



**SHERIFF APPEAL COURT**

**[2026] SAC (Civ) 28  
HAM-A529-23**

Sheriff Principal C Dowdalls KC  
Appeal Sheriff W A Sheehan  
Appeal Sheriff I Cruickshank

**OPINION OF THE COURT**

delivered by SHERIFF PRINCIPAL CATHERINE DOWDALLS KC

in the appeal in the cause

(FIRST) WALTER SIM MALCOLM; (SECOND) DOCTOR SUSAN JENNIFER MALCOLM;  
(THIRD) JOHN JOSEPH HEENAN; (FOURTH) KATRINA HEENAN; (FIFTH) ERIK JAN  
VAN DER MAREL; and (SIXTH) KIRSTY ANN VAN DER MAREL

Pursuers and Respondents

against

(FIRST) KEVIN WILLIAM PATON; and (SECOND) ANN MARIE MARION PATON

Defenders and Appellants

**Pursuers and Respondents: Boffey; Mellicks  
Defenders and Appellants: Manson; BTO Solicitors LLP**

5 May 2026

**Introduction**

[1] The issue in this appeal is whether the respondents demonstrated sufficient interest to obtain an order for the enforcement of a real burden in terms of the statutory scheme set out in section 8 of the Title Conditions (Scotland) Act 2003 (the 2003 Act). The purpose in enforcing the real burden is to prevent the erection of a boundary wall and electric gate wholly within the appellants' property.

## Background

[2] The appellants are the owners of 18 Gadwall Grove, Motherwell. The respondents are their neighbours and live respectively at 7, 12 and 16 Gadwall Grove. Gadwall Grove forms part of the Baron's Grange development in Motherwell, designed by the housebuilder, CALA. The Baron's Grange development consists of approximately 70 properties.

[3] The properties in the development are subject to a Deed of Real Burdens registered 15 December 2010. Rule 9.1 of the Deed provides:

"No additional boundary walls, fences, hedges, trellis work, ornamental fencing or draughtboarding fencing shall be erected anywhere on a Plot, nor shall any boundary walls or fences be used as a support or strengthening for such trellis work, ornamental fencing or draughtboarding fencing except in each case with Neighbour Consent."

Neighbour Consent is defined as:

"Neighbour Consent means... when CALA no longer own any Plot, the prior written consent of the Proprietors of all Plots any part of which is situated within 30 metres of the relevant Plot."

[4] On 1 November 2021 the appellants were granted planning permission by North Lanarkshire Council to construct a front boundary wall and electric gate at their property. The appellants did not seek prior written consent from the respondents for the construction of the boundary wall. The respondents do not consent to the erection of the boundary wall at the appellants' property. Unless they are prohibited from doing so by a court order, the appellants intend to proceed with the erection of the boundary wall at their property, notwithstanding the lack of consent from the respondents.

[5] To enforce rule 9.1, the respondents raised an action to interdict the appellants or anyone acting on their behalf or on their instruction from erecting a boundary wall at the

appellants' property for such time as rule 9.1 of the Deed of Real Burdens subsists and is not discharged or otherwise varied by the Lands Tribunal of Scotland. Interim interdict was sought and granted by interlocutor dated 22 September 2023 pending the resolution of the action.

[6] The action proceeded to a debate in respect of several challenges by the appellants to the respondents' action. Following the debate, a few of the respondents' averments were deleted; thereafter, the matter proceeded to a proof before answer.

### **Section 8 of the Title Conditions (Scotland) Act 2003**

[7] Section 8 of the 2003 Act provides:

**"8 Right to enforce**

(1) A real burden is enforceable by any person who has both title and interest to enforce it.

...

(3) A person has such interest if –

- (a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property; or
- (b) the real burden being an affirmative burden created as an obligation to defray, or contribute towards, some cost, that person seeks (and has grounds to seek) payment of, or as respects, that cost."

### **The sheriff's judgment**

[8] Following the proof before answer, the sheriff accepted that the appellants had valid reasons for wanting to erect the boundary wall; however, that was irrelevant to the issue before him. It was accepted that the respondents did have title to enforce the real burden contained at rule 9.1; the issue was whether they had interest to enforce it.

[9] The sheriff set out his reasoning at paras [84] to [90] of his judgment. He did not accept some of the respondents' concerns over the building of the boundary wall. However,

he did accept that the erection of the boundary wall and gate would have a significant effect on the appearance of Gadwall Grove. He also considered that, were the erection of the boundary wall and gate to be allowed, it would lead to other proprietors seeking to make similar alterations of their own to their properties. He also accepted the evidence of the respondents that the development was markedly open in its layout.

[10] At para [90] of his judgment the sheriff recorded that the respondents placed a strong emphasis on the mutuality of the rules in the Deed of Real Burdens in the context of the community they shared. They placed great reliance on the certainty that the Deed of Real Burdens gave in providing rules for the proprietors within the development to adhere to.

[11] The sheriff concluded that, in the circumstances, failure by the appellants to comply with rule 9.1 would result in material detriment to the respondents' enjoyment of the ownership of their homes.

[12] To reflect the above, the sheriff made the following two findings-in-fact in respect of material detriment:

“(u) The development, particularly, Gadwall Grove, is markedly open in its layout. There are no walls round the front gardens in Gadwall Grove.

(v) In the circumstances of this case, failure to comply with the burden will result in material detriment to the pursuers' enjoyment of their ownership of their homes.”

### **Submissions for the appellants**

[13] On his own objective evaluation and findings, the sheriff ought to have determined that the respondents did not have sufficient interest under section 8(3) of the 2003 Act to seek intervention from the court. Instead, the sheriff misdirected himself and fell into material error when applying the statutory scheme by: (i) allowing irrelevant subjective considerations based on the respondents' personal views to influence decisively the

operation of the objective test; and (ii) allowed irrelevant, speculative and subjective considerations based on what may happen in the future to, again, influence decisively the operation of the objective test.

[14] In relation to the first material error, the sheriff had adopted a subjective assessment influenced by the personal views and opinions of the respondents as to the importance of the members in the community adhering strictly to the rules in their title deeds at paras [90] – [91] of his judgment. That was manifestly incorrect and represented a material error if the scheme in the 2003 Act was to be applied properly and as Parliament intended. If the sheriff's subjective approach was correct it would result in the total disapplication of the objective approach required by Parliament and render the interest test in section 8 otiose and devoid of workable application. On the sheriff's approach, every single breach of a title condition would automatically become material because the very act of breach would upset the expectation of a prospective proprietor that all the rules would always be adhered to.

[15] The second strand of reasoning which the sheriff considered allowed him to determine that there was material detriment, despite his objective conclusion to the contrary, was his consideration as to what may happen in the future if the appellants were to construct the boundary wall. Again, the sheriff's approach offended against the statutory test. He drew on irrelevant, subjective and personal considerations as opposed to praedial ones. Further, section 8(3)(a) of the 2003 Act requires the court to consider the breach "in the circumstances". This means the particular circumstances when the issue arises. The relevant question, therefore, was whether the particular present circumstances would result in a material detriment to praedial interests.

[16] Based on the above, the sheriff erred in making finding in fact (v). That finding had been wrongly categorised by the sheriff; it was truly a finding-in-law as it made a finding as

to material detriment. Absent that finding, there was no basis upon which the sheriff could hold that there was a material detriment capable of satisfying the test in section 8 of the 2003 Act.

### **Submissions for the respondents**

[17] Pursuant to section 8(3)(a) of the 2003 Act, the sheriff required to assess whether “failure to comply with the real burden” would result in material detriment. The sheriff correctly applied that test. He correctly considered it a relatively low bar. No error was disclosed in his judgment. The respondents’ evidence was that, individually and collectively, they would suffer a material detriment to their enjoyment of their properties. The sheriff did not err in his assessment of that evidence. He produced a balanced judgment. The sheriff accepted the evidence recorded at paras [88] - [91] of his judgment. The issues identified within those paragraphs weighed significantly in his decision as to interest.

[18] The sheriff required to assess material detriment to enjoyment. In doing so, he was entitled, and indeed, correct, to have regard to the evidence of the respondents. No irrelevant factors were disclosed, but even if there were, there was ample other material for the sheriff to reach the decision he did.

### **Decision**

[19] The question for the sheriff to determine was whether, in terms of section 8 of the 2003 Act the respondents had both title and interest, such that they were entitled to enforce the real burden contained in rule 9.1 of the Deed of Real Burdens. The question whether they had title, as required by section 8 was not in dispute. To establish interest, it was

necessary for them to show, and for the sheriff to find, that the appellants' failure to comply with the real burden in the circumstances of this case resulted, or would result, in material detriment to the value or enjoyment of the respondents' ownership of, or right in, their respective properties. No issue was raised and no findings in fact were made as to the impact, if any, on the resultant value of the respondents' properties in the event the appellants were permitted to erect the wall. Therefore the only question for determination was whether the detriment claimed by the respondents was material to their enjoyment of each of the benefited properties.

[20] The only finding in fact made by the sheriff on the matter of material detriment is finding in fact (v). We agree with the submission for the appellants that this finding is better categorised as a finding in fact and law. As no findings in fact have been made underpinning this finding in fact and law, it is not possible to identify the basis upon which the sheriff concluded that the detriment suffered or likely to be suffered by the respondents as a consequence of the appellants' failure to comply with the real burden was material without considering the judgment as a whole. It should not be necessary for an appellate court to look beyond the findings in fact and findings in fact and law to properly understand the factual basis upon which a decision was reached. To that extent, at least, the sheriff's judgment is seriously flawed.

[21] We have considered upon what possible basis the sheriff has arrived at the conclusion contained in finding in fact (v). The sheriff acknowledges at para [81] that the validity of the appellants' reasons for seeking to erect the wall are irrelevant to the issue before him being, as he describes it, "the pursuers' enjoyment of their properties". The sheriff, properly, dismisses the submission on behalf of the fifth and sixth respondents that they will be denied informal use of the appellants' front garden and driveway. Likewise, he

dismisses as “fanciful” the submission that the electric gate could cause a build-up of traffic. He rejects the submission that children would be concealed behind the wall on the basis that the respondents’ case is not based on obstruction of visibility. He sets out at paras [88] to [90] those matters that he does accept, being the “significant effect on the appearance of the street” that the erection of the wall and gate would have; that it “would lead to others doing the same”; and that “the development is markedly open in its layout”. He explains at para [90] that the evidence that the respondents placed strong emphasis on the mutuality of the rules in the Deed of Burdens and the certainty of those rules weighed significantly with him, commenting that the decision he was required to make was one which “on the face of it, concerns a minor matter”. He notes that the “feeling that the regime of Rules on which they all bought is of no effect will also detract from the pursuers’ enjoyment” and concludes that failure to comply with the burden will result in material detriment to the respondents’ enjoyment of their homes.

[22] The question for us therefore is whether the sheriff’s conclusion that the respondents’ feeling that the rules are of no effect is sufficient in the circumstances of the case, looked at objectively, to amount to material detriment such that the respondents have sufficient interest to obtain an order for the enforcement of the real burden in terms of the statutory scheme set out in section 8 of the 2003 Act. In order to answer that question, we must consider, first, what amounts to detriment as provided for in section 8(3)(a) of the 2003 Act and, secondly, how materiality is to be assessed. Then we must assess whether the sheriff has identified detriment to the respondents sufficiently material to qualify as an interest to enforce the burden.

[23] We were referred during submissions to Gloag and Henderson on *The Law of Scotland*, 15<sup>th</sup> Edition at paragraph 34.132, wherein the authors state that “A party wishing to

enforce a real burden must show that he has an interest to enforce it at the time he wishes to enforce" and that the interest "must relate to the land and not merely to the personal circumstances of the owner for the time being". In support of the submission that the detriment must be praedal, or specific to a person's right in the benefited property, reference was also made to Gordon on *Scottish Land Law*, 3<sup>rd</sup> Edition, Vol.II, paragraph 24-93. The authors put it thus:

"... the concern here is with praedal detriment rather than personal detriment; to be relevant, the detriment suffered must relate to the benefited property itself, rather than being 'based on the likes, or dislikes, of an individual property owner'."

If further evidence of support for the proposition that the detriment must be praedal is required, such can be found in Professor Rennie's explanation of what is required:

"What is required is not material detriment of a personal nature but material detriment to the benefited property as property." (Rennie, *Property Law Reform; Interest to Enforce Real Burdens* (2008) paragraph 1-15).

[24] The test of materiality is an objective one, to be assessed having regard to the circumstances particular to the case under consideration. As Sheriff Principal Dunlop KC explained in *Barker v Lewis* 2008 SLT (Sh Ct) 17, in qualifying the word "detriment" by the word "material" section 8(3)(a) imports a question of degree. Identifying where the threshold lies for the degree of detriment sufficient to amount to a qualifying interest to enforce a real burden depends on the circumstances of the case. He concludes:

"Much will depend on the nature of the burden and its breach, the nature of the neighbourhood, including issues of proximity of burdened and benefited properties, and no doubt other circumstances particular to the case under consideration – the question being whether in those circumstances the detriment, viewed objectively, is of sufficient significance or import to persuade the court that it is proper to allow the benefited proprietor to enforce the burden." (para [27]).

[25] The Sheriff Principal's approach in *Barker* was discussed in the Lands Tribunal decision in *Franklin v Lawson* 2013 SLT (Lands Tr) 81 at para [10]. The Lands Tribunal adopted the Sheriff Principal's assessment of the test of materiality, adding:

“Determination of what is ‘material’ does involve assessment of matters of degree but what is required is a decision as to whether or not the subject matter is ‘material’. The term is not primarily an adjective expressing quantity. Where an adverse element of detriment can be identified as something more than fanciful or insignificant it can properly be described as material.”

[26] In the present case the sheriff concluded that the loss by the respondents of the certainty provided by the rules in the Deed of Real Burdens and the feeling that the regime of the rules that they bought into is of no effect will detract from their enjoyment of their property. That, he said, amounts to material detriment to their enjoyment of their ownership of their homes. That cannot be correct. The reference to the respondents' feelings, which is the only explanation for his conclusion as to detriment, is plainly not a reference to the benefited properties as properties. Rather, it is a reference to the personal detriment of the respondents. As such, it does not provide a sufficient basis for a finding in fact and law that the appellants' failure to comply with the burden will result in material detriment to the respondents' enjoyment of their ownership of their homes. It follows that the test in section 8(3)(a) is not satisfied.

[27] Having reached the conclusion set out above, it is unnecessary to consider in detail the materiality test as it falls to be applied. Had we been compelled to do so, however, we would have reached the conclusion that the threshold for materiality is not crossed. The respondents' feelings about the consequences of the appellants' failure to adhere to the Rules provide no objective basis upon which to judge the question of materiality.

[28] It follows from the above that in the absence of material detriment, the respondents had no interest and therefore were not entitled to the protective remedy of interdict. The

sheriff in his judgment does not engage in any analysis of the question of necessity of the remedy of interdict in the circumstances of the case. We do not require to engage in that analysis as there is no interest to protect.

[29] We are compelled to say something about academic comment that has followed the issuing of the sheriff's judgment in this case. The decision was welcomed by Professor Reid in his recent case commentary, produced in January 2026 as part of Edinburgh Law Seminars Roadshow: "*Conveyancing: What happened in 2025?*" as:

"... further and welcome confirmation that the law has moved away from the over-strict interpretation of interest to enforce adopted in *Barker v Lewis*. Neighbours wishing to enforce real burdens must show material detriment to the value or enjoyment of their property. That is what the legislation says. But the threshold to be surmounted is not very high".

We are bound to observe that the sheriff's decision in the present case does not supersede the decision of the Sheriff Principal in *Barker* or represent an innovation on or development of the law. In any event, we are in agreement with the analysis of the Sheriff Principal in *Barker* as to what amounts to material detriment sufficient for interest to enforce a real burden.

### **Disposal**

[30] We will allow the appeal; recall the interlocutor of the sheriff dated 4 June 2025; repel the first plea-in-law for the respondents; uphold the third, fourth and fifth pleas-in-law for the appellants; and assoilzie the appellants from the craves of the initial writ. We shall reserve the question of expenses. If parties cannot agree the issue of the expenses of the cause within 21 days, the clerk will arrange further procedure.