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***Bryson v Salmond* [2021] SAC (Civ) 29**

In *Bryson v Salmond*, the Sheriff Appeal Court gives some useful guidance on the interpretation of real burdens.

The Brysons (the respondents) and the Salmonds (the appellants) are owners of neighbouring properties in a development in Strathaven, Lanarkshire. The properties were formerly contained in the same title, held until September 2017 by the respondents. The appellants acquired their property at that time.

The dispute giving rise to this litigation arose from the interpretation of certain real burdens affecting the appellants' property. The appellants' property was therefore the burdened property, and the respondents' property was the benefited property. These burdens purported to do two things. First, the burdens provided that the parties, and their successors in ownership, were to bear an "equitable share...based on an equality of contribution" to the cost of "maintenance and repair" of certain facilities of shared utility to the parties. These included, for example, the shared access road, the security gates and certain drainage pipes. There is nothing unusual in this, of course, real burdens being very commonly used for this purpose. Secondly, however, and less usually, the burdens provided that the sums due under this burden were to be "established by certificate signed by" the owners of the benefited property. The burdens therefore purported to make the benefited proprietors the sole judges of the sums due for maintenance and repair under the real burdens. The only exception to this was where there was "manifest error" in the certificate. The opinion of the Sheriff Appeal Court focused on the interpretation of three terms: "established", "manifest error" and "maintenance and repair".

The starting point for this is s.14 of the Title Conditions (Scotland) Act 2003, which provides that real burdens "shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration." The reason for this provision is that, under the previous law, burdens were often interpreted in such a restrictive way as to deprive them of effect (see Gordon & Wortley, *Scottish Land Law* 3rd edn, para 24-59 and references there.) The Sheriff Appeal Court approved a passage in Gordon and Wortley's *Scottish Land Law* (para.24-61, referred to at para. [15] of the court's opinion) stating that burdens were now to be given their "ordinary meaning", and "interpreted in accordance with the intention of the parties so far as that intention is objectively ascertainable."

I must declare an interest at this point, in that I contributed the chapter of *Scottish Land Law* from which the quoted text was taken. I am bound to agree, therefore, with the general approach

that the court takes here. Let us take in turn the three terms identified above as being in need of interpretation.

The first term to be considered was "established". The burdened proprietors' liability was to be "established" by the certificate. The court, surely correctly, rejected the argument (at paras [17]-[18]) that this meant anything other than that the certificate was intended to be conclusive (except in the case of manifest error, as provided for by the burdens themselves.) The whole point of the language used was surely to put matters beyond dispute. Any other interpretation would make the word redundant.

However, the court put forward another justification for its reading of this word. It stated (at para [18]) that:

> "there is no policy ground which precludes a certificate issued by an interested party from being conclusive. The appellants chose to purchase [the burdened property] in the knowledge of the terms of real burden 5.2. Had they been unwilling to accept the terms of that real burden they would not have proceeded with the purchase. Having chosen to do so, the appellants cannot now complain on policy grounds."

That proposition may not be found quite so convincing. After all, given that real burdens must appear in the register, precisely the same argument would apply to any real burden at all. That the putative burdened proprietor voluntarily accepted the burden may reduce our sympathy for him or her, but it can hardly be determinative of the burden's validity.

Secondly, the court had to consider the meaning of "manifest error" (paras [19]-[21]). The court held that an error would only be manifest if it was clear beyond possibility of dispute – "obvious and clear beyond reasonable contradiction", in the words of Lord Malcolm in *Macdonald v Livingstone* [2012] CSOH 31, quoted in the court's opinion at para [20]. A challenge could not succeed simply by showing that the sum claimed was incorrect. It had to be obviously incorrect. In practical terms, in the absence of bad faith on the part of the benefited proprietors, the effect of this is that a claimed sum could only be disputed if it fell outwith the scope of the burden. As we shall see below, some parts of the benefited proprietors' claim were in fact excluded on this ground.

This may well be the correct interpretation of the term "manifest error". Indeed, it is difficult to see any reasonable alternative interpretation, given that the burdened proprietors' proposed interpretation would defeat the intended finality of the certificate. It does though seem highly to the disadvantage of the burdened proprietor, giving very little protection against "padding" of the sum

claimed in the certificate. Such padding can easily happen without anything deserving the name of bad faith, simply through removal of any real incentive to minimise costs.

Finally, the court had to consider the term "maintenance and repair". On consideration of various disputed items (at paras [22]-[32]), the court considered that certain of them did not fall within this term. Specifically, the following were held to be exceed the proper scope of maintenance and repair: removal and replacement of a gate; replacement of the Biodisk system kiosk and associated work; and the installation of new electric cables. In relation to the first of these, the court said (at para [23]) that "[w]hilst it is within reasonable contemplation that the replacement of certain elements of the gate mechanism might be required as part of a repair to the gates, the complete replacement of the gate is not contemplated by real burden 5.2."

This is a notably restrictive view of repair. By contrast, it is striking that previous case law has in different contexts often taken a much broader approach. For example, in *A & J Inglis v John Buttery & Co* (1878) 4 R (HL) 87, repair of a ship was held to include outright replacement of large amounts of hull plating. In *Assessor for Perth v Shields Motor Car Co Ltd* 1956 SC 186, for purposes of valuation and rating of premises operated as garage, extensive replacement of parts of cars, including their bodies, was held to be repair work. Similar views have been taken in various English cases (see *e.g. Lurcott v Wakeley & Wheeler* [1911] 1 KB 905, *Metropole (Folkstone) Ltd v Revenue and Customs Commissioners* [2007] STI 387 and *Hargrave House Ltd v Highbury Corner Magistrates' Court* [2018] EWHC 279). These are, of course, all decided on very different facts and are concerned with different areas of law. However, that tends to make the unanimity across these cases all the more striking. It is not clear that all of the work that was held in *Bryson v Salmond* not to be repair is in fact less so than the work considered in the five other cases referred to in this paragraph. Space precludes a full examination of the point. For the conveyancing practitioner, however, the lesson here is to be sure that, in future burdens deeds, outright replacement is explicitly included in repair obligations to the extent that that is considered appropriate.

There is one final comment to make. It is not of course known whether the terms of these burdens were specifically drawn to the attention of the appellants when they acquired the burdened property. If they were, it is perhaps surprising that the appellants agreed to undertake obligations which, on their face, are as one-sided as those contained in the disputed burdens. It would, however, be inappropriate to speculate on these matters. Speaking more generally, however, it is certainly the case that purchasers of houses are not always fully aware of the nature and extent of the obligations that are imposed on them by the real burdens affecting the property. Perhaps the main lesson to take from this case is the need to ensure that clients have their attention specifically drawn to the terms of real burdens, particularly where they impose unusual or onerous obligations.