SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2020] SC LIV 30

A59/16

JUDGMENT OF SHERIFF DOUGLAS A KINLOCH, ADVOCATE

in the cause

WEST LOTHIAN COUNCIL

Pursuers

against

THE EXECUTORS OF GEORGE CLARK

Defenders

Pursuers: Davie, Advocate
Defenders: Garrity, Advocate

Livingston, 3 June 2020

The Sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:-

FINDS IN FACT

1. The Pursuers are West Lothian Council, having a place of business at Civic Centre, Howden South Road, Livingston. The Defenders are Thomas Aitken Clark, residing at West Muir Farm, West Calder, and Turcan Connell (Trustees) Limited, as executors of the late George Anderson Aitken Clark. The Pursuers seek an interdict in relation to an alleged wrong relating to the said West Muir Farm, and this Court accordingly has jurisdiction.

2. By feu disposition dated 7 November 1985 and recorded GRS (Midlothian) 30 May 1986, Lothian Regional Council disponed an area of land, known as West Muir farm, West Calder, to Mr George Clark.

3. The copy disposition number 6/2/6 of process is a true and accurate copy of said feu disposition.

4. The said feu disposition contained a right of pre-emption in favour of Lothian Regional Council.

5. The pursuers are the statutory successors to Lothian Regional Council by virtue of the Local Government (Scotland) Act 1994.

6. West Lothian Council never registered any notice under section 18A of the Abolition of Feudal Tenure (Scotland) Act 2000 in relation to the right of pre-emption.

7. George Anderson Aitken Clark died on 23 November 2011.

8. By letter dated 17 December 2015 the solicitors acting for the executors of the said George Anderson Aitken Clark wrote to West Lothian Council stating *inter alia* that:-

> *"As required in terms of the Feu Disposition, we hereby give you notice on behalf of the Executors, that the Executors desire to dispose of that part of the Feu shown coloured red and brown on the plan annexed, by way of a sale."*

9. Number 5/3/1 of process is the said letter dated 17 December 2015 received by the Pursuers. The plan attached thereto is the plan which was annexed to the said letter.

10. By letter dated 23 December 2015, Wendy Richardson, a solicitor employed by West Lothian Council, replied to the solicitors acting for the executors stating *inter alia* that:-

> *"I refer to your letter dated 17 December 2015 indicating that your clients wish to sell the land shown coloured red and brown on the plan annexed to your letter. The area coloured brown is not clearly visible on plan. Please confirm where this is located."*

11. Number 5/1/3 of process is a true and accurate copy of said letter dated 23 December 2015.

12. There was no response on behalf of the solicitors acting for the executors to the said letter of 23 December 2015 until 25 January 2016. In said letter of 25 January 2016 the solicitors for the executors indicated that the executors were no longer bound by any right of pre-emption. Number 5/1/4 is a true and accurate copy of the said letter dated 25 January 2016.

13. The brown area referred to in the letter from the executors dated 17 December 2015 was not visible.

14. It was not possible for West Lothian Council to ascertain where the brown area on the plan was, even with the assistance of a consideration of said disposition or the disposition plan attached thereto.

FINDS IN FACT AND LAW

1. A right of pre-emption was created in the Feu Disposition by Lothian Regional Council in favour of George Anderson Aitken Clark dated 7 November 1985 and recorded GRS (Midlothian) on 30 May 1986;

2. That right continues as a contractual obligation between the original contracting parties or their successors notwithstanding the Abolition of Feudal Tenure (Scotland) Act 2000;

3. The successors to the original contracting parties are West Lothian Council and the executors of George Anderson Aitken Clark;

4. The letter sent on behalf of the Defenders to the Pursuers dated 17 December 2015 did not clearly specify which area of land the Defenders sought to dispose of;

5. The failure to specify clearly the area of land that the Defenders sought to dispose of meant that the letter (a) did not comply with the formal requirements of the contract, (b) could not be understood by a reasonable recipient of the letter, and (c) did not constitute a valid notice in terms of the contractual right of pre-emption;

6. If the letter dated 17 December 2015 did constitute proper notice under the contract, and was an offer to sell, then the letter from the Pursuers dated 23 December 2015 was intimation to the Defenders that it was on terms which were unreasonable, and the pre-emption right was accordingly not extinguished.

THEREFORE

Sustains the Pursuers' 2nd, 3rd, and 6th pleas in law; Repels the Defenders' pleas in law;

Finds and declares that the Defenders as executors of the late Mr George Clark are bound by the pre-emption right contained at condition (SIXTH) (One) of the disposition by Lothian Regional Council in favour of George Anderson Aitken Clark dated 7 November 1985 and recorded GRS (Midlothian) on 30 May 1986 in favour of the Pursuers;

Finds and declares that the letter dated 17 December 2015 on behalf of the defender to the Pursuers and produced in the 3rd inventory of productions for the Pursuers 5/3/1 is not a notice in terms of condition (SIXTH) (One) of the Feu Disposition by Lothian Regional Council in favour of George Anderson Aitken Clark dated 7 November 1985 and recorded GRS (Midlothian) on 30 May 1986;

Finds and declares that the Defenders are not at liberty to sell or otherwise dispose of West Muir farm, West Calder, as described in said disposition, or any part thereof;

Interdicts the Defenders and any others acting for them or on their instructions from selling, transferring, negotiating for sale or concluding missives for the sale or transfer of or change of registration of title of any part of West Muir Farm, West Calder described in terms of the Feu Disposition by Lothian Regional Council in favour of George Anderson Aitken Clark dated 7 November 1985 and recorded GRS (Midlothian) on 30 May 1986 now vested in the Defenders as executors of the late George Anderson Aitken Clark;

Continues consideration of all questions of expenses meantime.

NOTE:

[1] There are two issues in this case. The first is whether a right of pre-emption created in a feu disposition in 1986 survived the abolition of the system of feudal landholding in 2004. The second is whether, if it still exists, the right was extinguished by a notice given by the Defenders to West Lothian Council in 2015 under the pre-emption clause.

Introduction

[2] The circumstances which led to this litigation are that in 1986 Lothian Regional Council disponed West Muir Farm on the outskirts of West Calder to a Mr George Clark. The disposition to Mr Clark contained a pre-emption clause which gave Lothian Regional Council the right to buy the land back at agricultural land values in the event of Mr Clark seeking to sell the land at a later date. The pre-emption clause stated that the right was given to Lothian Regional Council as feudal "superiors", and that Mr Clark's obligation was as "feuar".

The pre-emption clause

[3] It is, I think, worth setting out at this stage the terms of the pre-emption clause in full. It is contained in the disposition by Lothian Regional Council in favour of George Anderson Aitken Clark, dated 7 November 1985 and recorded on 30 May 1986. An extract of the disposition has been lodged as number 6/2/6 of process, and is agreed by Joint Minute (number 30 of process) to be an accurate copy. The right of pre-emption in favour of Lothian Regional Council was in the following terms: –

> "AND ALSO WITH AND UNDER the following additional burdens, conditions, reservations , and others videlicet:-

> … (SIXTH) There is reserved in favour of the superiors a right of pre-emption of the feu or any part thereof in the events and upon the terms and conditions following namely: (One) in the event that the feuars may at any time desire to dispose of the feu or a specified part thereof whether by way of sale, transfer, exchange or otherwise, (not being a disposal by way of heritable security or mortgage or lease) the feuars shall give to the superiors notice in writing of their desire so to do: (Two) if after the feuars have given notice as aforesaid, the superiors shall desire to repurchase the feu or such specified part thereof and shall give to the feuars within twenty one days of the receipt from the feuars of the said notice, a notice in writing signifying such desire then the feuars shall forthwith reconvey or otherwise retransfer the feu or such specified part thereof to the superiors for a price equal to the current open market value of the feu or such part thereof as the case may be as at the date of the said last mentioned notice, the amount of which current open market value shall be arrived at on the basis that the use thereof is restricted to agricultural purposes only and shall failing agreement between the parties be determined by an arbiter to be nominated by the President of the Scottish Branch of the Royal Institution of the Chartered Surveyors on the application of either party, With entry not later than thirty days after the said price shall have been determined or as at such other date as the parties may agree: Declaring that the said price shall be payable on the last mentioned date of entry in exchange for a valid Disposition in favour of the superiors and delivery of the titles in the possession of the feuars and if appropriate search in the Property and Personal Registers showing clear records to the date of settlement of the transaction: (Three) if upon receipt from the feuars of a notice signifying their desire to dispose of the feu or such specified part thereof as aforesaid superiors do not signify their willingness to repurchase the same in manner and within the period specified as aforesaid, or within that period signify in writing to the feuars that they do not desire to repurchase the feu or such specified part thereof, then the feuars shall upon expiry of that period or on receipt of such writing, as the case may be, be at liberty to sell or dispose of the same."

[4] It appears to me to be clear that the intention of clause (SIXTH) was to create a right of pre-emption which was constituted as a real burden in favour of Lothian Regional Council as feudal superior. The Council was given the right to buy the land back at agricultural values.

Local Government Reorganisation

[5] In 1994 local government reorganisation took place. The Local Government (Scotland) Act 1994 abolished Lothian Regional Council. West Lothian Council became the statutory successors to the rights and obligations previously held by Lothian Regional

Council. All heritable property which had previously been owned by Lothian Regional Council was transferred to West Lothian Council by the Local Authorities (Property Transfer) (Scotland) Order 1995.

Abolition of feudal tenure

[6] On 28 November 2004 the centuries old feudal system of land ownership in Scotland came to an end, having been abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000. From November 2004 onwards every feudal estate ceased to exist, and was replaced by a new system of "land ownership". The relationship of superior and feuar also disappeared at the same time.

[7] Further changes to the system of land ownership were made by the Title Conditions (Scotland) Act 2003. Of most relevance to the present case is section 18A of the 2003 Act which allowed a superior to retain an existing feudal right of pre-emption by converting it into a personal right of pre-emption. To do this the superior had to register a s18A notice before the "appointed day". According to Professor KGC Reid (see "The Abolition of Feudal Tenure in Scotland", [2003], section 4.23) the effect of a s18A notice is as follows:-

> "Assuming the notice to have been validly drawn up and registered, and the feudal real burden to be still enforceable, the result on the appointed day is for the feudal pre-emption to be converted into a personal pre-emption burden. Its holder is the (former) superior or, if the superiority has changed hands since registration of the notice, that person's successor."

[8] West Lothian Council never registered any s18A notice in relation to the right of pre-emption created by the Disposition.

Letter of 17 December 2015

[9] Mr Clark died in November 2011. His executors wished to sell part of the farm for, it would seem, development purposes, which would give the land a value far in excess of its value as agricultural land. As required by the pre-emption clause they gave notice by letter dated 17 December 2015 to West Lothian Council, as Lothian Regional Council's successors, of their intention to sell. In the letter of 17 December 2015 the solicitors acting for the executors said, *inter alia* that:

> *"As required in terms of the Feu Disposition, we hereby give you notice on behalf of the Executors, that the Executors desire to dispose of that part of the Feu shown coloured red and brown on the plan annexed, by way of a sale.*
>
> *If you have any queries, please contact Rachel Davies in the first instance."*

[10] In terms of the pre-emption clause West Lothian Council had 21 days to say whether they wished to exercise the right given in the pre-emption clause to buy back the land, otherwise they would lose the right of pre-emption. Wendy Richardson, a solicitor employed by West Lothian Council, replied on 23 December 2015, well within the 21 day period, seeking clarification as to where the brown area was. In her letter she stated *inter alia* that:-

> *"The area coloured brown is not clearly visible on plan. Please confirm where this is located."*

[11] Despite the offer in the letter sent on behalf of the executors to deal with any queries, no clarification was forthcoming. The 21 days expired. The executors' position was that they were now entitled to sell the farm. They wrote to the Pursuers on 25 January 2015 (5/1/4 of process) stating their position as follows:

> "We *thank you for your letter of 23rd December 2015. That letter did not give the requisite notice in terms of the relevant Feu Disposition. The time limit within which you had to give the relevant notice has now expired. Your interest in the subjects of our letter of 17th December 2015 is at an end and our clients do not have to make an offer to you. We*

> *enclose a copy of the Opinion which we have received on this matter and which we have been authorised to send to you by professor Paisley."*

Professor Paisley offered the view that the letter from West Lothian Council dated 23 December 2015 did not state that the Council wished to buy back the land, and that the right of pre-emption had terminated.

[12] Wendy Richardson responded to this letter in detail on 2 February 2016 (5/1/6 of process). In her letter she said *inter alia* that:-

> *"The Council is entitled to know which area of land your clients wish to sell. Your initial letter did not provide sufficient detail to allow the Council to identify that land and invited the Council to contact your firm if further information was required. Unfortunately, no further information was provided in response to my written request for clarification or in response to a subsequent telephone call from the Council's Estates Section. You allowed the twenty one day time limit detailed in the feu disposition to expire without responding to requests for further information and now seek to rely on that failure. I do not consider that your clients have met their obligations as detailed in the 1986 Disposition and I do not therefore consider the Council's right of pre-emption to be at an end."*

[13] Matters did not proceed to an agreed resolution, and as West Lothian Council maintained that the purported notice did not give them proper notification of which area of land the executors wished to sell, they raised the present action of interdict in 2016 against the executors to prevent any sale.

Procedural history of the action

[14] The Defenders took the case to debate in order to try and have the action dismissed without a proof taking place. They argued at the debate that as a result of the abolition of the feudal system the right of pre-emption no longer existed, and that even if in principle it might have been able to survive the reform of the law, the Pursuers' averments did not set out any circumstances in which the Pursuers were able to claim that the pre-emption clause

remained alive as a matter of fact. They also argued that the Pursuers' case that the notice was invalid was, for various reasons, irrelevant as a matter of law.

[15] The Sheriff who heard the debate (Sheriff Edington) did not accept the Defenders' arguments and allowed a proof before answer.

[16] This case thereafter called before me for proof at Livingston Sheriff Court on 26 April, and 26 November 2019, and 4 February 2020. The Pursuers were represented by Ms Davie, Advocate, and the Defenders by Mr Garrity, Advocate, as instructed by Turcan Connell, Solicitors. I heard evidence at the proof from three witnesses on behalf of the Pursuers (namely a solicitor who formerly worked for West Lothian Council, a Regional Valuer, and an experienced conveyancing solicitor), and one witness on behalf of the Defenders (also an experienced solicitor). At the conclusion of the evidence the case was continued to 7 April 2020 for submissions. Before the submissions could be heard the case had to be adjourned for an unknown period of time because of the emergency situation created by the Coronavirus, and parties agreed that the final day of the proof would be dispensed with, and that their submissions would take the form of written submissions in order to allow a judgment to be prepared.

Preliminary matter

[17] Before turning to the evidence at the proof, and the issues raised by it, there is an important preliminary matter with which I must deal. It is that Counsel for the Defenders sought in his written submissions to re-open some of the points dealt with by the Sheriff at debate. He argued that the case called before me as a proof before answer, and that everything had to be considered of new taking into account the evidence that had been led at the proof, even though these matters had been considered by the Sheriff at the debate.

For her part, the Pursuers' Counsel accepted that as a proof before answer had been allowed it was technically open to me to look at all matters of law again, and consider them in the light of the evidence led at the proof, but contended that the evidence raised nothing new, and that the points raised at debate had therefore been decided once and for all. She argued that as the Defenders' arguments had been rejected, they were, no longer open for reconsideration.

[18] In order for me to decide whether Sheriff Edington's decision was effectively final, or whether the evidence led at the proof means that a reconsideration of the legal points is necessary, it is in my view necessary for me to look in more detail at the points raised at debate, and the Sheriff's decision regarding these.

Arguments at debate

[19] At the debate the executors argued that despite the fact that they had given notice to West Lothian Council of their intention to sell as required by the pre-emption clause, and regardless of whether or not their notice was valid, the pre-emption clause had in fact ceased to exist by virtue of the abolition of feudal tenure and the failure of West Lothian Council to record a s18A notice. Their argument was that the right of pre-emption was a feudal right created in favour of Lothian Regional Council as feudal superiors. The superiority had been abolished by the 2000 Act, and so the right of pre-emption had ceased to exist also. Parliament had created a mechanism for rights of pre-emption to continue but West Lothian Council had failed to take advantage of that. The pre-emption clause had flown off. They argued that the letter giving notice to West Lothian Council of the executors' intention to sell could therefore be ignored, as the right of pre-emption no longer existed. The executors

were therefore entitled to sell the land. They argued that the action ought accordingly to be dismissed.

[20] Although the Defenders' submissions at the debate were mainly concerned with the argument that there was no longer any existing feudal right of pre-emption, and although it is somewhat obscured in the Pursuers' pleadings by the many references to the 1986 disposition, West Lothian Council appear in fact to accept in their pleadings that the feudal right of pre-emption is no longer valid and cannot be enforced. This appears to be the meaning of the following averments which the Pursuers make:

> "The terms of the pre-emption in the Disposition are clear. The right of pre-emption was originally constituted as a title condition and continues to subsist. Notwithstanding the abolition of the feudal system with effect from 28 November 2004, the right of pre-emption continues as a contractual agreement."

[21] Any doubt as to the meaning of those averments was removed at the debate, as Sheriff Edington in his judgment recorded that West Lothian Council specifically accepted before him that the feudal right of pre-emption as created by the disposition was no longer in existence. Thus at page 4 of his judgment the Sheriff records the following:

> "At this point Miss Davie for the Pursuers indicated that the Pursuers accept that this is a matter of contract and not feudal tenure."

And at page 20 he records also that Miss Davie accepted that:

> "WLC cannot rely on a feudally preserved right of pre-emption but they can and do rely on a contractually preserved right".

[22] I would mention that it seems to me, for what it is worth, that Miss Davie was right to make the concession which she did. For example, the following excerpt from the discussion paper produced by the Scottish Law Commission on real burdens prior to the reform of the law (number 106) shows that the abolition of feudal rights of pre-emption is what was envisaged:-

> **"Feudal burdens .**
> 3.4 Real burdens which are created as part of a subinfeudation are enforceable by the superior/granter and by his successors as superior. The superiority, in other words, is the dominant tenement in the burdens. This right of the superior arises by implication, although sometimes it is expressed in the deed. It follows therefore that all burdens created in a grant in feu are, necessarily, feudal burdens and are enforceable by the superior. The same rule applies where the burdens are contained in a separate deed of conditions executed in association with a grant in feu. We need not linger over the details. With the abolition of the feudal system, all feudal burdens will disappear. In this paper we are concerned almost exclusively with a post-feudal world."

Similarly the following article from the Journal of the Law Society of Scotland published on 19/06/2006 confirms that abolition of the feudal system had the effect that the Law Commission envisaged. The article is entitled "Is that burden dead yet?":-

> **"Feudal deeds".**
> Where burdens were created in a feudal deed there are three possible positions: (a) it was preserved by the feudal superior; (b) it is enforceable as a community burden; or (c) it was extinguished. The first position is easily determined from examination of the register, because for a superior to preserve real burdens it was necessary to register a notice under Part 4 of the 2000 Act prior to the appointed day. Preservation was as a personal real burden …"

There are no doubt numerous other sources of confirmation of this position, but as the point is conceded I need not mention them. In my view Miss Davie was clearly correct to make the concession which she did. The system of feudal tenure was abolished by the 2000 Act, with effect from 28 November 2004. On that date feudal superiors were also consigned to oblivion. The 2000 Act was amended by the Title Conditions (Scotland) Act 2003 in order to give persons who had formerly been superiors the opportunity to convert existing feudal pre-emption rights into a continuing personal right of pre-emption. The mechanism was registration of a notice under section 18A of the 2000 Act. This did not take place here, and so it is, in my view, very clear that the feudal right of pre-emption which was created in favour of Lothian Regional Council disappeared on 28 November 2004 together with the abolition of the feudal system.

Contractual rights

[23] Despite the concession made by the Pursuers that the feudal pre-emption right no longer existed, the Pursuers argued at the debate that West Lothian Council still had an enforceable right of pre-emption, but that it was a *contractual* right of pre-emption with Mr Clark. They argued at the debate that the feu disposition by Lothian Regional Council to Mr Clark created a contractual right of pre-emption as well as a feudal real burden. It was said that the parties to the contract were Lothian Regional Council and Mr Clark, and that on the transfer of the property to West Lothian Council in 1994 (on local government reorganisation) West Lothian Council succeeded to the contractual rights previously held by Lothian Regional Council. They argued that on his death Mr Clark's obligations under the contract had passed to his executors, in accordance with the general rule of contract law that unless there is *delectus personae* obligations pass to executors on the death of a contracting party. It was argued that West Lothian Council were therefore entitled to enforce a contractual right of pre-emption, and accordingly had title to sue. It would be wrong, they argued, if the right of pre-emption which had been put in place in the interests of the West Lothian Council ratepayers should have disappeared.

Decision of Sheriff at debate

[24] It is clear that Sheriff Edington was persuaded by the Pursuers' arguments and found that they had title to sue. However, having read his judgment a number of times, he proceeded, as I understand it, on the basis of his understanding that there was agreement between the parties that there was a contractual right of pre-emption which had continued to exist after the abolition of the feudal system. Thus he said in paragraph 70 of his judgment (at page 38) that:

> "It appears to be agreed between the parties that this is not a perpetual feudal contract but that the original right of pre-emption remains valid in terms of it being a contract between the parties, or their successors despite the passing of The 2000 Act".

On the basis of that understanding, the Sheriff held that the Pursuers had title to sue. He took the view that the contractual rights and obligations which had been created under the contract had, on the one hand, transferred to West Lothian Council as the statutory successors to Lothian Regional Council in terms of local government re-organisation, and, on the other, had transferred to Mr Clark's executors on his death. He held that although West Lothian Council had never recorded or registered in any form any contractual right under the pre-emption clause, they were "vested" in the property as a result of local government re-organisation, and that was sufficient to give them title to sue as a matter of contract. He held that the death of Mr George Clark, the original buyer, did not end the contractual relationship between the parties, and did not bring any contractual right of pre-emption to an end, as George Clark's contractual obligations passed to his executors in terms of the general law of contract, even though the executors were not infeft in the property. He allowed a proof before answer so that evidence could be led in relation to the validity, or otherwise, of the notice served by the Defenders.

Can relevancy points be looked at again?

[25] In relation to all of this, I have come to the conclusion that it is incumbent on me, having now heard the evidence, to consider the single question of whether there was a contractual, as well as a feudal, right of pre-emption. I reach this conclusion on the basis that although the Sheriff at the debate understood that the Defenders conceded the continued existence of a contractual right of pre-emption, no such concession was made before me. The Defenders' position before me was that they did *not* accept that there was

any contractual right of pre-emption between the parties, or, alternatively, they maintain that if there was, it came to an end on the abolition of feudal landholding. It follows in my view that the Defenders are correct to argue that the question of whether any personal contract between the parties continues to exist after the abolition of feudal tenure is still a live question, as it was not decided upon at debate. It is, in my view, a question regarding which I need to give a decision now that the evidence in the case has been heard. This will, unfortunately, involve, at least to some extent, a reconsideration of the arguments put forward on the matter at the debate.

Was there a contractual right of pre-emption?

[26] In relation to the question of a contractual right of pre-emption, I can say immediately that I do not in fact regard the evidence which I heard as offering any assistance as to whether such a right exists. It is my view that the question is properly answered as a matter of law, and is not a matter of fact which is dependent on the evidence.

[27] In their pleadings the Pursuers' position is set out in a single sentence as follows:-

> "Notwithstanding the abolition of the feudal system with effect from 28 November 2004, the right of pre-emption constitutes a contractual agreement."

[28] In their written submissions lodged after the proof the Defenders maintain the position for which they contended at the debate, namely that there is no contractual right of pre-emption. It is worth setting out the relevant parts of their written submissions, which are as follows: –

> "30. The pursuer also appears to suggest that the real burden of pre-emption was and is somehow enforceable by it as a matter of contract, notwithstanding that (i) the pursuer has never been infeft in the interest of superior, and (ii) the right of pre-emption was extinguished along with the abolition of the feudal system. The Defenders have been unable to find any authority in support of the pursuer's

> proposition. Furthermore, it appears to run contrary to existing authority concerning title to enforce real burdens." …
>
> 36. There was never any direct contractual relationship between the pursuer and the Defenders …
>
> 38. … The pursuer fails to specify any separate contractual right that it now apparently seeks to found its case upon (the Defenders have made this criticism of the pursuer's pleadings before). The pleadings are based on the feu disposition, as was all the evidence before the court.
>
> When and how was that contract concluded? Who are the parties to it? What are its terms? When did it begin, and when does it end? How did the pursuer obtain any right? How can it operate independently and separately from the feu disposition, but in relation to the same area of land?
>
> The Defenders are unaware of any such contractual right existing separately from this superiority interest. The pursuer did not lead any evidence of such a contract. The only evidence before the court was the feu disposition. The feu disposition very clearly creates a right in favour of the superiors, not the pursuer. …
>
> 42. As is set out above, had West Lothian Council registered a s18A notice, it would have become entitled to enforce the new replacement personal pre-emption right against Mr Clark, and to assign the benefit of that personal pre-emption burden to a third party, similar to a contractual right … The Defenders submit that the Scottish Parliament could not have intended that the new rights provided for in terms of s 18A(7) were to operate alongside separate contractual rights, capable of separate assignation to and enforcement by an entirely different party.
>
> 43. That could lead to the situation whereby two separate parties were entitled to enforce effectively the same personal/contractual pre-emption right against the Defenders. The Defenders would be obliged to offer the same area of land to two different prospective purchasers at the same time and on the same terms and conditions. Such a dual obligation on the Defenders makes no sense and would be entirely unworkable. It is a position that the law avoids by placing enforcement rights only into the hands of the party infeft in the relevant tenement – in this case the former superiority – and now the holder of any personal pre-emption burden."

[29] In relation to the Defenders' submissions, it is true that it might not be obvious to think of the feu disposition as being a contractual document. It is, for instance, only signed by one party, namely the party disponing the property, whereas contractual documents are usually (but not, of course, always) signed by both parties to the contract. Moreover, in a transaction for the sale of heritable property it is the *missives* which are generally thought of

as constituting the contract. The missives are in due course superseded by the disposition (unless, as is usually the case the missives contain a non-supersession clause), and my understanding is that, at least in general terms, the disposition is simply the deed of conveyance of the land, which operates to transfer ownership of the land, and to create rights under the law of property, these rights being finalised once the buyer registers the disposition and becomes infeft in the property.

[30] However, contrary to the Defenders' submissions, it appears to be long established that a feu disposition is also a contractual document. Thus, in the well-regarded textbook *Conveyancing* (5th Edition) by Professors Gretton and Reid it is said at section 11-21 as follows: –

> "As well as being an executory deed, conveying of the land (and the writs and rents), a disposition is also a contract imposing obligations, usually on the granter but sometimes on the grantee. And whereas ownership passes to the disponee only on registration, the contractual obligations generally take effect immediately, on delivery of the disposition. The contractual obligations are: (i) entry; (ii) warrandice; (iii) obligation of relief; and (iv) miscellaneous obligations. Of these, warrandice may be left until later; the others are discussed below."

It is also said at 11-24 that:-

> "Other provisions sometimes found in dispositions may also have contractual effect. In particular, clauses providing for real burdens or servitudes have contractual effect from the moment of delivery of the deed …"

And at 14-30 it is said that:-

> "Sometimes, when land is split off and sold, the seller reserves the right of first refusal on a subsequent resale. This gives the option of buying back before the land is sold to someone else. Rights of pre-emption are common only in rural areas, and are found particularly where land is sold from a large estate. Sometimes a pre-emption is contractual in nature but more usually it is included within a conveyance with the idea (not always successfully realised) that it should be a real burden."

[31] These statements by the authors of the textbook are supported by the explanatory notes to section 17 of the 2000 Act, the section which abolishes superior's rights, which say as follows:-

> "It should be noted that under section 75 (saving for contractual rights), a former superior will retain any purely contractual rights. Like other conveyances, feudal deeds contain contractual terms which, on registration, become real burdens. In a dispute between the original parties to a feudal relationship, a condition in a feu which is valid as a real burden will also be valid as a contractual term. Even after abolition, a feudal superior will be able to enforce the terms of a feudal deed against the original vassal in so far as such terms are contractual. Section 17 (extinction of superior's rights) extinguishes only the real burden. Successive vassals are subject only to the real burden, not the contractual terms between the original parties."

A similar statement is to be found in the explanatory notes to section 75 of the 2000 Act where it is said as follows:-

> "Like other conveyances, feudal deeds contain contractual terms, such as warrandice or the conditions which, on registration, become real burdens. Such terms become enforceable immediately on acceptance of delivery of the deed, and thus before the superior/vassal relationship is constituted by registration. Section 54 makes clear that feudal abolition will extinguish (subject to exceptions) all rights and obligations of a superior which are held simply by virtue of being the superior. It is not, however, intended to extinguish contractual rights and obligations, whether created in feudal deeds or otherwise. Section 75 makes it clear that, even after abolition, a former superior will be able to enforce the terms of a feudal deed against the original vassal insofar as such terms are contractual. As with other contracts, the rights can be assigned."

It is not possible to ascertain the identity of the author or authors of the explanatory notes, but they provide strong confirmation that the view expressed by Gretton and Reid is correct.

[32] Surprisingly, perhaps, it seems from the Sheriff's judgment that the Pursuers' Counsel may not have offered any authority at the debate for the contention that the "right of pre-emption", which I take to mean the feu disposition itself, constituted a contract between the parties. She did, however, provide me with such authority. The Pursuers' Counsel in her written submissions at the end of the proof identified further confirmation of the contractual effect of a disposition. The submissions state as follows:-

"As stated in the Scottish Law Commission Report on Abolition of the Feudal System:

> 'A conveyance of land is, amongst other things, a contract between the parties, and the obligations which are to be constituted as real burdens are among the terms of that contract. Our recommendations will do nothing to disturb the contractual status of obligations. Thus while, on feudal abolition, a superior's rights to enforce the obligations as real burdens will go, any purely contractual rights will remain. This is a limited and temporary saving. Only the original parties to a deed are in contractual relations... This means that the original grantee of a feu disposition, while continuing to own the property, will be bound by the burdens, as a matter of contract.' (Scot Law Com, no 168, 11 February 1999, paragraph 4.88)

This position is underlined in the Stair Memorial Encyclopedia, Volume 18, in discussing the legal position when a real burden has not been properly constituted in a deed:

> 'However, while a failed real burden cannot affect successors it often binds the original parties to the deed in which it is contained. For conveyance, although unilateral in form [unlike a feu contract] is itself a type of contract. By accepting delivery of the deed the grantee is considered to have accepted its terms and is bound by them except where, unusually, they also fail by the rules of the law of contract.' (paragraph 392)

Lord Mackay, in the case of Co-operative Wholesale Society v Finnie (1937 SLT 900), strongly refuted an argument to the effect that a disposition did not constitute a contract in the following terms:

> 'In point of fact, we have before us here a very different case. It is the case of people who are still under direct contractual relations with one another… Now, further, the four heads to which the disponees agreed are designated in the following way:—"which declarations and stipulations above written are hereby declared real liens and burdens upon and affecting the subjects and others hereby disponed."… Then there was presented a sort of shamefaced argument that, despite the word "stipulation," these matters are not contractual because a disposition is a one-sided deed. Unlike a feu-contract, it does not bear to be executed by both parties. It is sufficient, I think, to say that such a restricted reading of the deed, which creates a new ownership of land, would be a reading which would completely score out of our books some dozens, I should think, of authorities in which contractual obligations have been found in, and enforced owing to, dispositions of land. The plain truth is that conveyance requires two parties, and that the occurrence of delivery of the document to the disponee named and of sasine taken complete the contractual relationship, if contract be plainly indicated in the terms of such deed.' (pages 842 – 843)."

[33] I regard all of these statements as set out above as carrying great weight, indeed as almost being authoritative. In any event, it surely must be correct that the feu disposition creates contractual obligations on both sides from the moment of delivery of the disposition. Otherwise it might be possible, for example, for a buyer who was subject to a right of pre-emption in favour of the seller to avoid his obligations simply by failing to record the disposition so that the real burden was never constituted, and then transferring ownership to a third party. It is only the existence of a contractual obligation arising on delivery of the disposition to the buyer that prevents either side from avoiding the obligations set out in the deed.

[34] It is also interesting to note that in an opinion from Professor Paisley sent by the executors' solicitors to the Pursuers (now to be found in the Pursuers' first inventory of productions as 5/1/4), Professor Paisley appears to accept that a contractual pre-emption was created. For example he states at 1.3 that: –

> "For brevity let me say I have accepted that certain aspect of the 1986 Feu Disposition potentially remain enforceable as contractual provisions and I have assumed this applies to the clause quoted below."

And at 2.1 he states that: –

> "The pre-emption stated above is now no longer a real burden and is merely contractually enforceable as a result of the dismantling of the feudal system and the extinction of superior's rights."

[35] It is important to note that none of the evidence which I heard really touched on the question of whether there was a contractual right of pre-emption (other than in an incidental reference to this by the first witness for the Pursuers, Wendy Richardson). However, although the precise circumstances of any case are always relevant, I do not believe that it would have been possible to lead any evidence which would have been relevant to the

question of whether the feu disposition created a contractual right of pre-emption. The contract came into being in this case essentially as a matter of law.

[36] I would mention also, for completeness, that while section 61 of the 2000 Act provides that there cannot be an obligation under both a feudal real burden and a contract at the same time, this only applies to deeds registered *after* the appointed day. The explanatory notes make this clear. There it is said as follows: –

> "When a burden is created (whether as a feudal or a non-feudal burden) it also operates as a contract between the parties. Section 61 prevents dual validity as both a contract and a real burden. In future an obligation will be either a burden or a contract, but it cannot be both. When the deed containing the obligation has been duly registered, the contractual liability will cease to the extent to which it is duplicated by the real burden. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. The section does not apply in cases where, notwithstanding registration, no real burden is created (e.g. because the obligation does not comply with rules as to content of a real burden set out in section 3). Nor (section 119(7)) does the section apply to constitutive deeds registered before the appointed day, except where the burdens are community burdens.

So section 61 has no relevance in the present case, the 1986 disposition being registered nearly 20 years before the appointed day.

Conclusion on existence of contractual right of pre-emption

[37] I have therefore come to the conclusion that as a matter of law, and contrary to the Defenders' arguments, the 1986 disposition did indeed create a contractual right of pre-emption in favour of the parties to the deed, which remains enforceable as between the original parties. There was nothing in the evidence which suggested in any way that this particular disposition did not create a contract.

[38] It follows that section 75 of the 2000 Act is, as the Pursuers argue, relevant in that it preserves the contractual right of pre-emption on which the Pursuers found.

Other relevancy points

[39] The existence, or otherwise, of a contractual right of pre-emption is the only relevancy point which in my view it is proper, or indeed competent, for me to consider. Now that I have held that a contractual right of pre-emption exists it seems to me that the question of the Pursuers' title to sue under the contract has already been decided upon by the Sheriff who heard the debate. He held, as set out above, held that if a contractual right of pre-emption existed then the Pursuers have title to sue, and I have held that there was indeed such a contractual right. As I regard the question of title to sue as having been adjudicated upon, I have not dealt with the Defenders' arguments as contained in their written submissions made after the proof to the effect that because West Lothian Council are not the original superiors, and because the executors are not infeft in the land, there is no title to sue and no correlating obligation by the executors to comply with the clause of pre-emption. These points were argued fully at debate and have been dealt with. The legal situation regarding the way in which local government reorganisation was achieved in relation to heritable property is set in the written submissions by the Pursuers' Counsel, but I need not consider that. All of that was considered by Sheriff Edington.

[40] I would mention, that my own view, for what it is worth, and I think, in agreement with Sheriff Edington, is that the arguments put forward by the Defenders regarding lack of infeftment are relevant only to a feudal right of pre-emption constituted as a real burden, rather than a contractual right where questions of infeftment do not seem to me to be relevant. If they were, the contractual right of pre-emption which comes into being on delivery of a disposition could never be enforced.

[41] It is also of note (as was drawn to my attention by the Pursuers' Counsel in her written submissions), that the Sheriff's decision at debate on the question of title to sue has

been subject to favourable comment by Professors Reid and Gretton in their manual "Conveyancing 2018" at page 25 which discusses the case. For ease of reference I will set out their commentary which is as follows:-

> "Today, pre-emptions which were created in a grant in feu can usually be disregarded, and indeed should no longer appear on the title sheets. This is because such pre-emptions were normally extinguished, with the feudal system itself, on the 'appointed day' (28 November 2003): see Abolition of Tenure etc (Scotland) Act 2000 s17. But there can be exceptions. One is where the superior acted to preserve the pre-emption by registering a notice before the appointed day under s18 or s18A of the 2000 Act. That, however, rarely happened. A second exception is where the pre-emption continues to bind the original grantee of the deed as a matter of contract. The present case was concerned with this second exception.
>
> On feuing Westmuir Farm, West Calder, to George Clark, in 1986, Lothian Regional Council included a right of pre-emption in the feu disposition. The question to be determined was whether the pre-emption continued to be enforceable, even after the abolition of the feudal system.
>
> If the original parties had remained in place, then there could have been little doubt that the answer was yes. The reasoning is as follows. (i) Like all conveyances, a feu disposition operates as a contract between the parties to the deed, coming to life when the deed is delivered. (ii) The pre-emption was a term of the contract between Lothian Regional Council and Mr Clark. (iii) For deeds registered before the appointed day, like this one, the contract remains in force notwithstanding registration of the deed. (For deeds registered on or after the appointed day, real burdens cease to be contractual on registration: see Title Conditions (Scotland) Act 2003 s61.) (iv) Probably, the contract comes to an end if and when the grantee disposes of the land to a singular successor: see Scottish Law Commission *Report No 181 on Real Burdens (2000)* paras 3.40 and 3.41. (v) The contractual effect of grants in feu is expressly preserved, after the appointed day, by s75(1) of the 2000 Act; this provides that:
>
> > As respects any land granted in feu before the appointed day, nothing in this Act shall affect any right (other than a right to feuduty) included in the grant in so far as that right is contractual as between the parties to the grant (or, as the case may be, as between one of them and a person to whom any such right is assigned).
>
> In the event, neither of the original parties remained in place. Their successors, however, were in the nature of universal rather than singular successors. Thus, (i) Lothian Regional Council, the original granter, was wound up as a result of the reorganisation of local government by the Local Government etc (Scotland) Act 1994; by virtue of that Act and of the Local Authorities (Property Transfer) (Scotland) Order 1995, SI 1995/2499, West Lothian Council succeeded to the Regional Council's

> assets and liabilities. (ii) In 2011 the original grantee, George Clark, died. The present litigation was triggered by the wish of his executors to sell part of the property.
>
> The contractual enforceability of the pre-emption would not, of course, have survived a transfer to a singular successor. So if Mr Clark had sold the property while still alive, the pre-emption could not have affected a subsequent sale by the person who purchased from Mr Clark. A singular successor is unaffected by contractual obligations undertaken by his author. A universal successor, by contrast, takes on his author's rights and liabilities. In principle, therefore, West Lothian Council would have acquired the contractual right conferred originally on Lothian Regional council by the pre-emption, and Mr Clark's executors would have been subject to the correlative obligation. Although the Sheriff (Sheriff Martin G R Edington) did not put matters quite like that, that was the conclusion to which he came."

The validity of the notice

[42] All of this brings me to the second issue with which I need to deal, and which occupied three days of court time. That is whether the notice given by the Defenders to West Lothian Council in terms of the (contractual) pre-emption clause was valid.

[43] The issue regarding the validity of the notice does not give me any difficulty and I feel that I can deal with it fairly briefly, and without going into the evidence at the proof at any length.

[44] The pre-emption clause and the relevant letters have already been set out above. However it is convenient to repeat the relevant parts again. The obligation on the defenders in terms of the right of pre-emption was as follows:-

> *"(One) in the event that the feuars may at any time desire to dispose of the feu or a specified part thereof … the feuars shall give to the superiors notice in writing of their desire to do so".*

[45] In the crucial letter of 17 December 2015 the solicitors for the executors wrote to West Lothian Council stating that:

> *"As required in terms of the Feu Disposition, we hereby give you notice on behalf of the Executors, that the Executors desire to dispose of that part of the Feu shown coloured red and brown on the plan annexed, by way of a sale."*

[46] On receipt of that letter Wendy Richardson, an in-house solicitor working for the Pursuers, wrote to the solicitors for the executors on 23 December 2015, a copy of that letter now being production 5/1/3. The relevant terms of the letter are as follows:-

> *"I refer to your letter dated 17 December 2015 indicating that your clients wish to sell the land coloured red and brown on the plan annexed to your letter. The area coloured brown is not clearly visible on plan. Please confirm where this is located."*

[47] It has been maintained by the Council since then, and is maintained by them in this action, that the notice is invalid on the basis that there was no brown area in the plan, or at least that it was not clear.

[48] The plan received by West Lothian Council has been lodged as a production by the Pursuers. It is available for examination. It is agreed in the Joint Minute that production 5/3/1 is the principal letter which was sent by the executors' solicitors. I will start by saying that it seems to me that I must, at least to some extent, be able to use the evidence of my own eyes as to whether or not there was any brown area visible on the plan. It would, in my view, offend against common sense if I was not able to do so. The position, it seems to me, can be compared with the modern role regarding the approach which juries in criminal cases are entitled to take to video evidence. That approach is summarised in the Jury Manual as follows:-

> "Once the recording is proved to show the relevant time and place, the content of the recording is available as proof of fact. The jury is free to make their own minds up about the events depicted and whether accused is the person responsible. It may be advantageous to hear evidence from witnesses who were present as to comment on the recording particularly if the witness comments on a matter not apparent from the footage or denies something apparently shown in the footage."

[49] Having examined the plan myself, there is in my view simply no brown area visible to the naked eye.

[50] Even if I am wrong as to the competency of me using my own senses to look at the plan, it is my view that the evidence of three of the witnesses led for the Pursuers clearly established that there was no brown area visible. Some of that evidence was led under reservation as to its competency as it related to relevancy points, but having taken the view that questions of relevance are still open, I regard the evidence as being competent.

[51] The first of these witnesses was Wendy Richardson who, as I have said, at the relevant time worked as a solicitor for the Pursuers. She said that a colleague who worked in another department of West Lothian Council had received the letter, and had told her that West Lothian Council might be interested in buying back the land. However, no-one had been able to identify the brown area referred to in the letter. She discussed matters with another colleague, Janet Rutherford, who was not able to see the brown area either. She therefore wrote to the solicitors for the executors on 23 December 2015 stating that the "area coloured brown is not clearly visible on the plan" and asking them to "confirm where this is located". There was no reply until after the 21 days had expired.

[52] The second witness for the Pursuers was Niall Carlton, a regional valuer. His evidence was that he saw the letter and the plan when it was received, and that he could not identify any brown area. He had tried to speak to the solicitor in the firm which had sent the letter but his call was not returned. Although he had prepared a draft report for West Lothian Council regarding the purchase of the land, the report remained as a draft report as the Estates Department could not confirm to the Council what area of land was to be purchased and at what price.

[53] The third witness for the pursuer's was Iain Doran. He is an experienced commercial conveyancing solicitor whose qualifications are set out in a report which he prepared for the Pursuers, and which has been lodged by them in in their Fifth Inventory of Productions as

number 5/5/1 of process. He adopted his report as part of his evidence. It is important to note that his report and evidence were given on the basis of a presumption that there was an enforceable right of pre-emption. In his evidence, as in his report, he said that he had considered the plan and could not see any brown area at all. He said that in his view West Lothian Council were correct to ask for clarification as to where it was.

[54] It is also of interest, although perhaps no more than that, to note that the Sheriff who heard the pursuer's motion for interim interdict (Sheriff Craig) stated in a report which she prepared after the hearing that: –

> "[12] In the course of submissions I was given a coloured version of the plan I was told had been attached to that letter. There was clearly an area marked on the plan that was coloured red. What was not obvious from that plan however was any area coloured brown. At no point in the hearing did anyone suggest that there was an area coloured brown shown on that plan or what that area might be. Certainly if there was an area coloured brown I could not see it."

[55] The only witness led for the Defenders was Rodney Wright, a solicitor who had also prepared an expert report (6/3/7). His qualifications are set out in his report, which he also adopted as part of his evidence. He expressed a contrary view to that of the Pursuers' witnesses as to whether any brown area was visible. He said that: "on first visual inspection it was apparent to me that it was a different colour" and that "when you expand it, it becomes a different colour". He said that he "could certainly see an area that wasn't red" although he conceded that: "the reference to brown is not as clear as it might have been". He said that he took a digital photograph of the plan and enlarged that. It appears from Mr Wright's evidence that, having done so, he detected a different colour for the road which runs through the red area. His evidence contained the sole dissenting view that a brown area was visible.

[56] I have summarised the evidence fairly briefly because in my view a consideration of the question of whether any brown area was visible does not require any greater detail to be given. However, the Pursuers' Counsel has set out the evidence of the witnesses in a little more detail in her written submissions. I am of the view that her summary is accurate. Those submissions and that summary of evidence are available for reference if required.

[57] Taking into account all of the evidence put before me, I have no doubt that the Pursuers have clearly established that no brown area was visible on the plan to the naked eye.

The reasonable recipient

[58] However, my conclusion that the brown area was not visible is not sufficient to dispose of the action because the Defenders argue that even if any brown area was not visible, a "reasonable recipient" would have been able to tell, or find out, where the brown area was. They argue that West Lothian Council needed to be given less information than others to identify the brown area, and that they ought to have been able to do so by using other information which they already had.

[59] I am not persuaded by this argument, which was a contention also put forward by their witness, Mr Wright, in his report.

[60] I have no difficulty, and as I understand it neither did the Pursuers' Counsel, with the idea that the amount of information which needs to be put into a notice depends on the state of knowledge which the recipient of the notice has, or can be taken to have. This, as I understand it, is in essence the concept of the "reasonable recipient": see *Mannai Investment Co* v *Eagle Star Life Assurance Co Ltd* 1997 AC 749. The contention of the Defenders' Counsel, as I understood it, was that West Lothian Council had, or ought to have had, access to the

1986 disposition, and that the terms of the 1986 disposition and any associated disposition plan ought to have allowed them to identify the brown area on the plan sent with the letter. Their Counsel argued that the evidence of the witnesses for West Lothian Council, in particular Wendy Richardson, that they could not see the brown area was of no moment, because this was just their view as uninformed, and therefore unreasonable, recipients. Had they been properly informed, as he argued they should have been, by a consideration of the 1986 disposition then they would have been able to understand where the brown area was.

[61] On this point I have to say that Wendy Richardson's evidence was not, according to my notes, quite as summarised in the written submissions for the Defenders who say that she never "even considered the Feu Disposition plan". Wendy Richardson's recollection, according to my notes, was that she looked at the Disposition, although she could not recollect whether the copy of the disposition to which she had access had a plan attached to it, and could not recollect whether she looked at any disposition plan. It is, however, clear from her evidence that looking at the disposition did not help her identify the brown area.

[62] The evidence of Mr Doran, the experienced solicitor led as a witness for the Pursuers, was that if he had received the letter in question he would have looked at the terms of the 1986 feu disposition in order to ascertain the nature of the right of pre-emption, but he was of the view that it would have been of no help to compare the plan sent with the letter with the feu disposition plan in order to try and identify the brown area. His evidence was that as only part of the farm was being offered back to West Lothian Council, it was simply not possible to identify where the brown area was. There were no features on the feu disposition plan which would give any clue as to where the brown area was. It would not be reasonable, he said, to expect West Lothian Council "to go fishing through the entire

disposition to see if they could find something which gave a clue as to where the brown section was".

[63] The disposition and the disposition plan have been lodged in process. I have also looked at the disposition and the disposition plan closely. Having done so, I entirely share the view of Mr Doran, and in any event accept his expert evidence as just summarised.

[64] It is therefore my view that recourse to the concept of a "reasonable recipient" is of no assistance to the Defenders. The disposition and the disposition plan is of no help, in my view, in trying to identify the area said to be marked in brown in the crucial letter.

Conclusion on validity of notice

[65] I therefore come to the conclusion, without any real difficulty, that the purported notice sent by the solicitors for the executors by letter dated 17 December 2015 to West Lothian Council did not give West Lothian Council sufficient information to allow them to identify the brown area referred to on the plan. As only part of the farm was being offered back to West Lothian Council they had no way of knowing what area of land was included in the brown area referred to. They could not tell whether the brown area had been omitted by mistake from the plan sent with the letter, and how extensive the brown area was. They needed to know precisely what land was being offered back to them before they could decide whether or not to purchase it.

[66] It is accordingly clear to me that the purported notice given by the executors was not a valid notice at all, and I am made even more certain in that conclusion by the fact that in law strict compliance with the terms of the pre-emption notice was required. The matter was potentially of great importance to West Lothian Council and it was therefore of crucial importance that the executors made it entirely clear just which area of land they were

considering selling: see eg, *HOE International Limited* v *Andersen* [2017] SC 313; *Batt Cables plc* v *Spencer Business Parks Limited* 2010 SLT 860.

[67] The pre-emption clause required notice to be given to West Lothian Council in the event that the executors wished to "dispose of the feu or a specified part thereof". The notice did not specify properly which part of the farm they wished to sell, and it was essential that it did. It was not a valid notice.

Does S84 of the Title Conditions (Scotland) Act 2003 apply?

[68] There is one other final matter with which I wish to deal, although in view of my conclusion that the notice was not valid, it is perhaps not strictly necessary to do so. The point is this. If I am wrong in the conclusion to which I have come, and if the letter from the executors dated 17 December 2015 *was* a valid notice, then the Pursuers argue that the effect of sections 82 – 84 of the Title Conditions (Scotland) Act 2003 has to be considered.

[69] These sections, as I understand it, effectively re-enacted s9 of the Conveyancing Amendment (Scotland) Act 1938. The earlier legislation greatly restricted feudal rights of pre-emption, so that they became, to all intents and purposes, personal rights only, rather than rights running with the land in perpetuity. Section 84(1) of the 2003 Act provides that a pre-emption is extinguished if, on sale or other trigger event, the property is offered back to the pre-emption holder. It makes no difference whether the offer is accepted or rejected. So the holder of a right of pre-emption only has one opportunity to buy back the land.

[70] However, the important point for the present case is that the Act also lays down a mechanism and procedure for the operation of the pre-emption right. In terms of s84 the party subject to the right of pre-emption must make an offer to sell the property. The holder of the pre-emption right has 21 days to accept the offer to sell, or to give reasons as to why

"the terms on which the offer is made are unreasonable". If the terms are unreasonable, then as I understand it, the right of pre-emption continues and is not extinguished.

[71] In relation to the Act, the first complication is that it is not entirely clear whether section 84 was intended to apply to rights of pre-emption where, as here, they are being founded upon as contractual rights only. It also appears that this point has not come before the courts before, and has not been the subject of any specialist comment (or at least I was not referred to any). The views which I express are therefore expressed with some diffidence.

[72] The Defenders' argument was that section 82 provides that the provisions of the Act only apply to "any subsisting right of pre-emption constituted as a title condition", and they contend that the right of pre-emption as constituted by the Disposition (and therefore as a title condition) was extinguished on 28 November 2004. The pre-emption right as constituted by the Disposition was not, they argue, a "subsisting" right at the time the Pursuers sought to enforce it. It had disappeared. Having considered the parties' submissions on the point, I find the submissions of the Pursuers' Counsel to be more persuasive. As I cannot improve on the reasoning of the submissions I will simply set them out here. They are as follows:-

> "This part of the Act puts in place some practical regulation for rights of pre-emption. It provides a mechanism for parties to exhaust a pre-emption right, practical provisions to deal with potential areas of dispute and ensures that the right is extinguished following the offer to sell. It supplements the terms of a right of pre-emption contained in a deed. It is in effect a statutory 'overlay' on a right of pre-emption contained in a deed.
>
> The Pursuers rely upon the provisions of section 84 (5) (b) which provide that the terms of the offer of pre-emption shall be deemed to be reasonable unless the holder of the right, in this case the Pursuers, within 21 days, informs the owner in writing, in this case the Defenders, that the holder considers that the terms on which the offer is made are unreasonable. If therefore the Defenders are held to have given effective notice, it is submitted that the pre-emption right is not extinguished in terms of

section 84 because the Council's letter dated 23 December 2015 gave such counter notice as stipulated in sub-section 5(b).

3.2 Application of the legislation to this case

Section 82 governs the scope of application of section 84. It states that section 84 applies to any subsisting right of pre-emption constituted as a title condition which was originally created in favour of a feudal superior or was created in a deed executed after 1 September 1974. The Pursuers submit that the pre-emption right contained at SIXTH (One) of the Disposition falls within the scope and application set out in section 82: (i) it is clearly a right of pre-emption; (ii) it was constituted as a title condition which was both (a) originally created in favour of a feudal superior, and (b) created in a deed executed after 1 September 1974; and (iii) the right of pre-emption subsists. Significantly the section does not provide that the right of pre-emption must subsist as a real burden, or more accurately following abolition of feudal tenure, as a preserved right. This particular right of pre-emption subsists as a contractual right between the original contracting parties. The section does not exclude subsistence of the pre-emption in such contractual form. In a practical sense there would be no reason for the legislation to differentiate between rights of pre-emption which subsists depending upon how they were created or continue.

Wendy Richardson referred in her evidence to the opinion provided to her by the Defenders from Professor Paisley lodged as a production at number 5/1/4 of process. That opinion was forwarded on behalf of the Defenders to the Pursuers under cover of a letterm dated 25 January 2016. From the terms of the opinion brought out in her evidence it is clear that the advice provided to the Defenders accorded with this submission. Professor Paisley advised the Defenders at section 2.1 of his Opinion that:

> 'The pre-emption stated above is now no longer a real burden and is merely contractually enforceable as a result of the dismantling of the feudal system and the extinction of the superior's rights. I accept that the pre-emption stated above is potentially one to which the provisions of the Title Conditions (Scotland) Act 2003 asp 9. S84 apply. It was originally created in a feudal deed in favour of a feudal superior and the deed was executed after 1st September 1974.'

Section 84 provides that the pre-emption right shall be extinguished if an offer to sell is made (sub-section 1), and within the time allowed for acceptance the holder of the right does not inform the owner that the terms of the offer are unreasonable (sub-section 5). If therefore, the holder of the right of pre-emption does inform the owner within the relevant timescale that the offer is unreasonable, giving reasons, then the pre-emption is not extinguished in terms of section 84(1). In this case that would involve the Pursuers informing the Defenders in writing, within 21 days of receipt of a valid notice, that the Pursuers consider the offer to be unreasonable. The Pursuers submit that was done in accordance with section 84(5) by virtue of the letter written by Wendy Richardson dated 23 December 2015.

3.3 Effect of Letter dated 23 December 2015
The letter from Wendy Richardson to the solicitors for the Defenders dated 23 December 2015 is lodged at number 5/1/3 of process. The relevant part of the letter is in the following terms:

> 'I refer to your letter dated 17 December 2015 indicating that your clients wish to sell the land shown coloured red and brown on the plan annexed to your letter. The area coloured brown is not clearly visible on plan. Please confirm where this is located.'

The letter then invited the Defenders to issue an offer to sell in terms of section 84 of the 2003 Act and specifically sought that such an offer should include the 'price and such other terms as would reasonably allow the Council to consider the offer.'

It is submitted that the relevant parts are (i) that confirmation is required of where the area stated to be coloured brown on the plan is located, (ii) that on the information available the Council is not able to consider whether it is interested in exercising the right, and (iii) in order to do so further information is sought which could reasonably allow the Council to make a decision, such as the price."

[73] As to the question of whether the 2003 Act applies, I prefer the Pursuers' submissions. The language of s82 – 84 is sufficiently wide to include pre-emption rights which, as here, were originally constituted as a title condition, but which later continued as a contractual right. They become subsisting rights by virtue of subsisting on the basis of a contract. The Pursuers' argument also has the virtue of providing a uniform system for the operation of all rights of pre-emption. As set out in the Pursuers' submissions, that view would also appear to have the support of Professor Paisley.

Were terms of notice reasonable?

[74] Having been persuaded that s84 applies, the next question is whether the Pursuers' response to the letter of 17 December 2015, which was within the requisite 21 days, can only be read as having been intimation to the executors under s84 that West Lothian Council considered the terms of the notice to be unreasonable in that it did not specify the area being offered.

[75] In this connection, it is not necessary for me to recount the efforts of the Pursuers as set out in emails which have been lodged as productions, and in the evidence primarily of Wendy Richardson, as to the efforts they made on receipt of the letter to try and obtain clarification as to where the brown area was. Nor, in my view, does it matter whether or not the response by West Lothian Council could have made it clearer that they did not regard the letter as being a valid notice, or that their response only referred to the fact that the brown area was not "clearly visible". The fact is that the actions of West Lothian Council in seeking to obtain clarification from the solicitors as to where the brown area was can only be seen, in my view, as intimation by West Lothian Council that they regarded the executors as having failed to make an "offer to sell" the property on terms which were reasonable. All of this led to the relevant period of 21 days expiring without any indication being given by West Lothian Council as to whether they wished to buy the land back.

[76] Moreover, the letter from West Lothian Council dated 23 December 2015 contained the following paragraphs:

> "As you are aware, the Council has a right of pre-emption in terms of clause (SIXTH) of the feu disposition recorded on 30 May 11986. The Council may be interested in exercising its right of pre-emption but will require to seek authority to do so. To allow the Council to consider its position, please issue an offer to sell in terms of section 84 of the Title Conditions (Scotland) Act 2003. This should include price and such other terms as would reasonably allow the Council to consider the offer.
>
> The offer should be open for acceptance for a period of twenty one days.
>
> I look forward to hearing from you."

I am also persuaded that this request for an offer to sell can also only be read as giving intimation that the terms of the notice were unreasonable.

Conclusion

[77] For all the above reasons, the Pursuers are entitled, in my view, to an interdict to prevent the sale of the land. Interdict, together with declarator as sought, will accordingly be granted. Although the terms of the declarators will refer to the disposition, this is on the basis that the terms of the contractual right of pre-emption are to be found there. I have not, however, granted decree of declarator in terms of Crave 4, as such a declarator would only be necessary in the event that I had held that the notice was valid.

[78] The case will need to be put out for a hearing on the question of expenses, if the parties are unable to agree this.

NOTE:

This judgement has been prepared and signed by Sheriff Kinloch who is currently working remotely due to the ongoing COVID situation. The Sheriff has instructed that a copy of the judgement be issued electronically (without a wet signature) to parties on 3 June 2020 due to the current COVID restrictions, and resultant court closures, preventing a copy of the signed hard copy being issued as per normal procedures.

Since the submission of this judgment for publication an appeal has been marked by the defenders.