SHERIFF APPEAL COURT

[2018] SAC (Civ) 8
PER-A127-16

Sheriff Principal M Lewis
Appeal Sheriff A MacFadyen
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by APPEAL SHERIFF ROSS

in appeal by

CATHERINE FRASER and GEORGE FRASER

Pursuers and Respondents

against

GEORGE McDONALD and MARJORY McDONALD

Defenders and Appellants

Appellants: Upton, advocate; Thorntons Law LLP
Respondent: Bennie, advocate; Jackson Boyd LLP

28 March 2018

[1] The appellants own an area of land at Stanley, Perthshire. In about 2008 they identified a part of that property ('plot A'), sufficiently large to accommodate a house and garden, which was subsequently sold to the respondents in 2011. By a deed of servitude dated 25 August 2008, but registered only in January 2010 (the '2008 deed') they created a servitude right of access to plot A along a road (the 'access road') which was not then fully formed, but would adjoin the east boundary of plot A and run some distance eastwards to connect to a nearby public roadway. That servitude right of access would only be created, as a matter of law, when the plot was sold to a third party (Title Conditions (Scotland) Act 2003

section 75(2)). The servitude right for plot A (more formally the "benefited property" described in the 2008 deed) was recorded in respect of plot A and also in respect of the surrounding, burdened land.

[2] In about November 2011 by disposition (the '2011 disposition') the appellants sold most, but not all, of the area of plot A to the respondents. This triggered a first registration in the Land Register of Scotland. The respondents subsequently built a dwelling house and usual services upon that smaller plot ('plot A minus' or 'the respondents' property', more formally the subjects described in the 2011 disposition). Plot A minus is entirely within the boundary of plot A, but somewhat smaller.

[3] The respondents, as part of those construction works on plot A minus, formed a wide driveway leading to the access road. It connected along the south boundary of plot A minus. The appellants wished the driveway intersection with the access road to be of more modest proportions. A dispute arose between the parties. This action was raised. The title was inspected. A doubt arose as to whether the respondents actually enjoyed an express servitude right of access at that junction to the access road. That question led to a debate restricted to that separate issue, and in turn to this appeal.

The relevant law

[4] Parties recognised that, in order to create a positive servitude by deed, it must be registered against both the burdened and benefited property (Title Conditions (Scotland) Act 2003 section 75). To find such a servitude, it is necessary to examine what has been registered. The effect of registration and Keeper's duties are set out (for pre-2012 transactions) in the Land Registration (Scotland) Act 1979 sections 3, 5, 6 and 9. No dispute

arose about the effect of these provisions. The learned sheriff correctly applied the law on the effect of registration.

[5] The question of whether the respondents enjoy this particular express servitude of access depends on what has been registered against the parties' respective titles. The learned sheriff construed the land certificate in such a way as to find a servitude right. In our view he was mistaken as to the facts of the relevant entries, and we will allow this appeal.

The facts on the ground

[6] The issue arises as follows: viewed on a map, plot A was roughly a rectangle aligned north-south. The 2008 deed of servitude granted to plot A a servitude right of access along an access road (not yet formed) from the south-east corner, in other words from the bottom right corner, leading eastwards across burdened property. The access road would connect with the base of the east side of the plot A. The southern side of the access road would align with the southern side of plot A.

[7] Between 2008 and the sale in 2011, the access road was formed. It extended, however, beyond what was shown in the 2008 deed. It was longer than shown, and did not stop at the east boundary of plot A. Instead it extended westwards across the whole width of plot A and onwards to other properties. That extra section (the 'disputed section') was built along, and within, the southernmost boundary of plot A. It runs east to west.

[8] The defenders then marketed plot A minus. Ignoring some lateral truncating, plot A minus has the same northern boundary as plot A, but does not extend as far as the southern boundary of plot A. As a result, it reaches only as far as the access road. The difference between the north/south dimensions of plots A and A minus, is approximately equal to the width of the access road. The effect is that, whereas plot A included the land on which the

access road was subsequently built, plot A minus does not. As a result, the respondents were not offered, and did not purchase, that area of the access road which ran through plot A. They do not own the disputed section of the access road. Unfortunately, it also appears that they did not have an express servitude right over the disputed section, because the servitude right granted by the 2008 deed stopped at the east boundary of plot A, to the east and to the south of plot A minus. As a result, the disputed section, which runs east/west over plot A but outside, and to the south of, plot A minus, is an area of the access road to which the respondents neither have title nor an express servitude right to use for vehicular access. By a matter of a few metres, plot A minus appears to have no express servitude right of access from the access road.

The registered title

[9] The titles are registered and plot A minus is identified in the relevant title plan. The access road is shown as a yellow line on the title plan. It travels westwards from the main road to the east, towards and eventually along the south boundary of the respondents' property (plot A minus), and beyond. A reader might assume that it represented a right of access to the respondents' property. The title plan, however, contains no such assurance. It is simply an undescribed yellow line. It is not described there as an 'access road' or anything else.

[10] It is necessary to look to the written description. The Property section refers to the respondents' property subjects, together with servitude rights contained in various grants and deeds of servitude and a disposition. Parties agreed that entries four and five of the Burdens section are the relevant deed references.

[11] None of these entries creates the necessary servitude right of access. Entry 5, 'part 4', '(six)' creates a servitude right, but over the wrong area of road (to the west of the respondents' property). Otherwise no relevant servitude is created. Entry 5, "part 4", "(three)" refers to 'The servitude rights benefiting the Property [i.e. the respondents' property] contained in the Disponer's Servitude Deed [namely the 2008 deed]'. Entry 5, "(Part 5)" refers to servitude conditions, rather than servitudes themselves, and section "(Three)" thereof states:

> 'With reference to the Disponer's Servitude Deed [the 2008 deed]:- '(i) The route of the access which has now been formed is shown tinted yellow on the said Plan between the points lettered "B" and "D" in blue on the said Plan'.

Unfortunately, while that reference includes the disputed area, Part 5 does not confer any servitude right. The reference is to a 'route' of 'an access' and appears to be ancillary to an obligation ("(ii)") to keep the access road clear of debris and mud during use by construction traffic. The use of the word 'access' does not confer any right, as it accurately describes that the route is an access for various properties to the west, and Part 5 is not concerned with servitudes, but their conditions.

[12] Counsel for the respondent could not identify any further entries which assisted her case.

[13] Parties did not dispute the relevant principles of law. This is a fact-based exercise. Our conclusion on what the title plan and sheet contains is different to that of the sheriff. In our view he has erred in his construction of the registered title. We will sustain the appeal.

Equitable principles

[14] The respondent has a subsidiary position based on the proposition in *Chalmers Property Investment Co Ltd* v *Robson*, a 1967 House of Lords case reported at 2008 SLT 1069. Lord Guthrie endorsed the principle that the court would not allow the clear intention of parties to be defeated by a mere inaccuracy in expression, and that documents should be construed so as to give them effect. However, we agree with the appellants' submission that Lord Guthrie limited this dictum to 'when the description was merely expository', in other words when explaining or describing something. That is not the same as defining a right. In *Chalmers*, the dispute was whether a 'spring or well' was the same thing as a streamlet or a burn. By contrast, in the present case the physical limits and descriptions of the servitude granted are plainly set out and are not ambiguous. There is no inaccuracy to be corrected, or overt error in the title deeds. We agree that *Chalmers* does not provide a means of finding a servitude right where none has been granted. It follows that in our view the learned sheriff erred in sustaining that subsidiary submission.

[15] The matter does not, however, end there. Counsel for the appellant submitted that an implied servitude of access can be created in some circumstances, albeit any servitude right of access thereby created may be restricted in its dimensions and extent. The respondent pleads no such case on record. Counsel for the respondent intimated that the respondents' pleadings would be amended, in the course of further procedure, to introduce such a case. That may meet any equitable issues arising in this case, but because that is a matter for further proof we express no view. Rectification of the register might be a statutory remedy, but that is not sought in the present action and again we express no view.

[16] We record that counsel for the appellant presented further argument about the high hurdle for finding irrationality before construction may allow remedy, based on *Pink Floyd Music Ltd* v *EMI Records Ltd* [2010] EWCA Civ 1429, *Cherry Tree Investments Ltd* v *Landmain*

Ltd [2012] EWCA Civ 736 and *Scottish Widows Fund* v *BGC International* [2012] EWCA Civ 607. These are English authorities, and were not the subject of detailed submissions, and because we have reached the foregoing view on *Chalmers* we have not relied on them.

Disposal

[17] The debate dealt only with the preliminary issue discussed here. Whatever occurs, it will be necessary for this case to go back for proof. We have reached a different analysis of the title deeds from that of the sheriff, and we find that the subsidiary submission based on *Chalmers* does not assist the respondent. We will accordingly allow the appeal, recall the interlocutor of 19 July 2017 and remit the cause to the sheriff to proceed as accords.

[18] Parties agreed that the expenses of this appeal should follow success, and that sanction for junior counsel should follow. We will accordingly find the respondents liable to the appellants in the expenses of this appeal procedure, and certify the cause as suitable for the employment of junior counsel for this appeal procedure only.