SHERIFF APPEAL COURT

[2019] SAC (CIV) 9
DUN-SA456-16
DUN-SA457-16

Sheriff Principal I R Abercrombie QC
Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

GREENBELT GROUP LIMITED

Pursuer and Appellant

against

JOHN WALSH & OTHERS

Defenders and Respondents

Pursuer & Appellant: D M Thomson QC, G Reid, advocate; BTO
Defenders & Respondent (Walsh): party
Defenders & Respondent (Harrison): party

08 March 2019

Introduction

[1] These conjoined appeals raise an issue of considerable significance in relation to the effectiveness of the land-owning model of property maintenance in Scotland, that being the model whereby the plot owners in a development do not own the amenity areas of their development, yet share the costs of maintenance of those amenity areas which are the

responsibility of a third party owner. The land-owning model falls to be contrasted with the common-ownership model, which is where the plot owners own the amenity areas in common and share the costs of maintenance. Both models were said to be common by the Lands Tribunal for Scotland in their decision in *Marriott & another* v *Greenbelt Group Ltd*, unreported, 2 December 2015 (LTS/TC/2014/27) (at para [109]).

[2] The appellant raised separate small claims actions in Dundee Sheriff Court seeking payment of £1,301.61 from the respondents Mr & Mrs Walsh; and £521.08 from respondents, Mr & Mrs Harrison being their respective shares of the costs of maintaining the amenity areas of the Ardler Development in Dundee.

The Facts Found by the Sheriff

[3] The background to the appeals can conveniently be ascertained from the facts found by the sheriff following a hearing at which evidence was led.

[4] The appellant is the heritable proprietor of the subjects registered in the Land Register of Scotland under Title Number ANG40561 being the land tinted brown on the Title Plan ("Open Ground"). The Open Ground is within the Ardler Development which is shown outlined in red on the Title Plan. They obtained title to the Open Ground on 25 January 2006.

[5] The respondents are the heritable proprietors of subjects within the Ardler Development. The first respondents (Walsh) took title to their property on 25 May 2008; the second respondents (Harrison) took title to their property on 3 October 2014.

[6] Both the Open Ground and the respondents' properties are subject to a Deed of Declaration of Conditions registered in the Land Register on 17 May 2003 by George Wimpey UK Ltd ("the Deed of Conditions").

[7] Clause Thirteenth of the Deed of Conditions provides:

> "(One) Whereas we in our sole discretion have agreed to convey to and their successors in title to the Open Ground or any part or parts thereof will be taken bound in terms of the disposition to be granted in their favour in respect of the Open Ground to manage and maintain the Open Ground as landscaped open spaces and others in accordance with the Management and Maintenance Specification annexed and executed as relative to this Deed of Conditions and in accordance with good residential land management practice (all of which works and other matters comprised from time to time in such management and maintenance are hereinafter referred to as "the Management Operations") all Proprietors are hereby taken bound and obliged in all time coming to contribute to the whole vouched for costs of the Management Operations together with insurance premiums, reasonable estate management remuneration and charges incurred by or its foresaids on a pro rata basis as aftermentioned and to pay and to make over to or its foresaids such annual sums (plus all Value Added Tax exigible thereon) as represent the pro rata share applicable from time to time to the relevant plot of the total annual costs of effecting the Management Operations, insurance premiums, estate management remuneration and charges as aforesaid for the relevant year..... (Three) Subject to the provisos aftermentioned, the costs of effecting the Management Operations and said remuneration and charges shall not be permitted to increase in any relevant year by a margin or amount which exceeds the relevant increase for that year in the rate of inflation as measured by the UK Index of Basic materials and Fuels as published by the Financial times, London, provided always that the limit of increase shall not apply in respect of the increase in the said costs applicable at the end of the fifth year and every fifth year following in perpetuity so as to ensure that at the end of such relevant period of five years the pro rate share applicable to each plot for the succeeding year reflects any actual increase in the costs of the Management Operations".

[8] In terms of Clause Thirteenth, the appellant and their successors in title to the Open Ground are bound to manage and maintain the Open Ground as landscaped, open spaces and others in accordance with a Management and Maintenance Specification, which is annexed to the Deed of Conditions, and in accordance with good residential land management practice.

[9] In terms of Clause Thirteenth, the respondents' properties are burdened by an obligation to pay a pro rata share of the maintenance costs incurred by the appellant in maintaining the Open Ground.

[10] Whilst not of direct relevance to the issues considered in this appeal, it is pertinent to observe that the sheriff found that (i) the appellant had undertaken regular inspections of the Open Ground and carried out maintenance works on the Open Ground; (ii) the maintenance carried out by the appellant was in accordance with the Maintenance Specification annexed to the Deed of Conditions and good residential land management practice; and (iii) the maintenance undertaken by the appellant had benefitted the respondents' properties.

[11] Having heard the evidence and submissions, the sheriff found that Clause Thirteenth of the Deed of Conditions had the effect of creating a monopoly, not expressly permitted by the Title Conditions (Scotland) Act 2003 ("the 2003 Act"), thereby contravening section 3(7) of the 2003 Act. The sheriff held that the burden created under Clause Thirteenth was invalid and assoilzied the respondents.

The 2003 Act

[12] Section 3 of the 2003 Act is in the following terms:

> **"3 Other characteristics**
>
> (1) A real burden must relate in some way to the burdened property.
>
> (2) The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.
>
> (3) In a case in which there is a benefited property, a real burden must, unless it is a community burden, be for the benefit of that property.
>
> (4) A community burden may be for the benefit of the community to which it relates or of some part of that community.
>
> (5) A real burden may consist of a right of pre-emption; but a real burden created on or after the appointed day must not consist of–
>
> (a) a right of redemption or reversion; or

(b) any other type of option to acquire the burdened property.

(6) A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).

(7) Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint–

(a) the manager of property; or
(b) the supplier of any services in relation to property).

(8) It shall not be competent–

(a) to make in the constitutive deed provision; or
(b) to import under section 6(1) of this Act terms which include provision, to the effect that a person other than [a holder] of the burden may waive compliance with, or mitigate or otherwise vary, a condition of the burden.

(9) Subsection (8) above is without prejudice to section 33(1)(a) of this Act."

The Questions for the Opinion of the Sheriff Appeal Court

[13] The appellant appeals the sheriff's decisions by way of stated case. The questions posed for the opinion of this court are in the following terms:

1. Did I err in law in concluding that Clause Thirteenth of the Deed of Conditions was invalid, in terms of the Title Conditions (Scotland) Act 2003, section 3(7), as having the effect of creating a monopoly?

2. Did I err in law in concluding that … the title condition was valid only insofar as it refers to the Open Ground delineated on the plan attached to the Deed of Conditions?

The First Question

Marriot & another

[14] The question of whether a burden in similar terms to that found within Clause Thirteenth of the Deed of Conditions contravened the terms of section 3(7) of the 2003 Act was one of a number issues considered in depth by the Lands Tribunal in *Marriott & another*. The comparable burden in *Marriot & another* can be found at paragraph [5] of the opinion of the Lands Tribunal. This particular issue was considered by the Lands Tribunal at paragraphs [99] to [124] of their opinion. The Lands Tribunal was divided on the point. In the appeal before this court, the appellant invited us to follow the reasoning of the majority of the Lands Tribunal, whereas the respondents invited us to follow the minority view, which was that preferred by the sheriff.

[15] The majority of the Lands Tribunal (The President (Lord Minginish) and Mr Gillespie) held that section 3(7) of the 2003 Act was not intended to prohibit arrangements such as existed in the case before them (and, by extension, in the present case) and did not in fact have that result. The reasoning of the majority is to be found in paragraphs [100] to [113].

[16] The dissenting opinion in Marriot & another was given by the second legal member of the Lands Tribunal, R.A.Smith QC. The reasoning of the minority is to be found in paragraphs [114] to [124].

[17] Asking themselves the question as to whether the real burden in question created or resulted in the creation of a monopoly, the majority said this:

> "[105] In our opinion it does not. It is merely a burden for the payment of a share of the management operations relating to the open ground. That payment has, of course, to be made to the respondents as the providers of the management operations. It might be said to *reflect* a monopoly, that monopoly

> being the respondents' exclusive right to manage their own land, but it does not create one.
>
> [106] It also seems clear to us that the quasi-reciprocal burden on the respondents to carry out these operations does not create a monopoly: it is only a burden on them to manage their own land. …. It can be expressed in this way: that the maintenance of land in the hands of its owner does not give rise to a monopoly in the sense required for (section) 3(7), otherwise any maintenance burden could be said to create a monopoly."

[18] The conclusion of the majority was that it was not the real burden but the ownership model used for the maintenance of the amenity areas in question, which were not owned by the proprietors in common but by a third party, which gave rise to the circumstances objected to. On the relationship between land ownership and monopoly the majority said this (at paragraph [107]):

> "The ownership of land is inherently monopolistic: owners have exclusive possession and complete control of their property subject only to such restrictions and obligations as are recognised by law, for example those arising from planning restrictions or title conditions. Subject to such constraints, no one can tell them how to manage their land. What a burden requiring maintenance does is to turn the right to maintain land into an obligation and in some cases set down standards for the work which is to be carried out …. It does not change the underlying monopolistic character of the ownership of land or the monopolistic rights that go with it. It might be said to vary the characteristics of the monopoly rather than create them. Usually, when one complains of a monopoly, the argument is that the monopoly should be ended and other suppliers of services given a chance to compete and consumers given a choice of supplier. That simply cannot happen when the monopoly comprises rights which are inherent in and inalienable from the ownership of land."

[19] Having regard to the divided opinions of the tribunal members, the majority viewed it as appropriate to consider the relevant background material in an attempt to identify if the intention of Parliament had been to abolish the land-owning model. The conclusion of the majority was that it had not been Parliament's intention to outlaw the land-owning maintenance model, opining that such a conclusion was not surprising and highlighting the perceived advantages in it.

[20] The rationale of the dissenting member is to be found at paragraphs [118] to [124]. Whilst agreeing with the majority that the land-owning model had advantages in sparing the house proprietors the necessity of the upkeep of the open areas and the accompanying administration, he was driven to the conclusion that the real burden in question failed on account of the express language of the 2003 Act.

The sheriff's reasoning

[21] The basis of the sheriff's decision is to be found in paragraphs [36] to [38] of the stated cases, which we set out in full below:

> "[36] I prefer the reasoning and observations made by Ralph Smith QC in *Marriott* and am of the view that the burden is expressly caught by the plain words of section 3(7) and the example given there. The burden in the present case provides for a particular person, namely the (appellant) (and their successors in title to the Open Ground), to be the supplier of the maintenance services in relation to the Open Ground. It provides for a particular person, namely the pursuers (and their successors in title to the Open Ground, to be the manager of the Open Ground. It seems to me that situation is expressly prohibited by section 3(7)(a) and (b) and the burden is therefore invalid.
>
> [37] In any event, it seems to me that the burden has the effect of creating a monopoly. As was explored in the *Marriott* case, there is no definition of a "monopoly" within the 2003 Act. A "monopoly" can be defined as a situation where the party has exclusive possession or control of or trade in a commodity or service. It seems to me that the essential question is whether the effect of the burden in clause Thirteenth is to create a situation where a party has exclusive control of or trade in a commodity or service. The effect of the clause, in my view, is to provide that only the (appellant) and their successors manage the Open Ground and only the (appellant) and their successors provide maintenance services for the Open Ground for which the (respondents) and the other proprietors of the Ardler Development must pay. The burden can in my view be easily understood as having the effect of creating a monopoly for the provision of services by the (appellant) for which the (respondents) and the others must pay. The fact that the (appellant) are entitled to make a profit, by charging reasonable management remuneration, is consistent with the creation of a monopoly. It is true that the (appellant) as landowners have always had the exclusive right to maintain their own land. However, in my view, it would not be appropriate to describe that as a monopoly service: when a landowner is maintaining his own land he is not providing a service to anyone else. But once

> the (respondents) become obliged to pay for those services, the maintenance works can be properly described as a service provided for the benefit of another. Without the burden the (appellant) have no right to charge the (respondents) for payment of the maintenance costs. It is the burden which has the effect of allowing the (appellant) alone to charge the (respondents) for that service.
>
> [38] It seems to me to be significant that the word "property" is not qualified in any way in section 3(7) and does not exclude property owned by the manager or provider of the services. The only circumstances where the prohibition does not apply is where such a burden is expressly permitted by the Act. Section 63 of the 2003 Act permits manager burdens for a maximum period of 5 years in certain circumstances but does not describe the burden created in clause Thirteenth. In my view, it makes no difference that the clause envisages management and provision of services may be by the (appellant's) successors in title to the Open Ground, as was submitted by the (appellant). The effect of the burden is still that one party manages and provides services for which the third party must pay. I have concluded that the burden is therefore invalid. That provides a defence to this action and it follows that the (appellant's) claim for payment must fail."

Discussion

[22] The correctness or otherwise of the sheriff's decision turns upon whether the real burden in issue, namely, Clause Thirteenth of the Deed of Conditions, has the effect of creating a monopoly. Only if it has that effect is it struck down by section 3(7) of the 2003 Act. As was observed by the majority in *Marriot & another* (at paragraph [107]), the ownership of land is inherently monopolistic. The 'monopoly' complained of in the present cases exists by virtue of the appellant's ownership of the Open Ground; it was not created by Clause Thirteenth of the Deed of Conditions. Clause Thirteenth of the Deed of Conditions burdened the respondents with an obligation to pay their respective shares of the cost of maintenance of the Open Ground, no more. That is apparent if one considers the position were Clause Thirteenth not to apply. The appellant would still be responsible for the maintenance of the Open Ground, although they would not be obliged to carry out any work. The respondents would still have no say in the maintenance of the Open Ground,

although they would not be obliged to pay the cost (if any) of that. Viewed in that way, it is apparent that Clause Thirteenth of the Deed of Conditions does not create a monopoly.

[23] Accordingly, question 1 falls to be answered in the affirmative.

The Second Question

[24] The second question posed by the sheriff relates to her conclusion that the real burden was valid only insofar as it refers to the Open Ground delineated on the plan attached to the Deed of Conditions. The appellant argued that the sheriff had not erred in reaching that conclusion. The respondents, Mr & Mrs Harrison, argued that the sheriff had erred and that the real burden was void from uncertainty. They argued that the real burden did not meet the requirements of section 4(2) of the 2003 Act; and that it was uncertain for the same reasons given in *Marriot & another* at paragraphs [166] to [173]. The respondents, Mr & Mrs Walsh advanced no argument in relation to the second question.

[25] Having first distinguished the factual position in the present cases from that which pertained in *Marriot & another* on this issue, the sheriff's reasoning on this issue is to be found in paragraphs [39] to [41] of the stated cases, which we set out in full below:

> "[39] One of (the respondents') main arguments was that the burden is void for uncertainty. When the (respondents) registered their title the extent of the Open Ground was defined as:
>
> > *'all and whole those open and landscaped areas within the subjects shown coloured green on the said plan annexed and executed as relative hereto together with any other open spaces or areas which have been or may in the future be designated as open space within the subjects'.*
>
> [40] Unlike in the *Marriott* case, the Open Ground is not defined in clause Thirteenth by reference to a planning permission, but by reference to a plan which is annexed to the Deed of Conditions. Accordingly, there would appear to be no lack of certainty as to the extent of the land for which the (respondents) are obliged to pay a share of maintenance costs insofar as it is delineated on the plan annexed to the Deed. I recognise that there is very small discrepancy

> between the pursuers and (respondents)' title plans insofar as one area of land is shown as a single area in the (respondents)' title plan and to be two separate areas in the (appellant's) title plan but the difference is so minute, it is, in my view, *de minimis* and of no real significance.
>
> [41] However, the burden provides that the Open Ground includes "other open spaces or areas which have been or may in the future be designated as open space within the subjects". The extent of the Open Ground, for which the defenders are obliged to pay a share of maintenance costs, is therefore not certain, having regard to the plan alone. In this case, the (respondents) established that there are additional, albeit small, pieces of land which have been added to the Open Ground and which are not included on the plan annexed to the Deed of Conditions. The (appellant's) witnesses suggested that those additional pieces of land did not impose any additional maintenance costs. But it seems to me that submission misses the point which is that the burden is uncertain insofar as it is dependent on some future act to add further areas of land which cannot be ascertained from the Deed of Conditions and relative plan alone. It seems to me, for the same reasons that were given in the *Marriott* case, in relation to a burden which sought to identify the extent of land by reference to a "planning permission for development as that permission may be varied or supplemented" that the burden so far as it refers to land "which may in the future be designated as Open Ground" is uncertain. There is no way of knowing for certain from reference to the plan or the burden alone the extent of the land for which the (respondents) will require to pay a share of the maintenance costs. Had I required to reach a view on this, I would have decided that the burden is valid only insofar as it refers to the Open Ground delineated on the plan attached to the Deed of Conditions."

[26] We are not persuaded by Mr & Mrs Harrison's argument that the sheriff erred. The real burden is not uncertain insofar as it relates to the Open Ground, being that shown on the plan attached to the Deed of Conditions. In our view it meets the requirements of section 4(2) of the 2003 Act. The factual position in the present cases is readily distinguishable from that which pertained in *Marriot & another*. The sheriff's reasoning in this regard is beyond reproach.

[27] Accordingly, question 2 falls to be answered in the negative.

Disposal

[28] We shall answer the questions in the stated cases in the manner proposed in paragraphs [23] and [27] above; allow the appeal; vary the sheriff's interlocutors in the manner proposed by the appellant; and grant decree as claimed in each case.

Expenses

[29] The ordinary rule in relation to the question of expenses is that if a party is put to expense in vindicating his rights he is entitled to recover it from the person who has required him to so do (see Maclaren "*Expenses in the Supreme and Sheriff Courts of Scotland*" at page 21, cited with approval by the Lord President (Cooper) in *Howitt* v *Alexander & Sons* 1948 S.C. 154 at 157). There is no basis upon which the ordinary rule should not apply in these cases. The respondents will each be found liable to the appellant in the sum of £150, by way of the expenses of their respective claims, at first instance. In addition, the respondents will each be found liable to the appellant in the expenses of the respective appeals, as those expenses will be taxed by the auditor of the Sheriff Appeal Court.

Sanction for Counsel

[30] The appellant sought sanction for the employment of senior and junior counsel; which failing sanction for junior counsel alone in respect of the appeal. The respondents opposed the grant of sanction.

[31] The issue of sanction for the employment of counsel in the Sheriff Appeal Court is governed by section 108 of the Courts Reform (Scotland) Act 2014 which, insofar as relevant, is in the following terms:

> "**108 Sanction for counsel in the sheriff court and Sheriff Appeal Court**
>
> (1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.
>
> (2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.
>
> (3) In considering that matter, the court must have regard to—
>
> (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—
>
> (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings,
> (ii) the importance or value of any claim in the proceedings, and
>
> (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.
>
> (4) The court may have regard to such other matters as it considers appropriate.
>
> (5) References in this section to proceedings include references to any part or aspect of the proceedings.

[32] In considering whether or not it was reasonable for the appellant to employ counsel, the court must first have regard to the difficulty or complexity of the proceedings. As we have noted, the issues argued before us are not free from difficulty. The differing conclusions reached by the sheriff and this court; and the dissenting opinion of Mr Smith QC in *Marriot & another* are testimony to that. The importance of the claim to the appellant is difficult to overstate. The effect of the sheriff's judgment, if upheld, would be to render the land-owning model ineffective. Whilst it would be futile to suggest that the appellant did not gain an advantage by virtue of their employing counsel, in the circumstances of these appeals that advantage cannot fairly be categorised as an unfair one.

[33] We are satisfied that, in all the circumstances of the case, it was reasonable for the appellant to employ counsel. Accordingly, section 108(2) of the 2014 Act compels us to sanction the employment of counsel, which we will do to the following extent. We shall sanction the appeal hearing only as suitable for the employment of senior counsel alone, sanctioning the remainder of the appeal proceedings as suitable for the employment of junior counsel.