FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 29
XA48/22

Lord President
Lord Malcolm
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the appeal against a decision of the Lands Tribunal for Scotland

in the application of

THE ROYAL LONDON MUTUAL INSURANCE SOCIETY LIMITED

Applicants and Appellants

against

(FIRST) CHISHOLM HUNTER LIMITED; (SECOND) DADA EVENTS LTD (THIRD) NORMAN WILLIAM INNES, ANNETTE AITCHISON and PETER ANDREW WYLIE AS TRUSTEES OF THE ROCK DCM LIMITED DIRECTORS SMALL SELF-ADMINISTERED SCHEME; and (FIFTH) TOM COLL JEWELLERY LIMITED

Respondents

Applicants and Appellants: DM Thomson KC, D Ford (sol adv); Brodies LLP
Respondents: Upton; Davidson Chalmers Stewart

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19 July 2023

Introduction

[1] This litigation concerns the validity and enforceability of real burdens for the repair and maintenance of the common parts of Argyll Chambers, Glasgow. The appellants' property forms part of the Chambers. It is subject to the burdens in terms of its title sheet.

The appellants argue that the burdens are invalid, unenforceable and incapable of application.

Background

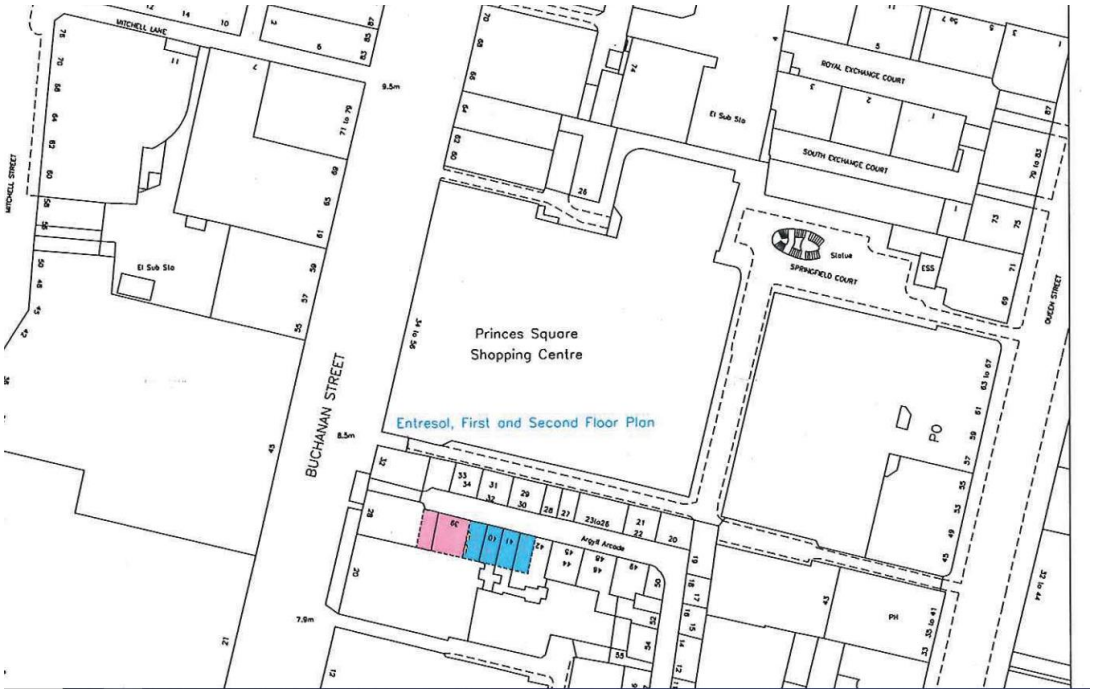
[2] The Argyll Arcade is one of the oldest covered shopping arcades in Europe. It was constructed in 1827. It runs in an L-shape from Buchanan Street to Argyle Street. The Arcade is essentially a walkway with a glass roof, with what are now predominantly jewellery shops on either side. It is shown in yellow on the following plan:

[3] At the Buchanan Street end, the Arcade now runs through and underneath Argyll Chambers. This is a seven storey (plus basement) building which was constructed in 1904 as commercial premises and replaced the existing late eighteenth century Buchanan Street tenement. The Chambers are depicted, for illustrative purposes, as delineated in red, in the following photograph:

[4] The appellants own the shop unit at 28 Buchanan Street (Land Register title number GLA205443) which is located in the south west part of the Chambers. The unit spans the ground floor, an entresol (mezzanine) level, and first and second floors. It extends marginally eastwards into the Arcade beyond the Chambers. The ground floor of the property is shown tinted in pink on the above title plan. The four respondents own other properties within the Chambers.

[5] General repairs are required to the Chambers. The properties within the Chambers are subject to real burdens concerning the maintenance and repair of the common parts. These are set out in terms of a disposition of ten properties in the Arcade and the Chambers, including the appellants' unit at 28 Buchanan Street, by Cranston's Tea Rooms to R Wylie Hill and Co dated 1954. Not all of these ten properties formed part of the Chambers nor were they all subject to the burdens concerning the common parts. Those that did were described in the disposition as the shop premises forming numbers 28 Buchanan Street and 36 Argyll Arcade "at present occupied by us" (Cranston's Tea Rooms) and 36A (or 37) Argyll Arcade "at present occupied by … The Iona Shop, situated on the ground floor of … Argyll Chambers", forming Numbers 28, 30 and 32 Buchanan Street, and 34, 35, 36 and 36A (or 37) Argyll Arcade. These properties were all said to have been built on a plot disponed to Cranston's Tea Rooms in 1934 which extended to 575 $^{2}/_{9}$ yds^{2}. In addition, the basement of the Chambers, which reflected those precise dimensions, was conveyed, subject to some defined excepted areas, along with "those restaurant office boardroom and other premises at present occupied by us forming the entresol first and second floors …".

[6] The title deed description of the appellants' property, as transposed from the disposition, is 28 Buchanan Street being the shop floor premises on the ground floor tinted pink on the title plan, to which reference has already been made, and on the entresol, first and second floors as tinted in different colours on a supplementary plan, as follows:



There are, as expected with the cadastral mapping system, no references to "at present occupied by" anyone. The title sheet defines the extent of the appellants' property.

[7] The 1954 disposition provided the Chambers' properties with certain *pro indiviso* rights, in common with "the other portions" of the Chambers, known as numbers 28, 30 and 32 Buchanan Street and 34, 35 and 36 Argyll Arcade. These included rights in *inter alios* the solum, foundations, gables and walls, roof, floors, drains, water, gas and electricity cables, the sprinkler system and "all other common parts … of the said building" together with a right to use two specific lavatories according to the disponer's existing right "if any", the central heating system and the lifts (hoists).

[8] The disposition imposes "additional burdens" relating to the Chambers whereby the disponees and other proprietors are to be liable "but only to the extent (if any) to which we ourselves [Cranston's Tea Rooms] are at present liable" for the maintenance of the lifts and sprinkler system and of "all the common parts of … Argyll Chambers".

[9] The liability of each proprietor for repairs is to be calculated according to the proportion "(if any)" that the assessed rental (ie rateable) value of each property bears to the total assessed rental value of the Chambers. There is a maintenance burden in relation to the central heating system based on the surface of the radiators. These burdens appear verbatim as "Burden 6" in the title sheet, with Argyll Chambers "forming 28, 30 and 32 Buchanan Street and 34, 35, 36 and 36A (or 37) Argyll Arcade".

[10] The appellants lodged an application with the Lands Tribunal for Scotland under section 90(1)(a)(ii) of the Title Conditions (Scotland) Act 2003. They asked the Tribunal to determine that the burdens were invalid, unenforceable and incapable of application. This was on the bases that: (1) the burdened and benefitted properties could not be identified from the 1954 disposition; and (2) the nature and content of the burdens were too ambiguous and uncertain to enable the appellants and the other proprietors to ascertain the extent of their respective liabilities. The appellants' grievance is that they are being saddled with up to 45% of the overall liability, which is significantly more than their proportion of the total floor area. They accepted that this is how matters had worked since 1954. This did not matter. They were, however, a relatively recent singular successor.

The Lands Tribunal

[11] The Tribunal rejected the appellants' argument that the burdened properties were not identifiable from the titles. The Tribunal accepted that the restriction imposed by a burden had to be ascertainable by a singular successor without travelling beyond the four corners of the title (*Anderson* v *Dickie* 1914 SC 706 at 717). The principal subjects were identified by their level in the building and by reference to their possession by named persons. Logically, the land which was conveyed was the land which was burdened. It had

not been suggested that the conveyance itself was invalid for want of description. The words of conveyance and the burdens were both part of the dispositive clause (Halliday: *Conveyancing* at para 37.04). If a description is sufficient for a general conveyances, it will also be sufficient for the imposition of burdens on the conveyed land. There was nothing in the authorities which indicated that a higher degree of specification was required. Although the words "as occupied" (*sic*, "as present occupied") were used in the title, they had not been used by the Keeper of the Registers, who had not considered this to present any difficulty.

[12] The burdens clause was not void for uncertainty. The use of the words "(if any)" in relation to the disponer's right to use the two lavatories, central heating system and the hoists was not very clear. However, it appeared that the drafter was exercising caution in using those words. There was uncertainty regarding the utility of the lavatories and hoists. The drafter was seeking to avoid creating a new right or obligation regarding the items. This did not destroy the meaning of the burdens clause.

[13] The clause which provided the formula for calculating apportionment of liability for the maintenance of common parts was not defective and remained workable. It provided that costs were to be borne in proportion to the assessed rental value of the disponed properties with the total assessed rental of the parts of the building which had the right to use the common parts. Though the units in the building may have been renumbered, or had their boundaries redrawn, these organic changes in the building's life did not affect the validity of the clause. The clause did not require the unit numbers and areas of the units to be set in stone. The occupied parts of the building would still be subject to an assessed rental on the Valuation Roll. A fair apportionment could still be arrived at, provided that the assessed rental value and the floor space for any specific unit could be ascertained. The

unit numbering was used to describe the Chambers; the extent of which was defined and ascertainable. All occupied areas would be subject to an assessed rental, wherever they might be. The Valuation Roll would refer to properties occupied as a *unum quid*. The units might have changed over time to encompass land outwith the Chambers, or become more restricted within the Chambers. Some form of apportionment might be needed, but this was the type of calculation which was often carried out by surveyors or property managers.

Submissions

Appellants

[14] The tribunal erred in finding that the 1954 disposition adequately identified the burdened property for the purpose of imposing the title condition. A description that was sufficient for the purpose of a general conveyance was not necessarily sufficient for the imposition of a real burden. Where the intention was for a conveyance to impose real burdens, a higher degree of specification was required (Gordon: *Scottish Land Law* (2nd ed) at para 23-04). It was possible to convey a good title to be fortified by prescriptive possession using a description which was general, indefinite or even ambiguous (*Auld* v *Hay* (1880) 7 R 663 at 668; *Duke of Argyll* v *Campbell* 1912 SC 458 at 490). Such a description would not suffice for the creation of a real burden. The tribunal ought to have determined that the descriptions in the 1954 disposition were too general, indefinite and ambiguous to impose a real burden. The extent of the burden had to be ascertainable within the four corners of the deed (*Anderson* v *Dickie* at 717, approved at 1915 SC (HL) 79 at 85 and 91-93). The nature of the burden had to be carefully specified (*Tailors of Aberdeen* v *Coutts* (1837) 2 Sh & Macl 609 at 663) as did the land to which it attached (*Anderson* v *Dickie*).

[15] There was no definite piece of land exactly described. There was no bounding description of the properties, nor was there any reference to a plan. The only information that could be ascertained from the descriptions was that, in 1954, the disponer and the Iona Shop were occupying unknown areas somewhere within a larger area. It was absolutely necessary that a singular successor should be able to ascertain, from the 1954 disposition, the areas to which the title condition applied (*Anderson* v *Dickie*; *Lothian Regional Council* v *Rennie* 1991 SC 212 at 221). Sections 2(5) and 14 of the 2003 Act lacked the clear wording required to displace the "four corners' rule" (*Marriott* v *Greenbelt Group Limited* LTS/TC/2014/27).

[16] The tribunal erred in finding that the content of the title conditions as expressed in the 1954 disposition was sufficient to create a valid condition. It ignored the content of the wording in order to render the burdens workable. It proceeded on the basis that the appellants had succeeded to everything disponed by the disposition. Whatever the Keeper had done in terms of registering the conveyance was irrelevant to assessing the content and validity of the burdens. The fact that the burden appeared in the Land Register did not mean that it was valid (Gretton & Reid: *Conveyancing* (5th ed) 151). The Tribunal's finding, that the burdens clause was valid, ignored the principle that restrictions on the use of property cannot be raised by conjecture or implication (*Tailors of Aberdeen* v *Coutts* at 667; *Frame* v *Cameron* (1864) 3 M 290 at 292). The Tribunal ought to have held that a deed purporting to impose a liability "(if any)" was inherently ambiguous and fatally flawed.

[17] The Tribunal erred in finding that the condition validly provided for the apportionment of responsibility for common repairs. It was in error when it suggested that an apportionment could be carried out. No provision was made for this approach in the authorities or in the disposition. There was a need to ensure that a titleholder clearly

understood his obligations from the terms of the title. That could not be reconciled with the suggestion that the parties needed to calculate a "fair" apportionment.

Respondents

[18] The Tribunal did not err in law in holding that no higher degree of specification was required for the identification of a burdened property than it was for the identification of subjects conveyed by a disposition. The appellants cited no authority to the contrary. The appellants had led no evidence that the burdened property was unidentifiable. The "four corners' rule" was subject always to the admissibility of evidence to apply the terms of the deed to the facts (*Anderson* v *Dickie*). It was not an error of law to hold that it required to yield to modern statute. The Tribunal had correctly exemplified this with reference to section 3 of the Tenements (Scotland) Act 2004 and sections 5 and 14 of the 2003 Act.

[19] Construction of a condition was integral to an assessment of whether its content was valid. The Tribunal did not err in holding that a decision maker should not attempt to read burdens in a manner that would render them unworkable. The Tribunal had not proceeded on the basis that the appellants had succeeded to everything which had been conveyed by the disposition. It had held that the appellants were among those successors. The appellants had led no evidence to rebut the presumption that the Keeper had correctly drawn up the appellants' title sheet using the 1954 descriptions. If what the appellants were objecting to was the use of the words "(if any)", there was nothing in that formula which was either objectionable in principle or unworkable in practice.

[20] The Tribunal merely discussed that there was a possible need for an apportionment. Such a need was not established by the appellants as a fact. If there was a need for an apportionment, that did not render the burdens invalid. It was possible to make an

application to the Assessor to have the Valuation Roll altered to make it consistent with the title boundaries. In any event, the appellants had failed to lead any evidence on the content of the Valuation Roll.

[21] Although it had not been raised before the Lands Tribunal or in the written note of argument, reference was made to the Scottish Law Commission Report on Real Burdens (no 181). This suggested that the courts had become hostile to the existence of real burdens (para 4.62). Rather than attempting to make them work, the courts had sought to extinguish them on the grounds of ambiguity or uncertainty. Section 14 of the 2003 Act had sought to remedy this.

Decision

[22] There is no dispute that, to be valid, a real burden must be ascertainable within the four corners of the relevant deed (*Anderson* v *Dickie* 1914 SC 706, Lord Guthrie at 717). The relevant title must not just give the burdened proprietor general notice of the existence of a burden. It must specify "its exact nature and amount" (*Tailors of Aberdeen* v *Coutts* (1837) 2 Sh & Macl 609, Lord Brougham at 663, followed in *Anderson* v *Dickie* 1915 SC (HL) 79, Lord Kinnear at 84). This will involve, first, a sufficient description of the land which is burdened and, secondly, an adequate statement of what the burden entails. Without those elements, a singular successor could not ascertain the measure of any burden upon him and it would fall to be regarded as invalid.

[23] For there to be sufficient clarity on the property affected by a common maintenance burden, the area in which the common parts and services are situated have to be ascertainable from the titles. There is no difficulty with this here. The area is identified as Argyll Chambers. These are stated to form numbers 28, 30 and 32 Buchanan Street and, in

short, 34 to 37 Argyll Arcade. No. 30 is an empty space forming the entrance to the Arcade with 28 and 32 on either side of the void. No. 34 is marked on the plan and No. 37 was identified by the Lands Tribunal, even if it is not now listed as a separate unit in the Valuation Roll. No. 36 had been subsumed into number 28. The footprint or solum of the Chambers is described down to the nearest ninth of a square yard. Its extent is manifest on the ground and thus from the photograph (above) illustrating that. The totality of the assessed rental values of each unit within the Chambers can readily be ascertained from the Valuation Roll.

[24] As a generality, when there is a conveyance of land, the whole of which is to be burdened, the description of that land for conveyancing purposes, if sufficient, will be adequate for the identification of the burdened land. They ought to be the same. The problem in *Anderson* v *Dickie* was the identification of a discrete piece of land (a lawn) within the land admittedly conveyed.

[25] It may be that one or other of the units has contracted from its former extent within the Chambers, leaving a space which a retailer with an adjacent unit has obtained. It may equally be that one of the units has expanded beyond the Chambers and has been assessed in a manner which takes into account the extra space. This is to be expected in a city centre commercial building which has existed for over a century. These discrepancies with the original layout of the Chambers do not vitiate the burdens under consideration. They merely mean, as the Lands Tribunal concluded, that some adjustment, probably of a relatively minor nature, may be necessary to take into account the parts of the units within the Chambers. That can be done with the assistance of a surveyor or other suitably qualified professional person, which failing by the court.

[26] The argument that the totality of the burdened property cannot be identified is therefore rejected. The fact that there is reference to areas formerly occupied by certain named persons does not prevent the properties from being otherwise readily identified. It may not be definitive, but it is worthy of remark that the Keeper of the Registers appears to have had no difficulty in registering titles, using cadastral mapping, which set out the extent of the various properties with considerable precision. These include those of the appellants at ground, first, second and entresol levels. The appellants and the other occupants of the Chambers will all be aware of their own rateable values and can ascertain those of the others. The division of the repair and maintenance costs is thus determinable by employing a relatively simple arithmetical exercise.

[27] The nature and extent of the burdens are also readily ascertainable from the 1954 disposition. They are, in essence, to share the costs of the repair and maintenance of the common parts and services in the Chambers. There is nothing difficult or complex about this. The use of the words referring to Cranston's Tea Rooms' existing use do not detract from this. They do not introduce uncertainty or ambiguity. They are only descriptive of the general existing burden and merely emphasise that no greater burden is being created. The reference to the use "(if any)" of the toilets and lifts merely caters for the event of their discontinuation. Again, although it is by no means definitive of the issue, which is primarily a matter of law to be resolved upon the titles, the court pauses to observe that there was no suggestion of there being any substantial problem in operating the burdens provisions over the last seventy years.

[28] The court was referred somewhat belatedly and obliquely to section 14 of the Title Conditions (Scotland) Act 2003. This provides that real burdens are to be construed in the same manner as other provisions of deeds which relate to land. As this was not before the

Tribunal and was not something of which notice had been given in the respondents' written note of argument, the court declines to express an opinion on its import for this case. Suffice it to say that, with a burden of repair and maintenance of common parts, the court would be inclined to look more favourably on a construction which was, as this one appears to have been, workable.

[29] The appeal will be refused.