FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 22
XA28/20

Lord President
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal by

BRIDGET JOANNA THOMSON

Appellant

against

LINDSAY ROBERTSON SAVAGE

Respondent

_____

Appellant: MacColl QC; Thorntons Law LLP
Respondent: van der Westhuizen; CMS Cameron McKenna Nabarro Olswang LLP

9 March 2021

[1] This is an appeal by Mrs Bridget Thomson against a decision of the Lands Tribunal for Scotland which granted an application under section 90(1)(a) of the Title Conditions (Scotland) Act 2003 for the variation of three almost identical title conditions burdening property at Liberty, Elie, Fife with servitudes of access and parking.

The background

[2] Originally the property consisted of a courtyard with stables on the western and southern sides and a garage towards the eastern boundary. Access was taken from the road

to the north. The stables were converted into three houses, and sold in 1961. The seller retained ownership of the courtyard.

[3] In 1992 Mrs Thomson purchased the middle house. Since then she has used it as a holiday home for herself and her family. Her title includes the following:

> "(One) right of access to the subjects hereby disponed from the said public road by the gateway in the north boundary wall of said courtyard and by the courtyard itself with right to use the same for the parking of cars in front of the subjects hereby disponed which gateway, north boundary wall and courtyard and the remaining boundary walls thereof ---- are hereby reserved to and shall be maintained in good order and repair by us and our successors in all time coming; ---". (The two other properties enjoy a similar entitlement.)

[4] In 2014 the courtyard and garage came on the market. Mrs Thomson and the adjacent proprietors tried to purchase the plot, but it was bought by Mrs Lindsay Savage. The garage was demolished in 2016. In its place Mrs Savage wants to erect a house, for which she has received planning permission. Mrs Thomson has resorted to court action on two occasions to prevent the development on the basis that it interferes with her parking rights over the courtyard. The current position is that in October 2018 a sheriff at Dundee granted her interim interdict stopping the project. Those proceedings have been sisted (put on hold) pending the outcome of the application to the Lands Tribunal.

The application to the Lands Tribunal

[5] The requested variation of the burden is designed to resolve the dispute between the parties and allow the development to proceed. It would restrict the exercise of the access and parking rights by excluding from the burden a strip of the courtyard extending out 8.05 metres from the eastern boundary. This would allow compliance with a condition of the planning permission, namely that a grassy area to the north of the proposed dwelling be

dedicated to it for use as a parking space for two cars. The difficulty is that Mrs Thomson contends that she is entitled to park cars on that area by virtue of the servitude. In addition she maintains that the benefitted proprietors can each park at least two cars in the courtyard, which includes the grassy area. The parties agree that these activities cannot be exercised without the availability of the grassy area, thus they would stymie Mrs Savage's plans.

[6] Mrs Savage submits that the servitude allows only one car to be parked directly in front of each of the benefitted properties and away from the grassy area; but in any event that it would be reasonable to grant the variation thus making it clear that the grassy area is not subject to the access and parking rights.

The decision of the Lands Tribunal

[7] The Lands Tribunal has power to vary a title condition if having regard to certain specified factors it is satisfied that it is reasonable to do so: sections 90, 98 and 100 of the 2003 Act. In a careful and detailed judgment the tribunal summarised the evidence led at the hearing. It had the benefit of a site inspection and expert evidence. It concluded that there was no conflict as to the facts and as to what is, and what is not, possible in terms of parking in the courtyard.

[8] For Mrs Thomson it was submitted that if Mrs Savage's restrictive interpretation of the servitude is correct, the application is unnecessary and ought to be refused on that basis. However it was maintained that the correct approach is that each benefitted owner can park more than one car anywhere in the courtyard, including the grassy area, and that this is needed for the enjoyment of their properties. To remove these rights would be unreasonable.

[9] Though not required to determine the extent and scope of the title condition, the tribunal considered that the question could hardly be avoided. It had not been requested to vary a purported entitlement to park at least two cars anywhere in the yard; rather it was "being asked to confine the condition, whatever it means, to a limited area of the courtyard" (paragraph 62 of the judgment). That could only be done if it was reasonable to do so, an assessment which necessarily involved a consideration of the current entitlement.

[10] In the tribunal's view the servitude allowed Mrs Thomson and her neighbours to park one car immediately outside each of their houses (paragraph 65). It was recognised that this would mean that the parties' rights in respect of parking could co-exist (paragraph 68). As to the proposition that this rendered the application unnecessary, while Mrs Savage could have sought vindication elsewhere, her application for a variation was "well-judged and proportionate" in that it did not seek to confine the other proprietors to one car each; they could still bring a plurality of cars onto the hardstanding if there was space to do so (paragraph 70). The application had to be dealt with on its merits.

[11] In determining whether it would be reasonable to vary the condition the tribunal was influenced by the following considerations. The use of the grassy area was a requirement of the planning permission. There had been no explanation as to how Mrs Savage could make use of her property in a manner commensurate with Mrs Thomson's approach to the parking rights. If a workable solution could be found which allowed the new house to be built, that would weigh in favour of granting the application, even if it meant less space for the benefitted proprietors (paragraph 79). This was not a case where Mrs Savage should have foreseen parking problems when she bought the subjects.

[12] The tribunal acknowledged that its view as to the nature and extent of the servitude rights might be erroneous. If the variation was granted Mrs Thomson could still park two

cars if space allowed. Over the years little use had been made of the more extensive parking, suggesting that it was not needed. On the other hand it disproportionately inhibits the reasonable use of the courtyard by its owner.

[13] The tribunal was satisfied that it was reasonable to grant the application. It pronounced an order varying the title condition "to the extent of restricting the area over which access rights and parking rights are exercisable by the owners of the benefitted properties to the area to the west of the line shown by a red broken line on the plan annexed and signed as relative hereto –". The overall result is that, if so advised, the parties can continue to argue as to the nature of parking entitlements, but, whatever they may be, it is now clear that they do not extend to the grassy area and do not impede compliance with the terms of the planning permission.

The submissions to this court

Mrs Thomson

[14] The tribunal erred by holding that it had the power to grant the variation. Section 90 permits the variation of a title condition applying to property burdened by that condition. The tribunal has purported to vary the condition by excluding land which was not burdened by it, it having found that the appellant and the other benefited proprietors did not have any legal right to exercise access or parking rights over the areas purported to be excluded by the order. The tribunal had no power to make an order which, on its own analysis, was wholly unnecessary. The order was thus *ultra vires*. Separately, it was *per se* unreasonable (2003 Act, section 98(a)) to pronounce an order which was wholly unnecessary.

[15] In the course of discussion at the hearing of this appeal, counsel for Mrs Thomson indicated that if the appeal is successful she will continue to assert her rights over the whole

of the courtyard, including the grassy area, in the sheriff court proceedings. This will be open to her in that the opinion expressed by the tribunal as to the proper interpretation of the servitude has no operative or binding status.

Mrs Savage

[16] For Mrs Savage it was submitted that there is no basis for the proposition that the tribunal's order was *ultra vires* or unnecessary. It did not purport to vary the title condition by excluding land that was already unburdened. The hearing before the tribunal focussed on parking issues, and its judgment should be read in that context. However the title condition also conferred access rights over the whole courtyard. Mrs Savage did not submit to the tribunal that Mrs Thomson had no such rights over the now excluded area. The tribunal did not make a finding that the title condition had no impact on the land to the east of the red dotted line. The tribunal was entitled to consider the extent of existing rights when assessing reasonableness. It is clear that it did not consider its order to be unnecessary. In any event the test is one of reasonableness. There was no obligation on Mrs Savage to await the outcome of the court proceedings.

Analysis and decision

[17] As counsel for Mrs Thomson said, the issues in this appeal are short and crisp. First, was the Lands Tribunal order truly a variation of a title condition, or was it simply replicating the existing provision as to the parties' rights and obligations? If the latter, it is said that the tribunal had no jurisdiction to make it given the terms of section 90(1) of the 2003 Act. Secondly, if it was a variation, did the tribunal err in holding that it was reasonable to make the order? There is a degree of overlap, in that essentially both

submissions depend on the proposition that the new condition has no impact on the parties' rights and obligations, and that as a result there is no logical or reasonable justification for the tribunal's order.

[18] The equally short and crisp answer to the appeal is that the order is not a replication of the existing condition. The issue between the parties concerned the use by Mrs Thomson of the courtyard for access to and parking in respect of her ownership of one of the properties on the west side. The focus at the tribunal hearing was on parking rights; however, whatever else, access was still a potentially important matter for Mrs Savage's development plans. The tribunal order has restricted the extent of the land subject to the condition. It removes an obstacle which so far has stopped the erection of a house on the east side of the courtyard. It is self-evidently different in material respects from the pre-existing condition. It follows that the first ground of challenge has no merit.

[19] The only real question before the tribunal was whether the variation was reasonable having regard to the various factors set out in section 100 of the Act, which include anything which the tribunal considers to be material. The tribunal carefully addressed each and all of those factors.

[20] As counsel for Mrs Savage observed, context is important. She has planning permission to erect a house broadly speaking on the area previously occupied by the garage. Mrs Thomson has raised legal proceedings designed to stop this, which have enjoyed a degree of success, principally because of uncertainties in the terms of the existing condition concerning parking rights in the courtyard. The tribunal has expressed a view as to the proper interpretation of the condition in respect of parking, but that is not determinative of the issue, and the tribunal has recognised that it might be wrong. It is an opinion which has no operative or binding effect.

[21] Notwithstanding that his submission pre-supposes that the tribunal's view is correct, Mrs Thomson's counsel acknowledged that if the appeal succeeds she will maintain her argument before the sheriff at Dundee that her parking rights are unrestricted. If upheld this would stymie the building plans, which have received planning permission. The tribunal's order, which removes the development area to the east of the courtyard from the scope of the burden, resolves the dispute between the parties. For the reasons given by the tribunal (summarised above), it was an order which it considered to be entirely reasonable and appropriate. We see no reason to disagree. There being no flaw or legal error in the tribunal's order, the appeal was refused. Unless there is some additional factor of which the court is unaware, it follows that the interim interdict should be recalled and the development allowed to proceed.