of living crisis. The appellant offered, if permission were granted, to limit guests to one per room (whereas at present there were up to three guests per room).

The reporter's decision on the planning notice appeal

[11] The reporter considered that he was restricted to considering the grounds set out in section 130(1) rather than the merits of the unauthorised use. The appellant's detailed

submissions on that point having thus fallen away, the reporter disposed of the appeal succinctly:

> "4. The enforcement notice requires the cessation (of) the unauthorised use of the building as a guest house. The appellant does not contest that the premises (are) presently being used as a guest house. Nor does the appellant contest that until recent times the premises (were) used as a residential property, which I am satisfied is its legitimate and authorised use. Because planning permission is required to change the use of a building from a residential use to a guest house use, I consider that no lesser steps would be effective to achieve the requirements of the enforcement notice. I consequently find that the appeal on ground (f) fails."

The present appeal

[12] Section 239 of the planning Act and section 58 of the listed buildings Act both provide a mechanism for an appellant disappointed with a reporter's decision to appeal to this court. The appellant's grounds of appeal are:

> Ground 1: The reporter erred in deciding the listed building notice appeal because he improperly exercised his discretion by failing to undertake a site visit.
>
> Ground 2: The reporter erred in deciding the planning notice appeal because he did not consider whether the property could continue to operate as a guesthouse despite being a class 9 property.
>
> Ground 3: The reporter erred in deciding the listed building notice appeal because he characterised the subdivided rooms wrongly – only one was a "principal room"; the other was a bedroom.

Relevant law

[13] Section 6 of the listed buildings Act provides:

> "Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or

> extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised."

The requirement for authorisation is thus dependent upon the alterations to a building affecting its character as a building of special architectural or historic interest. The appellant's position before the reporter was that his internal subdivisions did not do so.

[14] The Town and Country Planning (Use Classes) (Scotland) Order 1997 categorises various uses to which land and buildings may be put. Class 9 use is defined by Schedule 1 Paragraph 9:

> "Use–
>
> (a) as a house, other than a flat, whether or not as a sole or main residence, by–
>
> > (i) a single person or by people living together as a family, or
> > (ii) not more than 5 residents living together including a household where care is provided for residents;
>
> (b) as a bed and breakfast establishment or guesthouse (not in either case being carried out in a flat), where at any one time not more than 2 bedrooms are, or in the case of premises having less than 4 bedrooms 1 bedroom is, used for that purpose."

Class 7 use is defined in Schedule 1 Paragraph 7 as:

> "Use as a hotel, boarding house, guest house, or hostel where no significant element of care is provided… to persons other than residents or to persons other than persons consuming meals on the premises and other than a use within class 9 (houses)."

Article 3 of the 1997 Order provides that the use of a building or land for another purpose within the same class does not constitute "development" of the land. Whether a change of use has in fact occurred is a question of fact and degree principally for the reporter (*Cameron* v *Scottish Ministers* [2020] CSIH 6, Lord Malcolm [11]).

[15] In the planning notice appeal, the appellant relied upon section 130(1)(f). Significantly for present purposes, an appeal under section 130(1)(f) proceeds on the basis of

an acceptance that there has been a change of use amounting to a breach of planning control. What is contended for is that the action proposed to remedy the breach is excessive.

[16] Appeals under both Acts are governed by the Town and Country Planning (Appeals) (Scotland) (Regulations) 2013. Regulation 12(1) provides that the reporter "may at any time" undertake a site visit. A wide discretion is given to decision-makers in carrying out functions involving planning judgement. In *Simson* v *Aberdeenshire Council* 2007 SC 366, delivering the opinion of the majority, Lord Abernethy held at 379:

> "In my opinion it is for the … planning authority to decide how much information they need to enable them to assess and decide upon a planning application ... In my opinion that is a question of planning judgment, which was entirely a matter for the planning authority."

[17] Site visits were specifically considered in *Liddell* v *Argyll and Bute Council* 2020 SLT 956. Delivering the opinion of the court, Lord Malcolm held that the fundamental requirement is that the decision maker understood the planning assessment required (in that case, an evaluation of the historic setting of the petitioner's property):

> "…can it be said that the decision maker did not understand the setting of the listed building, and whether the proposed development would be within it or in some way related to it? In the court's view, the answer is no. The contrary proposition depends upon the misconception that the planning officer could only reach a proper understanding after a visit to the house itself. There may be cases where a visit of that kind is obviously necessary, but there is no reason to place this officer's task in that category. She considered that her investigations, which included three visits to the locality, equipped her with a sufficient appreciation of the views from the house, the local topography, the distance of the house from the development, and the nature of the development's intrusion on the landscape and those views, to allow her to evaluate whether the development would or would not affect the setting of the house. The submission that the investigations were inadequate is no more than a challenge to her judgment on that matter." (para [21])

[18] Two authorities provide guidance on procedural matters. The onus lies with the appellant to make out the factual basis for his appeal (*Cartledge* v *Scottish Ministers (No. 2)* 2011 SC 602). In general terms the reporter should confine his decision-making to the legal

and factual material placed before him (*Taylor* v *Scottish Ministers* 2019 SLT 681, Lord President Carloway [34] and [35]).

The appellant's submissions

Ground 2

[19] Counsel for the appellant dealt first with ground 2. The reporter had failed to consider whether the steps required by the planning notice went beyond what was necessary to remedy the alleged breach of planning control. The notice required the appellant to cease the use of 11 Pilrig Street "as a guesthouse". However, the effect of the refusal of planning permission was that it remained a class 9 house. According to Schedule 1 paragraph 9(b) of the 2013 Order a class 9 house can be used as a guesthouse provided that no more than two bedrooms are used for that purpose. The planning notice required the appellant to cease operating 11 Pilrig Street as a guesthouse entirely. It should have restricted him to operating 11 Pilrig Street as a guesthouse insofar as permitted by Schedule 1 paragraph 9(b).

[20] The reporter had concluded that permission was required to operate the building as a guesthouse, and so no lesser steps could achieve the requirements of the enforcement notice. That was an error of law.

Grounds 1 and 3

[21] A site visit was "obviously necessary" per *Liddell*. The reporter's assessment of the impact of subdividing the principal rooms required interior inspection. He improperly exercised his discretion to decide whether a site visit was necessary, and as a result failed to inspect the internal alterations under consideration. The reporter had erred in describing

the subdivided rooms as principal rooms. He relied upon HES's guidance which distinguished between "principal spaces" such as dining or drawing rooms, and "less formal" private spaces such as bedrooms. The first floor room was used as a bedroom. The reporter's decision implied that he had not considered this. These were failures to take into account relevant considerations rendering his decision *ultra vires* per *Wordie Property Co. Ltd* v *Secretary of State for Scotland* 1984 SLT 345.

Submissions for the respondents

Ground 2

[22] The appellant's submissions were at odds with his position before the reporter. In his appeal he had offered to reduce the number of guests from 24 to 8. That was inconsistent with Class 9 use. 11 Pilrig Street had been operating as a Class 7 guesthouse without planning permission. The reporter was required to determine whether a breach of planning control had occurred. It was clear that one had. He therefore concluded that no steps short of prohibiting the use of 11 Pilrig Street as a guesthouse would be effective to achieve the requirements of the notice. In any event, this ground of appeal was not before the reporter, and he was entitled to confine his consideration to the ground actually advanced.

Grounds 1 and 3

[23] The appellant's appeal was perilled on section 35(1)(c) – that the works he had carried out did not constitute a contravention of listed building control. It was for the reporter to determine whether there was an alteration affecting the special character of the listed building per section 6. The reporter had had before him photographs, floor plans and the correspondence from HES. He decided that these were sufficient for him to understand

the issue for decision per *Liddell*. His planning judgement not to visit the property was within his discretion and should not be interfered with. The reporter considered that the subdivided rooms were the principal rooms within the context of 11 Pilrig Street. He had had regard to the relevant guidance from HES in doing so. That was pre-eminently a matter of planning judgement.

Decision

Ground 2

[24] The appellant focuses upon the passage in the planning notice quoted in paragraph [5] above. He construes this as a blanket prohibition on operating 11 Pilrig Street as a guesthouse or B&B at all, which goes beyond what is necessary to remedy the breach of planning control per section 130(1)(f). Counsel for the appellant accepted that if we did not agree with his construction of the notice, then this ground failed. We consider that the construction of the notice proposed by counsel is misconceived.

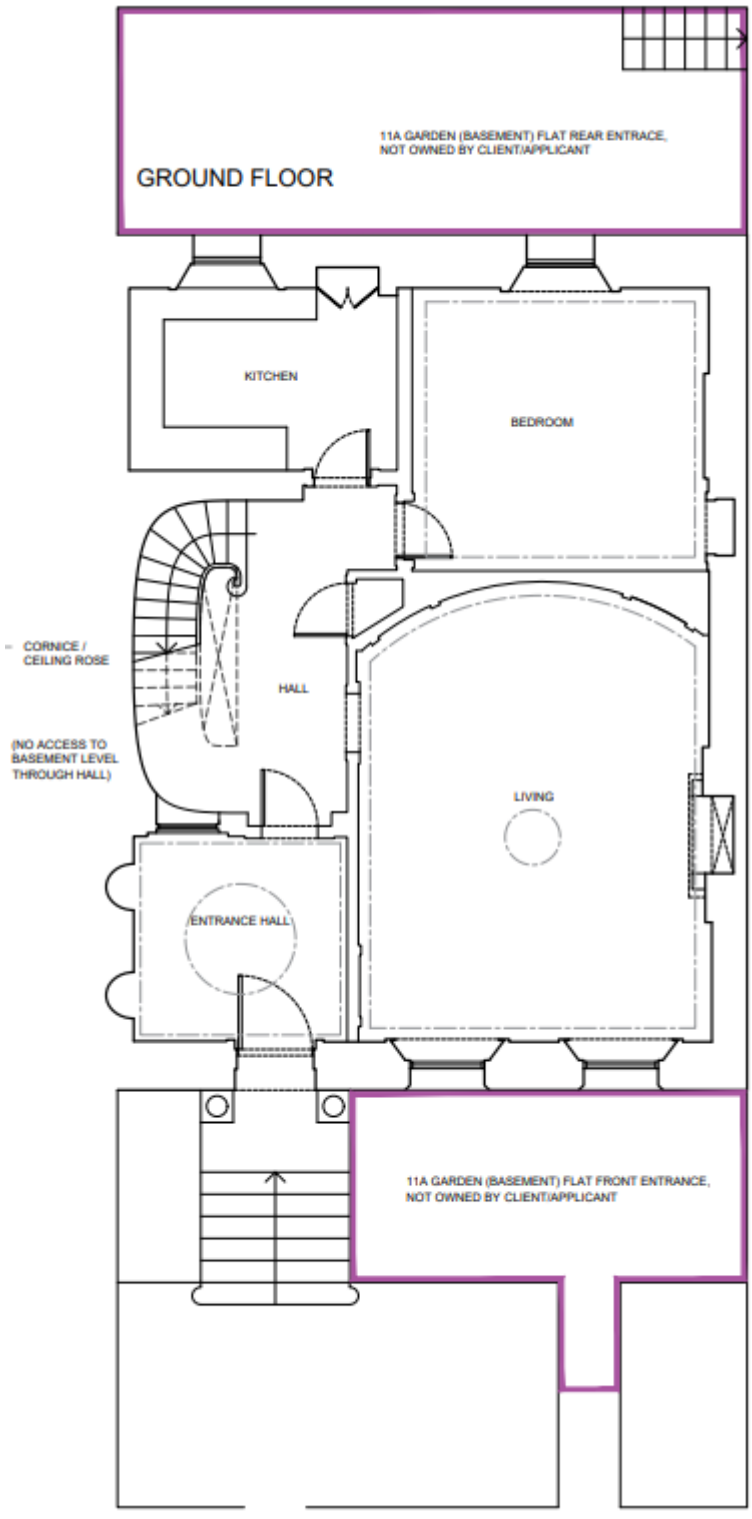
[25] The breach of planning control alleged in the notice is "Without planning permission, the material change of use of the property from residential dwelling to guesthouse (Class 7)". What is required is "cessation of the unauthorised use". The unauthorised use alleged is clearly Class 7 use. What the notice requires the appellant to do ("Cease the use of the residential property addressed as 11 Pilrig street, Edinburgh as a guesthouse.") has to be read in that context, *viz* the use which is to cease is use as a Class 7 guesthouse. The reporter's decision specified that it is unauthorised use as a guesthouse which has to cease. There is no doubt that the current use is Class 7 use and that it is unauthorised. A requirement for the framers of enforcement notices issued to prevent

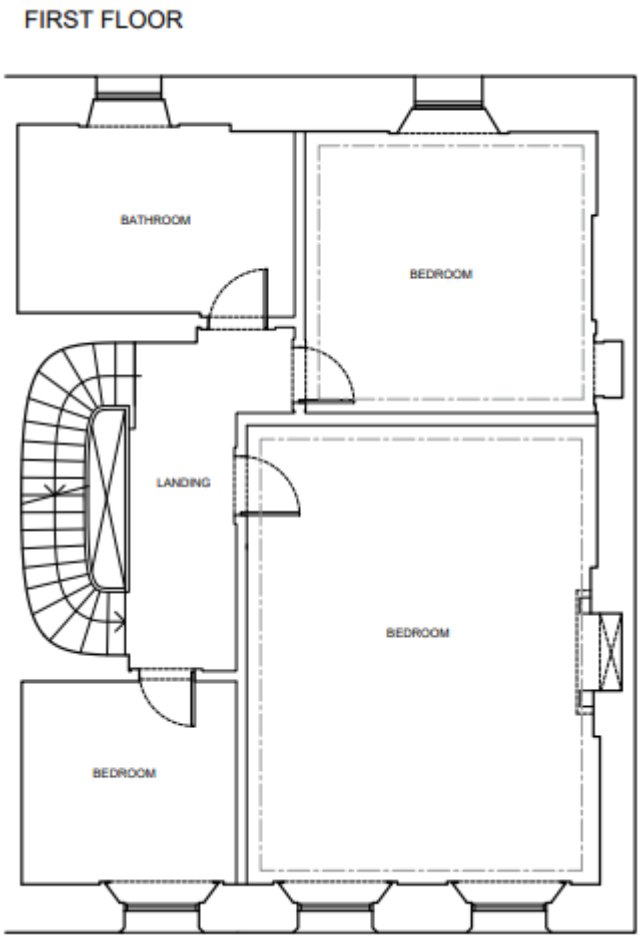
unauthorised use to spell out specifically that authorised use remains permitted would be otiose.

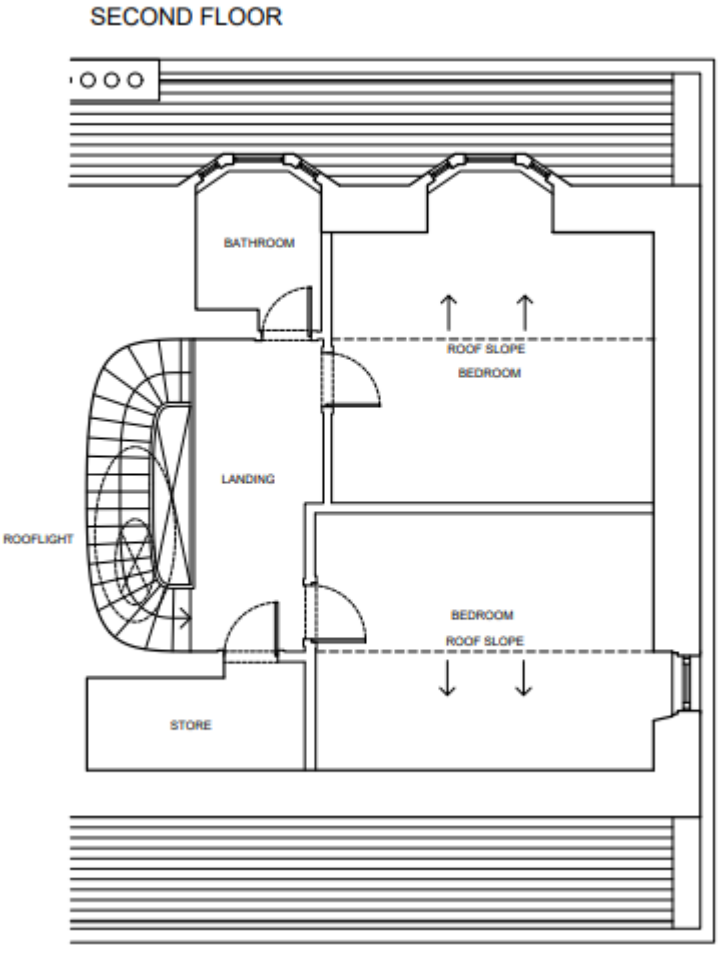
Ground 1

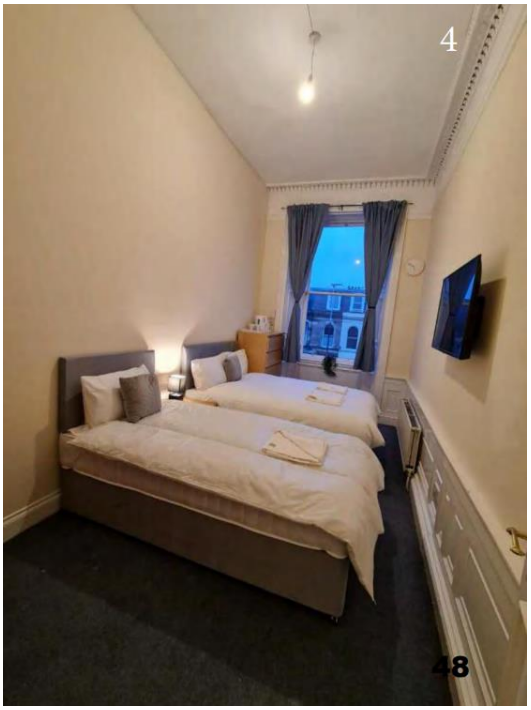
[26] A "fundamental principle of British planning law" is that the court reviews the legality of the decision-making process, not the merits of the decision (*Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759, Lord Hoffmann at 780H). Before the court will interfere with an exercise of planning judgement it must be satisfied that the judgement was *Wednesbury* unreasonable (*Tesco Stores,* Lord Keith of Kinkel at 764H). Whether to undertake a site visit is quintessentially an exercise of planning judgement per *Liddell.*

[27] In determining the listed building appeal, the reporter had the following floor plans and photographs before him:


11A GARDEN (BASEMENT) FLAT REAR ENTRACE,
NOT OWNED BY CLIENT/APPLICANT
GROUND FLOOR
KITCHEN
BEDROOM
CORNICE /
CEILING ROSE
HALL
(NO ACCESS TO
BASEMENT LEVEL
THROUGH HALL)
LIVING
ENTRANCE HALL
11A GARDEN (BASEMENT) FLAT FRONT ENTRANCE,
NOT OWNED BY CLIENT/APPLICANT


FIRST FLOOR
BATHROOM
BEDROOM
LANDING
BEDROOM
BEDROOM


SECOND FLOOR
BATHROOM
ROOF SLOPE
BEDROOM
LANDING
ROOFLIGHT
BEDROOM
ROOF SLOPE
STORE



[28] The appellant invites us to find that the reporter, presented with this material, should have concluded that it was "obviously necessary" for him to carry out an internal inspection of 11 Pilrig Street and in failing to do so exercised his discretion unreasonably. We do not agree. It is obvious that the alterations are significant. They remove the symmetry of the principal rooms. They interfere with important original features and erode their setting. The overall effect in each of the subdivided rooms is a significant deterioration in their appearance and ambience. A finding, even absent an internal site inspection, that they affect 11 Pilrig Street's character as a building of special historic or architectural interest such that listed building consent is required does not remotely approach *Wednesbury* unreasonableness.

Ground 3

[29] Counsel for the appellant did not place great weight on this ground. That is understandable. The reporter was plainly correct to consider the two rooms the appellant

has subdivided as the principal rooms of the property. They are the largest rooms. HES's advice, referred to above, was that they were the original ground-floor dining room and first-floor drawing room. The rooms' airy and impressive proportions and the quality of their original fittings and finishes bore that out. What listed building control protects, per section 6, is a building's special historic or architectural interest. In assessing 11 Pilrig Street's "special historic or architectural interest", the particular designation chosen by the appellant for the subdivided rooms was plainly of very little weight compared to HES's assessment. In fact, it is almost irrelevant.

Disposal

[30] The appeal is refused. We have reserved all questions of expenses.