

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE

A85/06

JUDGMENT OF SHERIFF PRINCIPAL

R A DUNLOP QC

in the cause

(First) KRISTEEN BARKER and KEVIN GRAHAM BARKER;

(Second) PROFESSOR FRANCIS MICHAEL SULLIVAN and DR DOROTHY BEATRICE SULLIVAN;

(Third) DONALD ROSS GARRY WALKER and MRS JANIS WALKER

Pursuers and Appellants

against

AIRLIE JOAN LEWIS

Defender and Respondent

Act: Kennedy, Advocate, instructed by Miller Hendry, Dundee

Alt: P Murphy, Advocate, instructed by Murray Donald Drummond Cook, St Andrews

CUPAR, 5 March 2008. The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the sheriff's interlocutor of 5 April 2007 complained of; certifies the appeal as suitable for the employment of junior counsel; finds the pursuers and appellants liable to the defender and respondent in the expenses of the appeal; allows an account thereof to be given in and remits the same, when lodged, to the auditor of court to tax and report.

NOTE:

Background

[1] The parties to this action are neighbours in a steading development near St Andrews. The development comprises five houses in close proximity to each other and is set in a rural location. The title of each of the properties is subject to the burdens and conditions specified in a Deed of Conditions which provides, among other things, that each property "shall be used and occupied by the proprietors as a domestic dwellinghouse with relative offices only and for use by one family only and no other purpose whatsoever." (condition third). It also provides that each proprietor shall be entitled to enforce against each other the conditions expressed in the Deed of Conditions "for the protection of the amenity of the development." (condition seventeenth).

[2] Not long after purchasing her property and moving into it the defender started to operate a bed and breakfast business. Over a period of seventeen months there were a number of incidents which caused the pursuers concern and which they attributed to the operation of that business. Thereafter the present action was raised seeking to interdict the defender from operating a bed and breakfast or similar boarding establishment at her house. The foundation of the action was an alleged breach of condition third in the Deed of Conditions.

[3] In her defences the defender challenged the pursuers' title and interest to enforce condition third. Following a proof the sheriff sustained the pursuers' title but found that they had no interest to enforce the condition. Accordingly he refused the crave for interdict. The pursuers have now appealed.

Sheriff's decision

[4] The question of interest to enforce a real burden is governed by the terms of section 8(3)(a) of the Title Conditions (Scotland) Act 2003 (hereinafter referred to as "the 2003 Act") which provides that a person has such interest if -

"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."

[5] The sheriff took the view that, in its context, "material" meant "substantial" and "value" meant "market value" and that in each case this was the plain meaning of these words. So far as concerned the phrase "enjoyment of the person's ownership of, or right in, the benefited property" the sheriff found it helpful to apply the law of nuisance as a means of setting the parameters of what would constitute material detriment within the meaning of the Act. Thus he concluded that "in order to find that the disputed activity of the burdened proprietor has resulted, or will result, in material detriment to the enjoyment of the benefited proprietor, the court must be satisfied that the result has been, or will be, more than just sentimental, speculative, trivial discomfort or personal annoyance and that it amounts to a substantial inconvenience or annoyance, as judged by the objective standard of what would affect a proprietor of ordinary sensibility and susceptibility and taking into account both the existing character of the locality affected and the extent to which the benefited and the burdened properties are geographically inter connected."

[6] He then went on to assess the evidence against that standard and concluded that the defender's use of the property for running a bed and breakfast had not so far resulted in any material detriment to the value or enjoyment of the pursuers' ownership of their properties but that should the defender exceed the current level of business there was a real risk of material detriment to the pursuers' enjoyment of their properties in the future. The sheriff's decision is now reported at 2007 SLT (Sh Ct) 48.

Grounds of appeal

[7] In an amended note of appeal the appellants challenge the sheriff's finding that, in the context of section 8(3)(a), the natural and ordinary meaning of "material" was "substantial". They point out that the words material and substantial are both used in the 2003 Act and it cannot therefore have been intended that they should have the same meaning. They contend for a less stringent test than that suggested by the sheriff. They also challenge the sheriff's reliance upon the law of nuisance as an aid to the interpretation of the Act.

Submissions for pursuers and appellants

[8] In opening his submissions, counsel for the appellants made it clear that no issue was taken with the sheriff's conclusion that a bed and breakfast business would have no effect whatsoever on the value of adjoining properties. His argument was confined to the finding that there was no material detriment to the enjoyment of their benefited properties.

[9] Turning to the proper meaning of "material detriment", counsel pointed out that the sheriff's view of the ordinary meaning of the word "material" was apparently unsupported by reference to any dictionary. In fact there were many meanings attributed to the word according to the context in which it was used and this was apparent from an examination of any dictionary. It was also the clear view of the court in *City of Glasgow District Council v Secretary of State for Scotland* 1998 SLT 283.

[10] Counsel pointed out that both "material" and "substantial" were used in similar contexts in the 2003 Act. In section 90 of the Act provision was made for the discharge or variation of a title condition by the Lands Tribunal and for payment of compensation to the benefited proprietor in respect of "any substantial loss or disadvantage" suffered by him in consequence of the discharge (see section 90(6) and (7)(a)).

[11] It was submitted that this formulation was close to the sheriff's definition of "material detriment" but in using different words the legislature must have intended "material" to mean something different from "substantial". Counsel referred to the critique of the sheriff's decision by Professor Kenneth Reid in an article entitled "Interest to Enforce Real Burdens: How Material is Material?" (2007 11 Edinburgh Law Review 440) and adopted his contention that the hierarchy which the words imply is obvious - "where detriment or disadvantage reaches the point of being "material" there is interest to enforce; but it is only when it is raised to the level of "substantial" that compensation is due, in the event of variation or discharge by the Tribunal."

[12] Counsel submitted that there must be a threshold between material and immaterial detriment and that in requiring substantial detriment the sheriff had set the threshold too high. He submitted that in its context "material detriment" meant detriment that matters; it must have some substance to it and have sufficient significance to put it over the threshold. That was a matter of judgment for the sheriff in all the circumstances of the case.

[13] Counsel criticised the sheriff's reliance on the law of nuisance as an aid to the interpretation of "material detriment." Nuisance was an actionable wrong and if one applied the same test to an interest to enforce a burden there would seem little worth in having a burden at all. Furthermore it was difficult to see how it could be applied across the whole range of burdens typically found. Finally on this matter counsel pointed out that the sheriff had clearly taken the expression "sentimental, speculative, trivial discomfort or personal annoyance" from the speech of the Earl of Selborne in *Fleming v Hislop* 1886 13R (HL) 43 but he submitted that he had failed to carry forward the qualification of the words "personal annoyance" by the words "of that kind". The word "material" did not exclude personal annoyance which was more than sentimental, speculative or trivial.

[14] In the final analysis counsel submitted that the sheriff had misdirected himself as to the meaning of "material detriment" and that therefore his decision could not stand. Accordingly the matter was at large for the appellate court, although it was pointed out that it was clear from the sheriff's note that he thought it a borderline case and it could be concluded therefore that he would have granted interdict had he applied a less stringent test.

Submissions for defender and respondent

[15] In responding to these submissions counsel for the defender and respondent declined to support the sheriff's approach, firstly, insofar as it relied on the law of nuisance as an aid to the interpretation of the 2003 Act and, secondly, in construing the phrase "material detriment" as meaning "substantial detriment." In this latter respect he acknowledged that this was a departure from the submission which had been made to the sheriff on behalf of the defender. In changing the defender's position, counsel explained that he recognised the force of the submission made on behalf of the appellants that the 2003 Act used both "material" and "substantial" and that given the context in which each was used they were intended to mean something different from each other.

[16] While counsel departed from a test of substantial detriment he submitted nevertheless that the words material and substantial were close neighbours. In this regard he aligned himself with the positions, firstly, of

Professor Reid (*Abolition of Feudal Tenure in Scotland* para 3.30 and note 6) that the tests of "material detriment" and "substantial loss or disadvantage" were broadly similar in character and effect and, secondly, of Professor Rennie in an article commenting on the present case (Real Burdens - A Question of Interest 2007 SLT News 89), where he expressed the view that the statutory test of material detriment was a higher test than the previous common law test.

[17] With these observations in mind counsel submitted that "material detriment" ought properly to be construed as "significant or serious/important detriment". This was consistent with the Oxford English Dictionary definition - "of serious or substantial import; of much consequence; important.) It was submitted that support for such a construction could also be found in *City of Glasgow District Council v Secretary of State for Scotland* sup. cit. and in the fields of planning law (Rowan-Robinson on *Scottish Planning Law and Procedure* para 5.71) and compulsory purchase (Rowan-Robinson on *Compulsory Purchase and Compensation* para 3.11 et seq).

[18] In proposing this construction counsel submitted that the proper meaning of "material" could not be divorced from the context in which it was used and that whether a test of material detriment was met would always depend on the particular circumstances of the case. Reference in this regard was made to *City of Glasgow District Council v Secretary of State for Scotland* sup. cit., *Bendles Motors Limited v Bristol Corporation* 1963 1WLR 247 and *Duke of Westminster v Birrane* 1995 3 ALLER 416.

[19] In applying this approach to the facts of the present case counsel submitted that a test of significant or serious detriment had not been met and that had the sheriff applied this test he would still have reached the same conclusion. He went on to submit that, if I was against him on that matter, nevertheless the interdict sought was too wide in its terms and that it was not inconceivable that the respondent could run a bed and breakfast business without material detriment to the appellants' enjoyment of their properties.

[20] In regard to this latter point counsel for the appellants pointed out that this had never been an issue although he appeared to recognise that there may be some force in the point and if I was otherwise disposed to allow the appeal he would seek the opportunity to consider and address this criticism at a further hearing.

Discussion

[21] The word "material" is used in many different legal contexts and I respectfully agree with the opinion of the court in *City of Glasgow District Council v Secretary of State for Scotland* sup.cit. that it is impossible to give real meaning to the word except by considering the context in which it is used. That view is reinforced by an examination of the dictionary definition of "material" which shows that there is no single and precise meaning.

[22] The context in which the word is used in section 8(3)(a) of the 2003 Act is of course the identification of an interest to enforce a real burden. Generally speaking the concept of interest to sue involves the identification of "some benefit from asserting the right with which the action is concerned or from preventing its infringement" (Macphail *Sheriff Court Practice* 3rd edn. para 4.29) It would normally be expected therefore that an interest would be sufficiently instructed if it could be shown that the interests of the pursuers would be adversely affected if the remedy sought were not granted. Thus the requirement of "detriment" in section 8(3)(a) is what one might expect in any formulation of a statutory test for establishing an interest to enforce a real burden. But in qualifying the word "detriment" by the word "material" section 8(3)(a) plainly imports a question of degree. I think counsel for the appellants was well founded in saying therefore that there must be a threshold between that degree of detriment which will qualify an interest to enforce and that degree of detriment which will not.

[23] To say that there is a threshold however does not take one very far in identifying precisely where that threshold lies and in my view the best that can be said is that it will depend on the particular circumstances of the case. Indeed section 8(3)(a) specifically relates the question of material detriment to the circumstances of

the case. Burdens are of many and varied kinds and the breach of a burden will not necessarily affect all benefited properties in the same way. It will always be a matter of judgement therefore whether the particular facts and circumstances of the case add up to a detriment of such a degree as to amount to material detriment and it is perhaps because of the variety of circumstances which may be found to exist that section 8(3)(a) of the 2003 Act is expressed in such general terms.

[24] Against that background I doubt the wisdom of going beyond the language used in the section. The word "material" is an adjective of degree and it must be open to question whether any greater precision of meaning can be achieved by resort to other adjectives of degree. The question posed in the title of Professor Reid's article - How material is "material"? - illustrates the point. When the Scottish Parliament has chosen to describe the detriment necessary to instruct an interest to enforce in one way why should it be thought appropriate to describe it in another? Were it not for the fact that the sheriff has done just that, aided and abetted by the parties, I would have thought it unnecessary and unhelpful to go beyond the words used.

[25] In defence of the sheriff however it might be argued that one can at least test the true meaning of "material" by reference to a variety of synonyms provided always that one remembers the context in which the word is used. On that approach I think there is a difficulty in the sheriff's use of the word "substantial", not least for the reasons outlined by counsel for the appellants under reference to Professor Reid's article. The sense in which the sheriff has used that word seems to be "of ample or considerable amount" but it is difficult to see what justification there could be for setting the threshold at that level in the context of qualifying an interest to enforce. If that is what the sheriff has done, in my view he has set the threshold too high

[26] Similarly I think it unhelpful to have resort to the law of nuisance which, apart from the other considerations referred to by counsel, would not provide a useful point of reference in relation to every type of burden. No doubt there are words derived from the law of nuisance which could be applied appropriately in the context of the enforcement of real burdens and one could not take issue with the sheriff's view that "material detriment" would exclude a result which was "sentimental, speculative or trivial". But the contexts are nevertheless entirely different and any such similarity of language is coincidental.

[27] If one has to resort to synonyms at all, in my view a better reflection of the true meaning of "material" in this context would be found in words such as "significant", "of consequence" or "important", although in relation to the latter word it might be thought to carry an inappropriate connotation of subjectivity which it is necessary to remove. Even these words however are no less imprecise than the word "material" itself. While this imprecision might be seen as a weakness in the legislation, it might equally be inferred that there is a deliberate intention to leave the identification of an interest to enforce to the judgement of the court on the basis of a common sense and practical approach in light of the particular circumstances presented to it. 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. If that leaves an element of uncertainty for burdened and benefited proprietors that is simply the consequence of the general and imprecise terms in which the Scottish Parliament has chosen to legislate.

[28] One consequence of this approach is that, in my view, there is a band within which different decisions may be equally sound and in such circumstances the scope for interference by an appellate court in the sheriff's exercise of judgement will be subject to well recognised limits. That appeared to be conceded on both sides of the bar.

[29] In the present case the respondent conceded that the sheriff had approached the question of material detriment on an erroneous basis and it seemed to be common ground that in that event the whole matter was at large for me. Approaching the appeal on that basis, I consider that I am nevertheless entitled to proceed on the sheriff's assessment of the weight and significance of the detriment that he found established, particularly

since neither party invited me to examine the notes of evidence. Furthermore neither party suggested any flaw in the sheriff's evaluation of the circumstances presented to him.

[30] The five categories or types of activity founded on as supporting a case of "material detriment" are specified in finding in fact 21 but that finding does not afford a complete picture unless one also examines the frequency, nature and extent of the incidents to see what is their effect both individually and cumulatively. The extent of the detriment founded on is confined to the incidents recorded in a log kept by the appellants for a period of seventeen months (no. 5/4/2 of process), the tenor of which is summarised by the sheriff at pages 21 and 22 of his note. Quantitatively speaking the sheriff did not consider that these amounted to a great number of incidents. Furthermore it is clear that not all of the incidents complained of could be related to the respondent's business and that some of the late night traffic was caused by the respondent's daughter returning home after a night out. Of perhaps greater significance is his view that all the incidents could be characterised as trivial, most of them being over in either seconds or minutes and some of them due to "a concatenation of circumstances that was unlikely to be repeated." Accordingly it seems clear that on the sheriff's evaluation of the evidence a finding of only infrequent minor irritations could be supported.

[31] While it is true that the sheriff expresses the opinion that "with a few more serious incidents" the result might have gone the other way, this does not seem to me to detract from the overall impression given by the sheriff that those incidents which had occurred were essentially trivial. Not having had the benefit of seeing the witnesses myself nor having been referred to the notes of evidence, I do not consider that I am in any position to reach a contrary view.

[32] On the sheriff's view of the evidence therefore I have come to the conclusion that, even on a lowered threshold of detriment, the appellants have not demonstrated that the incidents founded on constitute "material detriment" to the enjoyment of their ownership of their respective properties. It should also be borne in mind that, in seeking permanent interdict, the appellants require to show that on a balance of probability there will be material detriment in the future. The sheriff's view seems to be even less supportive of that likelihood than it was for the past. He accepted the respondent's evidence that she did not intend to increase her business beyond her present use at one third of capacity and he seems also to have placed much store by the fact that the respondent had been on a steep learning curve during the period in question and that she had made mistakes which she was anxious to avoid in the future. Thus there were steps which the respondent could take in the way she ran her business which would reduce the chance of incidents such as those complained of re-occurring. To this can be added a number of easy steps that all parties could take, such as appropriate signage, which the sheriff thought would cut down the irritating incidents which had taken place.

[33] It follows that in my opinion the sheriff reached the right result in light of his evaluation of the factual circumstances which he found established and that accordingly the appeal should be refused. Parties were agreed that the expenses of the appeal should follow success and that the appeal should be certified as suitable for the employment of junior counsel.