



SHERIFF APPEAL COURT

**[2026] SAC (Civ) 14
GLW-CA133-23**

Sheriff Principal S F Murphy KC
Appeal Sheriff B A Mohan
Appeal Sheriff J F Kerr

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in the appeal in the cause

QUARTER MILE SERVICED APARTMENTS LIMITED

Pursuer and Appellant

against

SPEIRS GUMLEY PROPERTY MANAGEMENT LIMITED

Defender and Respondent

Pursuer and Appellant: Tosh; Gilson Gray LLP

Defender and Respondent: G Walker KC, E Campbell; Brodies LLP

23 February 2026

Introduction

[1] This appeal concerns the validity and enforceability of a real burden contained within the Deed of Conditions for the Quartermile Development in Edinburgh. Parties dispute whether the Deed of Conditions contains a clause that prohibits proprietors of residential units within the development from short-term letting; even if it does, the parties also dispute whether such a condition remains enforceable.

[2] The pursuer and appellant, Quarter Mile Serviced Apartments Limited (“QMSAL”, referred to in the decision section as the appellant), alleges that the defender and respondent Speirs Gumley Property Management Limited (“Speirs Gumley”, referred to in the decision section as the respondent) made false and malicious statements within two “Cease and Desist” letters it sent in 2021 to owners of residential units within the development. The letters advised the recipients that short-term letting was prohibited in the development due to the real burden created by the Deed of Conditions. QMSAL alleges the two letters were defamatory and caused it verbal injury.

Background

[3] The former site of the Royal Infirmary of Edinburgh was sold in 2001 and redeveloped into the Quartermile Development. The development comprises a mixture of offices, leisure, and residential units. On 1 October 2007, a Deed of Conditions was registered by the owners of the development, Southside Capital Limited, in the Land Register of Scotland against the development. Following registration, the owner of the development began to sell off individual plots for their respective designated use: office, leisure or residential.

[4] Subsequently, in 2021, the Quartermile Management Committee (“QMC”, a representative body of residents of the development) raised concerns about short-term letting of residential units at the development. Such actions were, it was alleged, raising problems of noise, anti-social behaviour, and rubbish. The QMC instructed the managing agents (or factor), Quartermile Estates Limited (“QEL”), to seek legal advice. QEL had subcontracted certain duties and obligations it holds as the managing agent to Speirs

Gumley. In effect, therefore, Speirs Gumley carried out the instruction on behalf of the QMC.

[5] Speirs Gumley sought advice from the legal firm of Brodies LLP as to whether short-term letting was prohibited by the Deed of Conditions. After receipt of the legal advice the QMC instructed Speirs Gumley to take further steps. On behalf of Speirs Gumley “Cease and Desist” letters (legal correspondence which threatened court action if certain behaviour or actions were not ended) were sent by Brodies to owners of residential units operating their properties as short-term lets. The letters were sent to these owners on 28 September 2021.

[6] A number of owners of residential units had leased their properties to QMSAL, which carries on a letting business. The company sublet the leased properties it had within the development for both long-term and short-term lets. Following the issuing of the Cease and Desist letter in September 2021 a number of QMSAL’s client landlords terminated their leases with it.

[7] A subsequent meeting of the QMC in February 2022 noted that many owners of residential units were still operating their apartments as short-term lets. A second Cease and Desist letter was issued at the development; on that occasion, it was sent to every owner of a residential unit within the development.

[8] QMSAL contend that the representations made within the Cease and Desist letters were false and malicious. QMSAL considers that, contrary to the representations within the letters, there is no prohibition on short-term letting in the Deed of Conditions for the development. Nor does it accept that any disturbance or nuisance was caused by any of its customers. QMSAL allege that the issuing of the Cease and Desist letters was intended to injure (ie cause loss to) its business and its professional reputation.

[9] QMSAL raised the present action against Speirs Gumley in September 2022. It seeks declarator that there is no prohibition on short-term letting within residential units in the Deed of Conditions for the development. Its primary position is that the real burden prohibiting short-term letting was not validly created. Their *esto* position is that, if the real burden was validly created, it is no longer enforceable. On the basis that there is no subsisting real burden, QMSAL seeks interdict to prevent Speirs Gumley notifying any party that there is such a burden prohibiting short-term letting at the development. It also seeks damages from Speirs Gumley in the sum of £785,696.28 with interest. It alleges that the Cease and Desist letters were defamatory and caused verbal injury due to the false statements contained in the letters.

Debate and motion for summary decree

[10] Speirs Gumley sought a debate. It alleged that QMSAL's averments were irrelevant. There was no absolute requirement in law that the Deed of Conditions must specify the designated use of each unit within the Quartermile Development to create a real burden. The "four corners" rule was set out in a commonly cited judgment by Lord Guthrie in *Anderson v Dickie* 1914 SC 706 at 717: "[T]he restriction must be such that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his titles." This rule survived the implementation of the Title Conditions (Scotland) Act 2003. There were also insufficient averments to establish that the real burden was no longer enforceable. The final challenge within the note of basis of preliminary pleas for Speirs Gumley was that QMSAL had adopted an irrelevant approach to causation and loss.

[11] A week in advance of the diet of debate, the defenders enrolled a motion for summary decree in respect of the pursuer's case based on verbal injury. They stated that

there was no real prospect of success in QMSAL reaching the necessary threshold, which would require proof that the employees of Speirs Gumley had acted maliciously.

The sheriff's judgment

[12] The sheriff held that a real burden prohibiting short-term letting was validly created within the Deed of Conditions. It had not been extinguished by virtue of prescription, extinction, or discharge in terms of the Title Conditions (Scotland) Act 2003. Nor had it been extinguished by common law acquiescence. The burden, therefore, remained enforceable. The sheriff refused to grant the declarator sought by QMSAL and dismissed their craves for declarator and interdict. The sheriff considered that the averments on causation and loss relating to defamation were, however, sufficient for enquiry and allowed those to proceed to probation.

[13] Standing his determination on the real burden, the sheriff agreed with Speirs Gumley that QMSAL's case of verbal injury had no real prospect of success. He therefore granted Speirs Gumley's motion for summary decree (of dismissal) and refused to allow QMSAL's averments of verbal injury to proceed to probation.

The Deed of Conditions

[14] The following terms and definitions within the Deed of Conditions are relevant to the parties' submissions:

"2 Community Burdens

2.1 Creation

2.1.1 The conditions set out in Conditions 3, 4, 5, 6, 7, 10 and 12 of this Deed are imposed on the Units in the Development as community burdens.

2.1.2 For the purposes of this Deed, the community is the Units in the Development.

...

2.2 Date of creation and application

The real burdens imposed by this Deed will take effect immediately on registration of this Deed.

...

3 Use

...

3.4 Relevant Designated Purpose

Without prejudice to any more restrictive provisions which may be imposed in any disposition or lease of a Unit, no Unit is to be used for any purpose other than for the Relevant Designated Purpose allocated to it by the Developer or the Managing Agent, and specified in the disposition of that Unit, except with the prior written consent of the Managing Agent.

...

SCHEDULE

Part 1 Definitions

In this Deed:

...

'Dwellinghouse' means a Unit intended to be occupied for residential purposes forming any one of the flatted dwellinghouses within a Block of Flats or a Mixed Block;

...

'Relevant Designated Purpose' means [...] (ii) in relation to a Unit the appropriate use as defined in Part 9 of the Schedule;

...

'Unit' means any unit sold to an individual Owner or to two or more Owners jointly, and will mean a Dwellinghouse or a Building where the context permits.

...

Part 9 Relevant Designated Purpose

2 Each unit is to be allocated one of the following relevant designated purposes to be determined by the Managing Agent, acting under the instructions of the Management Committee, and the following designations will have the meanings ascribed to them in this Part of the Schedule:

Office Purposes (i) Use for the occupation as office premises for the provision of.....

Retail Premises Use....

Leisure Purposes Use as....

(iii) a hotel and/or aparthotel (incorporating serviced apartments).

[...] **Residential Use** as a private dwellinghouse and not to be occupied by more than one family at a time.”

Submissions for the appellant

(i) Creation of the real burden

[15] The terms of a proposed real burden must be set out in full within the “four corners” of its constitutive deed. That deed must contain a sufficient description of the land burdened and an adequate statement of what the burden entails: section 4(2) of the Title Conditions (Scotland) Act 2003, and *Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd* [2023] CSIH 29; 2024 SC 17 [22]. A real burden cannot be created in one deed by the importation by reference of terms set out in another deed, even where the imported deed had itself been recorded or registered in the Register of Sasines or Land Register or where the other deed had been granted by the same granter: *Campbell’s Trustees v Glasgow Corporation* (1902) 4 F 752, 759 - 760; *Bainbridge v Campbell* 1912 SC 92, 96; *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788; *Marriott v Greenbelt Group Ltd*, unreported, Lands Tribunal for Scotland, 2 December 2015; and K Reid, “Real Burdens” in *Stair Memorial Encyclopaedia* (Volume 18), paragraph 388.

[16] A statutory exception to that rule allows a real burden to be created by registration of a deed that imports into itself the terms of the proposed real burden from a deed of conditions: section 6(1) of the 2003 Act. However, where that statutory exception applies,

the real burden is created by the registration of that subsequent deed rather than any Deed of Conditions.

[17] In response to the submission by Speirs Gumley that the “four corners” rule still applied subsequent to the enactment of the 2003 Act, QMSAL submitted that *Tailors of Aberdeen v Coutts* (1837) 2 Sh & Macl 609 and *Anderson v Dickie* 1914 SC 706 at 717, as affirmed by *Anderson v Dickie* 1915 SC (HL) 79 at 80 - 85 and 93, had been superseded by sections 4 and 5 of the 2003 Act. Reference was made to K Reid and G Gretton, *Conveyancing*, (5th edition) (2022), paragraph 14-10, fn 69.

[18] No valid real burden was created by clause 3.4 of the Deed of Conditions. It contained no sufficient description of the land burdened by it nor an adequate statement of what the burden entailed. It did not identify which particular units were to be used only for any particular Relevant Designated Purpose. In any event, any real burden created by clause 3.4 of the Deed of Conditions required any Relevant Designated Purpose to be “specified in the disposition of that Unit.” No Relevant Designated Purpose was specified in any disposition relied upon by the respondent. Even if the Relevant Designated Purpose could be construed in the dispositions relied upon by the respondent, the term “dwellinghouse” was ambiguous.

(ii) Extinction of the real burden

[19] Even if a valid real burden had been constituted by clause 3.4, Speirs Gumley was not entitled to summary decree. QMSAL was entitled to an inquiry of its averments that any such real burden had been extinguished by acquiescence at common law.

[20] To establish acquiescence there was no requirement on QMSAL to offer to prove abandonment on the part of any particular benefited proprietor in the case of a burden

imposed for the general benefit: *Campbell v Clydesdale Banking Co* (1868) 6 M 943, 950; *Fraser v Downie* (1877) 4 R 942; *Johnston v The Walker Trustees* (1897) 24R 1061; *Howard de Walden Estates Ltd v Bowmaker Ltd* 1965 SC 163 at 182; K Reid, *Stair Memorial Encyclopaedia*, (Volume 18), paragraph 429; W M Gordon and S Wortley, *Scottish Land Law* (3rd edition, Volume 2) (2020), paragraphs 24-130 – 24-131. QMSAL was not bound to fail when seeking to establish that acquiescence by common law operated to extinguish the real burden.

(iii) Truth

[21] In the event the court held that the real burden had not been validly created or had been extinguished, it would follow that Speirs Gumley's averments that the impugned statements in the Cease and Desist letters were true would be irrelevant. Those averments proceed on the hypothesis that the units owned by the recipients of the letters were bound by the Deed of Conditions.

(iv) Fair comment

[22] The impugned statements in the Cease and Desist letters were statements of fact. They were not matters of comment. They were not readily identifiable as a deduction, inference, conclusion, criticism, remark, or observation: *Campbell v Dugdale* [2020] CSIH 27; 2020 SC 481 [36] - [38] and [45].

[23] Insofar as any of the impugned statements were matters of comment, they were not based on facts that were true (as they required to have been for the respondent to avail itself of a defence of fair comment): *Campbell* at [34]. The impugned statements were not made on any matter of public interest. Whether any matter is of public interest is a question of law. It

can be resolved without inquiry: *South Hetton Coal Co Ltd v North Eastern News Association Ltd* [1894] 1 QB 133, 141; and D M Walker, *Delict*, (2nd edition) (1981), 842 - 847.

(v) **Verbal injury [the subject of the motion for summary decree]**

[24] Liability for verbal injury could be established if QMSAL were to prove three things:

(i) Speirs Gumley made a false statement (ii) the statement was intended to injure QMSAL in a particular way (ie, malice), (iii) the intended injury resulted: *Paterson v Welch* (1893)

20 R 744, 749; *Steele v Scottish Daily Record and Sunday Mail Ltd* 1970 SLT 53, 60.

[25] An intention to injure or malice required three elements: (i) the statement was made deliberately, but not necessarily in the knowledge that it was false, (ii) the statement was made with the intention and design of injuring QMSAL (which may be evidenced, for example, by spite, malevolence or other improper motive, intent to injure QMSAL's business, or a lack of belief in the truth of the statement), and (iii) the statement was calculated or likely to cause QMSAL some actual damage, although it was not necessary for QMSAL to show that it had suffered actual or special damage: *Barratt International Resorts Ltd v Barratt Owners' Group*, unreported, Lord Wheatley, 20 December 2002, at [30] - [33].

[26] QMSAL had a real prospect of establishing that the statements made in the Cease and Desist letters were malicious. The purpose of the statements was expressly to bring an end to the business of short-term letting carried on at the development. That business was perceived as a problem and Speirs Gumley sought to end it. Short-term letting was a business carried on by QMSAL. The fact that QMSAL was not named or otherwise identified in the letters did not matter: *Marathon Mutual Ltd v Waters* [2010] EMLR 3 at [8] - [9]. In any event the statements were targeted towards the appellants: the first Cease and Desist letters were sent to a small number of owners, including the owners of all

properties operated by QMSAL. The purpose Speirs Gumley sought to achieve was injury to QMSAL's business that was calculated or likely to cause QMSAL loss of its short-term letting business at the development. There were other circumstances averred from which malice could be inferred, for example, refusal of access to parking and removal of lockboxes.

[27] The dispute between the parties over verbal injury could only be resolved following enquiry at proof. In any event, the timing of Speirs Gumley's motion for summary decree was unfair as it had not allowed QMSAL sufficient time to set forth its evidence in response to new points made by Speirs Gumley in a recent minute of amendment.

Submissions for the respondent

(i) Creation of the real burden

[28] A real burden was validly created at clause 3.4 of the Deed of Conditions.

Section 4(2) of the 2003 Act did not alter the well-established "four corners" rule:

Marriott [79] - [89]. That rule did not require that the full terms of any burden be found within a deed of conditions. In respect of any real burden the restriction must be such that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his title: *Tailors of Aberdeen*; *Anderson v Dickie* 1914 SC 706 at 717, as affirmed by *Anderson v Dickie* 1915 SC (HL) 79 at 80 - 85 and 93; *Aberdeen Varieties Limited* at 794 - 795 and 802 - 804; and *Royal London Mutual Insurance Society Ltd* [11] and [22].

[29] Professor Reid had misquoted Lord Guthrie at paragraph 388 of Volume 18 of the *Stair Memorial Encyclopaedia* and that passage ought to be ignored. Likewise, Professors Reid and Gretton were in error at paragraph 14 - 10 of *Conveyancing* to say that section 4(2)(a) of the 2003 Act was restricted in the manner suggested. No explanation was given by the professors as to how the "four corners" rule was removed in the absence of clear language in

the 2003 Act so doing. *Marriott and Royal London Mutual Insurance Society Ltd* showed the error evident in the textbooks.

[30] The properties in which QMSAL has an interest are designated as “residential,” as defined in Part 9 clause 2 of the Schedule to the Deed of Conditions. “Dwellinghouse” was defined within Part 1 of the Schedule to the Deed of Conditions. The properties relevant in this action were all identifiable as residential properties. The properties in which QMSAL had an interest were expressly described as dwellinghouses within their dispositions. A singular successor in title could identify the terms of the real burden within the “four corners” of their title deeds.

(ii) *Extinction of the real burden*

[31] The only method of extinction which QMSAL argued on appeal was acquiescence at common law. However, QMSAL’s averments did not relevantly offer to prove that there had been a general abandonment of the real burden established at clause 3.4 of the Deed of Conditions, including by those who had the ability to enforce it, namely the benefited proprietors. There was no offer to prove that the benefited proprietors at the development were aware of residential units being used for short-term letting and tolerated such use to an extent which could constitute a general abandonment of the real burden. That was a minimum requirement for acquiescence at common law: *W M Gordon and S Wortley, Scottish Land Law*, paragraphs 24-130 – 24-131. A party must offer to prove that the benefited proprietors had willingly allowed the acts to pass, or had conceded that there was no legitimate interest to stop such acts: *JA Mactaggart & Co v Roemmele* 1907 SC 1318 at 1323. There was no offer to prove that short-term letting had impacted all benefited proprietors, such that an absence of objection could be taken to be acquiescence: *Gould v*

McCorquodale (1869) 8 M 165 at 170. There was no offer to prove that the residential status of the relevant units (or blocks intended to be residential) had lost their residential nature:

Howard de Walden Estates Ltd at 191. There was no offer to prove that the benefited proprietors had granted authority for, were aware of, or consented to, any actions of QEL relied upon by QMSAL. In all the circumstances, there was no offer to prove that the benefited proprietors, who had the title and interest to enforce the real burden, had acquiesced to any extent, let alone to the extent of amounting to a general abandonment. QMSAL's pleadings were irrelevant.

(iii) Truth

[32] QMSAL contended that the sheriff erred in reserving the respondent's first plea-in-law and admitting to probation Speirs Gumley's averments that the statements made in the Cease and Desist letters - namely that short-term letting was prohibited by the Deed of Conditions - were true. The sheriff did not err. He was correct to hold that such statements were true.

(iv) Fair comment

[33] A comment may contain an allegation of fact. It will nevertheless be classified as comment for the purposes of defamation, if it is something which can be inferred to be a deduction, inference, conclusion, criticism, remark, or observation: *Clarke v Norton* [1910] VLR 494 at 499; and *Campbell* at [38].

[34] The Cease and Desist letters were readily identifiable as expressing the opinion of Speirs Gumley that the short-term letting of properties at the development was prohibited. The facts upon which that opinion relied were contained within the terms of the Deed of

Conditions and the designation of the properties as being for residential use. An opinion also expressed that behaviour that acted contrary to that prohibition amounted to a nuisance. The defence of fair comment was not bound to fail on the basis that the Cease and Desist letters were not capable of being comment.

[35] The appellants' contention - that even if the statements were comment they were not true - proceeded on the incorrect submission that there was no real burden: there was one.

As for the submission that the statements in the Cease and Desist letters were not matters of public interest, that was disputed. Matters of public interest can relate to the public life of the community and those who take part in it: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 [176] - [177]. The issue of short-term letting is of interest to the many residents in the development, and to those who have an interest in short-term letting or the prevention of it at development.

[36] The meaning of the Cease and Desist letters was disputed. Whether the letters amounted to fair or honest comment on a matter of public interest could not be determined until after their meaning was assessed.

[37] As a consequence, the sheriff did not err in holding that Speirs Gumley's averments regarding fair or honest comment were suitable for probation.

(v) Verbal injury [summary decree]

[38] A sheriff can grant a motion for summary decree in the event they are satisfied that a party's case, or any part of it, has no real prospect of success and there exists no other compelling reason why summary decree should not be granted at that stage: *Maclay Murray & Spens v Orr* 2014 GWD 18-330 (Sheriff Principal); that decision was affirmed by the Inner House at *Maclay Murray & Spens v Orr* [2014] CSIH 107.

[39] QMSAL sought damages arising from verbal injury. To succeed in such a claim, a pursuer must prove malice. To show malice in a verbal injury claim a pursuer must aver and then prove: (i) that there was the deliberate utterance of a false statement; (ii) that the false statement was made with the intention and design of injuring the pursuer; and (iii) that it was calculated or likely to cause damage to the pursuer.

[40] The quality of malice required is a positive element of ill-will or intent to injure as either a principal or significant element in the expression of any false statement. Malice must be evidenced by something more than the expression of a statement subsequently found to be untrue and uttered with the intention of causing injury or damage. The facts and circumstances which introduce the quality of malice must be clearly specified:

Barratt [30] - [34]. QMSAL's averments of malice amount to no more than mere assertion. Malice requires an improper purpose or motive: *Grier v Lord Advocate* [2022] CSIH 57; 2023 SC 116 at [118].

Decision

Creation of the real burden

[41] The appellant is tenant of a very small proportion of the total number of units within the Quartermile Development. Nonetheless, in crave 1, they seek declarator to the effect that no unit in the development is subject to a real burden that restricts its use to "Residential Use as a private dwellinghouse and not to be occupied by more than one family at a time." Their primary position is that the Deed of Conditions relative to the development failed to constitute such a real burden.

[42] The Deed of Conditions was registered in the Land Register on 1 October 2007 by the owners of the development prior to any unit being disposed. The Title Conditions

(Scotland) Act 2003 (“the 2003 Act”) was by then in force. This Act sets out, in section 4, how a real burden is created:

“4 Creation

- (1) A real burden is created by duly registering the constitutive deed except that...the constitutive deed may provide for the postponement of the effectiveness of the real burden to –
 - (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or
 - (b) the date of registration of some other deed so specified.

- (2) The reference in subsection (1) above to the constitutive deed is to a deed which –
 - (a) sets out (employing, unless subsection (3) below is invoked, the expression ‘real burden’) the terms of the prospective real burden;
 - (b) is granted by or on behalf of the owner of the land which is to be the burdened property; and
 - (c) except in the case mentioned in subsection (4) below, nominates and identifies –
 - (i) that land;
 - (ii) the land (if any) which is to be the benefitted property; and
 - (iii) any person in whose favour the real burden is to be constituted (if it is to be constituted other than by reference to the person’s capacity as owner of any land).

- (3) Where the constitutive deed relates, or purports to relate, to the creation of a nameable type of real burden (such as, for example, a community burden), that deed may, instead of employing the expression ‘real burden’, employ the expression appropriate to that type.

- (4) Where the constitute deed relates to the creation of a community burden, that deed shall nominate and identify the community.”

[43] Counsel for the appellant submitted that section 4(2)(a) was the critical part of the Act and that the Deed of Conditions fails to comply with same as the real burden is not fully set out. He contended that it is not possible to identify from its terms what the relevant designated use of any particular unit within the development will be. Whilst counsel for the appellant acknowledged that if a burden was created it was a community burden as clause 2 of the Deed of Conditions states that the condition with which this action is concerned

(3.4) is a community burden and identifies the community as “the units in the development”, what was not developed in arguments was the fact that community burdens are treated differently in the 2003 Act. Section 4(2)(c) (at [42] above) does not apply to them. There is no need for the benefited land to be identified because, in accordance with section 27, each unit is “a benefited property” and “a burdened property”. This must, in our view, mean that the way a community burden is set out in the constitutive deed can be different from the way another real burden requires to be set out. It is the community burden which must be established in the constitutive deed. When the detail of the clauses in the Deed of Conditions quoted in para [14] above is explored, the community burdens applying to every unit in the development are clearly and fully set out. The requirements of section 4 of the Act which apply to common burdens are fulfilled. The appellant argues that allowing the Relevant Designated Purpose of a unit to be specified within the disposition for the unit rather than being clear in the Deed of Conditions (the constitutive deed) offends against the Act. Given the nature of the real burden being a community burden, we cannot agree that the sort of specification suggested by the appellant is required in the constitutive deed.

[44] Submissions were made about the application of “the four corners rule” in the circumstances of this case. Counsel for the appellant began his submission by saying that “a real burden must be set out within the four corners of the constitutive deed.” We understood his submission to be that both before and after the 2003 Act came into force the four corners rule was that a real burden had to be fully set out within the deed which first mentioned it. He did, however, appear to attempt to ride two horses when he later cast doubt on whether the four corners rule survived the 2003 Act, referencing *Gretton & Reid*

Conveyancing (5th edition) 2018). Counsel for the respondent submitted that the four corners rule had not been altered by the advent of the 2003 Act.

[45] The origin of the four corners rule is the dictum, endorsed in the House of Lords, of Lord Guthrie (in *Anderson v Dickie* 1914 SC 706) when he stated of a real burden: “The restriction must be such that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his titles.” There has been an unfortunate tendency for the passage to be misquoted: Lord Guthrie, (and their Lordships Kinnear and Parmoor in the House of Lords) used the word “titles.” Often that word has been misquoted and the word “deed” substituted. (For example, within para [22] of *Royal London Mutual Insurance Society Ltd v Chisholm Hunter Ltd* 2024 SC 17, and, by Professor Reid writing in the *Stair Memorial Encyclopaedia* (Volume 18) at paragraph 388 and fn 16 and, later, in Gretton & Reid *Conveyancing* (5th edition) 2018). *Anderson* was of course decided in days when a conveyancer would have to wade through a bundle of deeds in order to note a client’s title. In more modern times a single deed contains the title in various sections, including a burdens section. It may be that the misquotation has arisen as a result.

[46] In *Scottish Woodlands v Majekodunmi* [2019] SAC (Civ) 38 this court opined that the 2003 Act did not displace the four corners rule. We remain of that view and reiterate that, although the land tribunal case of *Marriot v Greenbelt Group Ltd* unreported, 2 December 2015 is not binding upon us, we adopt the reasoning therein. The Lands Tribunal analysed the relevant sections of the 2003 Act in detail and discussed the convention for a statute to be precise and clear in its terms should it have the intention of displacing a deep-seated principle of the common law. Although the *Scottish Woodlands v Majekodunmi* case was not referred to by the parties before us, we note from the sheriff’s judgment that it was referred to before him on behalf of the appellant, presumably because it does mention that a burden

should be contained within “the four corners of the deed which constitutes it”. We have dealt with this point in the context of the current case. The Deed of Conditions sets out the community burdens which apply to every unit in the development as required.

[47] Whatever the reason for the frequent misquotation of the four corners dictum we are clear that the import of the four corners rule itself is that the real burdens over a property should be obvious to a purchaser of a property from the documents conveying the property to him without him having to search into extraneous documents such as, *inter alia*, planning consents (*Scottish Woodlands v Majekodunmi* [2019] SAC (Civ) 38), or, by reference to a statute (*Aberdeen Varieties Ltd v JF Donald (Aberdeen Cinemas Ltd)*).

[48] A common-sense approach should be taken. So far as the Quartermile Development is concerned, each singular successor to a unit will obtain a title deed in relation to that unit. As was clear from some of the productions to which we were referred, such a title deed begins with a title sheet which defines the unit but also, importantly, lists the burdens to which the unit is subject. The Deed of Conditions registered in 2007 is narrated in full within every title sheet lodged. Reference to the Deed of Conditions is made within every disposition to which we were referred, and which is lodged. We endorse the sheriff’s common-sense approach in stating at paragraph 3.1.6 that “The four corners of the titles to the individual units are ... the individual dispositions and by reference the Deed of Conditions.”

[49] The appellant has a further attack upon a valid real burden being created: it was submitted that the use of the word “dwellinghouse” in a disposition to describe each relevant unit disposed is ambiguous and does not adequately comply with clause 3.4 of the Deed of Conditions which states that any “Relevant Designated Purpose” is to be specified in the disposition of the unit.

[50] The relevant clause and schedule of the Deed of Conditions is found at para [14] above. We were taken to a number of dispositions all lodged within the core bundle available to us. Firstly (at page 127) for Flat 8, 31 Simpson Loan, Edinburgh, EH3 9GG; secondly (at page 242) for Flat 5, 5 Simpson Loan, EH3 9GX, also (at page 247) for Flat 7, 26 Simpson Loan, and also (at page 253) for Flat 29, 21 Simpson Loan. Without exception each was said to be a “dwellinghouse known as a flatted dwellinghouse.” As previously stated, the 2007 Deed of Conditions is referenced in each.

[51] A contrast was drawn with the disposition relating to the Marriot Hotel (at page 328) wherein reference was made to clause 3.4 of the Deed of Conditions and the Relevant Designated Purpose being “office purposes and retail premises”. When referencing the detail of this disposition counsel for the appellant stated, “that is what specified in the disposition looks like.” In so stating he did, it appears to us, concede that the sheriff correctly concluded that the title of a unit could be a disposition with reference to the Deed of Conditions. In making that concession he seemed to be moving away from his previous position that the Deed of Conditions contravened section 4(2) of the 2003 Act and, instead, pinning his colours to this submission that the question of how clear the terms of an individual disposition was would determine whether a real burden had been created.

[52] Turning back to use of the term “dwellinghouse”, it is defined within the Deed of Conditions as “a Unit intended to be occupied for residential purposes forming any one of the flatted dwellinghouses within a Block of Flats...” It is, therefore, clear from the use of “residential purposes” that the Relevant Designated Purpose contained within schedule Part 9 of the Deed of Conditions which applies is “Residential use as a private dwellinghouse and not to be occupied by more than one family at a time.” No other Relevant Designated Purpose could have any relevance or application.

[53] We are not persuaded by the appellants' argument that the use of the description "dwellinghouse or flatted dwellinghouse" is in any way insufficient or ambiguous. The Relevant Designated Purpose is evidently residential purposes and, therefore, according to the Deed of Conditions, to be occupied by one family at a time. We were at no time addressed on the basis that being used for the type of letting which constitutes the appellant's business would mean anything other than a unit being "occupied by more than one family at a time."

[54] A singular successor looking at the title contained within the relevant disposition, describing the unit as a dwellinghouse, and, referring to the 2007 Deed of Conditions would, in our view, be in no doubt that their flatted dwellinghouse was subject to a real burden that it be used for "residential use as a private dwellinghouse and not be occupied by more than one family at a time". Further, as previously stated we are satisfied that the way the real burden was created was in accordance with the terms of the Title Conditions (Scotland) Act 2003. We, accordingly, adhere to the findings of the sheriff, expressed in paragraphs 3.1.1 to 3.1.11 that a valid and enforceable real burden was created in the Deed of Conditions registered on 1 October 2007 prohibiting the use of units disposed as dwellinghouses as anything other than residential units. Operating short-term lets within the units would be in breach of that burden except where it could be shown that the burden had been extinguished.

Acquiescence

[55] This was the appellant's secondary submission: in the event that the real burden had been validly created, it had ceased to exist through the operation of acquiescence.

[56] Section 16 of the Title Conditions (Scotland) Act 2003 makes provision for the extinction of a real burden by acquiescence. Before a party can utilise that section a number of conditions must be satisfied. Section 16(1) requires that: (a) the burden must be breached in such a way that material expenditure is incurred, (b) any benefit arising from such expenditure would be substantially lost if the burden was to be enforced, and (c) the owner of the benefited property has consented to the continued breach or,

“being aware of the carrying on of that activity (or, because of its nature, being in a position where that person ought to be aware of it), has not, by the expiry of such period as is in all the circumstances reasonable (being in any event a period which does not exceed that of twelve weeks beginning with the day by which that activity has been substantially completed), objected to its being carried on”.

[57] The sheriff rejected any application of section 16 (at paragraph 3.1.19 of his judgment). He found that the relevant conditions were not satisfied in this case. No issue was taken with that finding in the appeal.

[58] Instead, the appellant sought to rely on the common law of acquiescence, which still applies notwithstanding the terms of section 16 of the 2003 Act. In this regard the appellant argued there had been a general abandonment of the burden in question.

[59] The principle is stated in *Scottish Land Law* by Gordon & Wortley (3rd edition, 2020) at paragraph 24-130: “...the benefitted proprietors in a common scheme of burdens lose the right to enforce against a breach by acquiescing in a general departure from the common scheme.”

[60] For a real burden to be extinguished by acquiescence at common law two conditions must be satisfied. First, a party must demonstrate that the burden is part of a common plan affecting two or more properties. The second condition is that the burden in question:

“has ceased to be enforceable against a number of other proprietors in the same estate, either because it has been expressly discharged in whole or in part or because

it has been so generally contravened that acquiescence has operated.” (K Reid, *Stair Memorial Encyclopaedia* (Volume 18), paragraph 429).

[61] The extent to which such general contravention must be proved by a party (or averred in their pleadings beforehand) has been the subject of much judicial scrutiny, as could be seen by the numerous authorities cited in this appeal. In *Fraser v Downie* (1877) 4R 942, following a restriction on houses being “single or self-contained lodgings” a feuar (owner) objected to a neighbour converting his house into business offices. Over the course of 30 years, a large number of houses in the same street in Glasgow had been altered without objection, and this included two recent conversions within the immediate neighbourhood. It was held that the right of the feuar to object had been lost by abandonment. In that case the Lord President noted:

“If he had any objection he ought to have stood forward and protested at the time when his own part of the street was reached. But that he did not do, and I think he is not now entitled to maintain his objection.” (at p.943).

In the same case Lord Deas observed:

“The acquiescence of Mr Fraser and his neighbours is really to be regarded as acquiescence in a gradual and seen change of the character of the whole street, which has in a manner forced itself on the locality...”

[62] In *Johnston v The Walker Trustees* (1897) 24R 1061 restrictions in a real burden prohibited the conversion of houses into shops. The court held enforcement was not merely open to the superior, but that co-feuars also could enforce the burden. It was argued that there had been acquiescence to a breach of the burden *quoad* restrictions on the shape of buildings (with some owners having added dormers). But Lord Adam observed at p 1073:

“...the consent to the abandonment of certain building restrictions, implied from acquiescence, does not imply consent to the abandonment of all building restrictions which may be imposed on the feuars.”

[63] *Howard de Walden Estates Ltd v Bowmaker Ltd* 1965 SC 163 concerned a real burden from 1862 restricting the use of houses on a street in Kilmarnock. Over 100 years later the defenders had purchased one of the houses and wished to convert it to an office. The pursuers raised an action to prevent this and sought declarator that the property could be used only as a dwellinghouse. The defenders argued acquiescence and abandonment of the real burden by the superiors. The order was refused by the Lord Ordinary but on appeal this decision was reversed. Lord President Clyde noted at p 184:

“...it seems to me clear that the defenders have fallen far short of establishing that complete loss of its original character which would entitle the court to negative the existence of an interest in the superior to assert the maintenance, as regards the house in question, of the real burden in the title.”

[64] From these authorities it can be concluded that to prove acquiescence by a general abandonment of the restriction imposed in the common scheme, it is not sufficient to demonstrate merely that *some* owners of properties affected have acted in breach of the burden. A litigant must aver detailed action or inaction on the part of a sufficient number of owners of individual properties who were aware of the breach so that it could be inferred or concluded more widely that the owners of properties within the development had abandoned any interest in enforcing the real burden.

[65] In this regard there can be a distinction between owners physically close to or distant from the party in breach before they can be held to have acquiesced. In *J A Mactaggart and Co v Roemmele* 1907 SC 1318, Lord MacLaren said:

“I think it would be a very inconvenient, not to say inequitable, rule that a feuar who becomes aware of some infraction of building conditions by a feuar from the same superior, but at such a distance from himself that the infraction causes no inconvenience to him, must either apply for an interdict or be taken to have waived his right to enforce the condition in a question with conterminous feuars or disponees.”

Averments on acquiescence

[66] In Article 4 of condescence the appellants aver that, *esto* the Deed of Conditions was sufficient to create a real burden, it “ceased to be enforceable for lack of interest on the part of any person to enforce it”. In support of this plea of acquiescence they detail four separate properties within the development which were used for short-term lettings over a period of years. They then aver:

“There has (and had at all material times) been a general abandonment of the common plan insofar as it manifested itself in any real burden restricting the use of any Unit to Residential Use – at least to the extent of prohibiting short-term letting.”

[67] The appellant’s position was that evidence would need to be led for the court to determine whether there had been such widespread departure as to enable the appellant to rely on acquiescence. The sheriff, however, found that the pursuer had failed to aver a relevant case of acquiescence to allow the matter to proceed to probation (paragraph 3.1.22 of his judgment).

[68] We agree with the sheriff’s assessment about the lack of detailed pleading on acquiescence. The appellant’s averments on record fall short:

- The appellants do not offer to prove that there has been a general abandonment of the real burden including by the owners of properties who have the ability to enforce the burden;
- There is no averment that the owners of properties at Quarter Mile were aware of the use of any particular properties for the purposes of short-term lets and tolerated such use to a degree which could constitute a general abandonment of the burden (only four out of hundreds of flats were specified in the pleadings);

- The appellants do not aver that short-term letting had impacted all owners such that an absence of objection could be taken to be acquiescence;
- There is no averment that the benefited proprietors authorised, were aware of, or consented to, any actions by QEL relied on by the appellants.

[69] In summary, the appellant failed to aver tolerance, knowledge or conduct by a sufficient number of impacted owners in the development to demonstrate the crucial aspect of acquiescence, namely widespread contravention of the burden - or a general abandonment of it - which would allow them to argue that it has ceased to be enforceable. In this regard the pleadings are lacking in specification, and the sheriff was correct to reject the appellant's argument on acquiescence.

[70] The appellant offered to prove a further point which they argued demonstrates acquiescence. This is to the effect that QEL, the body on whose behalf Speirs Gumley acted, provided "commercial space" for two companies for use to operate businesses, advertising and providing short-term lettings for the owners of flats within the development (as averred at Article 4 of condescendence). We did not find that to be a compelling argument. Even if it were accepted that the named companies operated such a business "under the noses" of QEL that cannot of itself infer knowledge by a sufficient number of owners that the real burden prohibiting the short-term letting of units designated for residential use was being breached. QEL were managing agents and not bound by the real burden. We agree with the sheriff's assessment (paragraph 3.1.22 on page 38) that the managing agent/ owner relationship is in no way akin to a superior/feuer relationship. These averments are irrelevant in trying to prove acquiescence on the part of relevant owners. We accordingly adhere to the sheriff's findings that the appellant's pleadings are insufficient to support a

common law case of acquiescence and conclude that he was correct to dismiss craves 1 and 2.

Truth

[71] The action before the court craves declarator together with a substantial sum in damages based on both defamation and verbal injury. In essence, the appellant's case was that the respondents had circulated information in the "Cease and Desist" letters which was both false and malicious, with the appellants having suffered business losses as a result of the damage caused by these statements.

[72] That the statements in question were true or substantially true is a defence available in an action for defamation. The appellant's challenge to the availability of this defence rests squarely on their primary argument, namely that there was no real burden in existence which prohibited short-term letting and for the respondents to have stated otherwise was false. Given our conclusion that there is indeed such a real burden in force, the defence of "truth" remains available to the respondent. Because the real burden exists, the statement to this effect by the respondents in their Cease and Desist letters can be argued as true. Accordingly, that remains a relevant defence available to the respondents and the sheriff was correct to make that finding. We therefore reject the ground of appeal that the sheriff erred in so finding.

Fair comment

[73] It is a defence available in an action of defamation that communication involved "fair comment". The appellant maintained that the respondent could not rely on this defence because the Cease and Desist letters contained statements of fact, not comment. The

appellant argued that none of the offending communication was a deduction, inference, conclusion, criticism, remark, or observation (*Campbell v Dugdale* [2020] CSIH 27; 202 SC 481).

[74] In a written communication, the line between what is stated as fact and what is comment or observation may not always be clear. A comment may contain a statement of fact but still be regarded as a comment for the purposes of defamation (*Clark v Norton* [1910] VLR 499). The point was reinforced in *Campbell v Dugdale* (supra) where the Inner House noted at para [34] the following passage from *Delict* (Walker, 1966): “[I]n fair comment the defender must show that each statement of fact is true, that the matter is one of public interest, and that the comment on the facts is fair.” The decision later noted:

“[38] A significant element in the decision may be whether what is said to be comment is readily identifiable as such and is not so intermingled with fact that it is not clear which is which...”

[75] Fair comment is available where the comment is a matter of public interest. Matters of public interest do not need to affect all members of the public but can relate to the public life of the community and those who take part in it (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 [176] - [177]). The Cease and Desist letters under consideration in this case did not merely make the statement that short-term letting was prohibited. The letters also referred to anti-social behaviour and nuisance. These issues (short-term letting, nuisance, anti-social behaviour) can be argued to be of interest to owners and occupiers within the Quarter Mile development. We therefore agree that, whether the content of those letters amounted to fair or honest comment on a matter of public interest can only be determined after probation. This was the finding of the sheriff, and we agree with his conclusion. Of course, the extent to which any communication was distributed or disseminated (assuming they are held to be defamatory) can have an impact on the quantum of a claim. That is not a matter with which

this appeal is concerned. The sheriff allowed the defamation element of the appellant's claim to proceed to probation. We agree that, at such a future hearing, the defence of fair comment remains available to the respondent.

Verbal injury

[76] Part of the appellant's claim was founded on the common law ground of verbal injury. For an action to succeed on that ground, a different test applies from that of a cause alleging defamation. The sheriff dismissed the verbal injury element of the appellant's case by way of summary decree. In our view the sheriff approached both the question of the test which applies, and the question of whether it was appropriate to grant summary decree in relation to this head of claim correctly.

[77] To succeed in a case of verbal injury a pursuer has to prove malice. This requires a pursuer to prove both that the statements made by a defender are false, and that the communication of these statements was malicious (Lord Wheatley in *Barratt International Resorts Limited v Barratt Owners Group* 20 December 2002, unreported, at para [30]). It has been well established in this context that malice comprises three elements: (1) the deliberate utterance of a false statement, (2) the falsehood uttered with the intention and design of injuring the pursuer and (3) the falsehood must be calculated or likely to cause the pursuer some actual damage.

[78] The appellant's position was that they had a real prospect of establishing that the statements made in the Cease and Desist letters were malicious, and that a proof on this ground was accordingly required. The sheriff found that the appellant's pleadings lacked sufficient detail to proceed to probation.

[79] We do not accept the respondent's argument that, for the appellant to succeed on this ground, the pleadings require to name the individuals who demonstrated malice. The communications in question were sent by Speirs Gumley clearly acting on behalf of another body (QEL, who in turn represented the owners of flats in Quarter Mile, or at least a majority of them). An action against an agent can be competent and relevant: *Crawford v Adams* (1900) 2F 987.

[80] Notwithstanding that element, to succeed in a case of verbal injury the appellant would still require to aver relevantly that the respondent acted with malice. The letters in question were founded on the premise that there was a real burden which prohibited short-term letting. We have already given detailed reasons why we agree that the real burden was in place. It is therefore axiomatic that it was not a falsehood for the appellant to state as much in correspondence. Furthermore, the Cease and Desist letters were not targeted only at the appellant's clients. Nor were they initially targeted at all owners. The first Cease and Desist letters were sent to 30 properties out of 900. The second Cease and Desist letters (when it became clear that the practice of short-term letting had not ended) were sent to all owners in the development. Accordingly, the communications were not sent at random. Speirs Gumley were acting on behalf QEL, who in turn were responding to concerns noted by the QMC. The problem identified was one of short-term lets in breach of the real burden. Any impact on the appellant's business would be the result of their providing short-term lets where this was in breach of the real burden. It is apparent from the content of the letters that this was their focus, not the appellant's business *per se*.

[81] Summary decree in the sheriff court is regulated by Rule 17.2 of the Ordinary Cause Rules 1993 ("OCR"). The task of the court in such a situation was analysed in the decision of *MacLay Murray and Spens LLP v Orr* [2014] CSIH 107:

[21] It is also important, when considering a motion for summary decree, that the sheriff recognises that the mere existence of a dispute of fact will not preclude the application of a rule such as OCR 17.2...the court does not have to accept, without analysis, everything said in the documents by, or on behalf of, the party whose case is being challenged as being without real prospect of success. Indeed, we consider that it would be failing in its duty to judge whether or not there are 'real' prospects of success if it did so."

[82] In the same case at an earlier stage (before Sheriff Principal Scott) the task of the court was noted as follows:

"...the court requires to undertake a qualitative assessment of the case which is claimed to have no real prospect of success. In most situations, that will involve scrutiny of the pleadings and analysis of any material said to be the foundation for a party's case." (*MacLay Murray and Spens LLP v Orr* 2014 GWD 18-330).

[83] In the case before this court the sheriff states (paragraph 3.3.7) that he considered the appellant's pleadings, in Articles 23 and 24 of condescendence in particular, the affidavits lodged, and the productions he was referred to. He goes into detail (paragraphs 3.3.8 - 3.3.14) as to why he concluded that the appellants had not relevantly pled a case based on malice. The pursuer's pleadings lack detail about the supposed "false and malicious" actings by the defenders, other than by general reference to the content of the Cease and Desist letters, and, since the letters were founded on the reality that a real burden prohibited short-term letting in residential units, that there was no real prospect of success on this ground. His reasoning cannot be faulted. Accordingly, he was entitled to grant decree of dismissal on this basis and to do so by way of summary decree in terms of OCR 17.2.

Outcome of appeal

[84] It follows that we refuse all grounds of appeal

The remaining case

[85] The sheriff's judgment allowed proof before answer on the pleadings relating to defamation. The defences of "truth" and "fair comment" remain available to the defender (respondent). The averments which can proceed to a proof before answer relate not to the existence of the real burden but to the inference that the pursuers (appellants) as letting agents may have been responsible for allowing anti-social and nuisance behaviour (even though they were not named directly in the letters). The pursuers contend that such statements may damage their reputation or result in lost leases or earnings. Those are the restricted matters which have been allowed to proceed to proof.

[86] The sheriff identified that some amendment to the pleadings would be required and ordered further procedure so that the irrelevant pleadings could be removed from the record. In refusing this appeal we remit the cause back to the sheriff court for that procedure identified by the sheriff to take place.

Disposal

[87] We refuse the appeal and adhere to the sheriff's interlocutor of 10 March 2025. We will reserve the question of expenses. Parties should attempt to agree the matter of expenses and advise the clerk of their position. Should that not be possible within 21 days, the clerk will arrange further procedure.