



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 12  
P897/19

Lord President  
Lord Malcolm  
Lord Pentland

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the petition of

PHG DEVELOPMENTS SCOT LIMITED (IN LIQUIDATION)

Petitioner and Respondent

against

LOTHIAN AMUSEMENTS LIMITED

57<sup>th</sup> Respondent and Reclaimer

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**Petitioner and Respondent: Lindsay QC; Ennova Law LLP**  
**57<sup>th</sup> Respondent and Reclaimer: DM Thomson QC; DLA Piper Scotland LLP**

12 February 2021

[1] I agree with the Opinion of Lord Pentland, to whom I am grateful for setting out the background, relevant legislation and the submissions of the parties. The reclaiming motion should be refused.

[2] The Deed of Conditions is a unilateral one which was executed by PHG. It may have had in mind the terms of the car park missives between the Kiln's Development Limited and Lothian Amusements Limited, but was not a document which implemented any prior

agreement in terms of section 8(1)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. It falls to be regarded as a document intended to create rights under section 8(1)(b). The court may therefore order its rectification if it finds that the Deed failed to express accurately the intention of PHG at the time when it was executed. PHG offer to prove that failure and their averments, against the background of the rights to be granted to LAL, are sufficient for that purpose. If PHG do prove their averments, the court can decide, having regard to all the relevant circumstances averred, whether to rectify. If it does so, the Deed of Conditions will have effect as if it had always been so rectified (1985 Act, s 8(4)). There is no need to rectify any of the split-off dispositions to the owners of the 55 flats. There are no consequential deeds requiring change (1985 Act, s 8(3A)).

[3] As a generality, it is correct, as LAL have submitted, that section 8 of the 1985 Act does not envisage that a person, who has acquired a real right in good faith, can lose that right on the basis of a unilateral error in the expression of the deed which created that right. If a person so acquiring the right tendered a plea to that effect, it may well be sustained. No such plea has been advanced in this case. It is not for LAL, in the absence of an interest, to do so.

[4] If the Deed of Conditions were to be rectified, there would be an alteration of the real rights of the owners of the 55 flats; although not one that would have any substantial practical effect on their enjoyment of their single car parking space. These owners seem content with that occurring, even if they have not formally consented to it. It would seem to be to their advantage to do so, as it would solve the current reality of the 18 other spaces being blocked from practical use.



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 12  
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Lord President  
Lord Malcolm  
Lord Pentland

OPINION OF LORD MALCOLM

in the Reclaiming Motion

in the petition of

PHG DEVELOPMENTS SCOT LIMITED (IN LIQUIDATION)

Petitioner and Respondent

against

LOTHIAN AMUSEMENTS LIMITED

57<sup>th</sup> Respondent and Reclaimer

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**Petitioner and Respondent: Lindsay QC; Ennova Law LLP**  
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12 February 2021

[5] I am grateful for Lord Pentland's account of the relevant circumstances and the issues. In agreement with his Lordship I see no merit in the complaints as to lack of specification in the pleadings. I have more difficulty with the proposition that the rights of the purchasers of the apartments can be altered without their consent simply on proof that the deed of conditions did not reflect the intentions of the petitioner.

[6] After its execution and registration the deed of conditions did not grant or create rights and obligations. It gained an operative legal life only when a purchaser agreed to its terms in concluded missives. It was the missives which created rights and obligations on both sides, including those contained in the deed of conditions, subsequently made real through registration. It is trite that bilateral contracts are determined by what the parties say and do, not by private intentions. Section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 impinges on this to an extent by the power to alter a contract which fails to express the parties' common intention. It is not suggested that so far as the petitioner and the purchasers are concerned there was a common intention to exclude the 18 car park spaces. The power to rectify is extended to enforceable unilateral promises where for obvious reasons the purpose of only one party arises for consideration. However since the deed of conditions alone granted nothing, it is not obvious that on its own it is a rectifiable document in terms of section 8(1). And given that it set out mutual rights and obligations on both sides, it is hard to view it as a purely unilateral document.

[7] On the assumption that the deed of conditions is to be seen as a document amenable to retrospective rectification in terms of sections 8(1)(b) and 8(4) of the Act, it is questionable that rectification of it alone has any impact on the existing missives and dispositions. If A agrees to purchase a property on the strength of the grant of rights set out in a separate deed, including the right to Y, with the separate deed being incorporated by reference in the missives and the disposition, the subsequent retrospective alteration of that document by removal of Y does not alter the terms of the parties' agreement. It remains a fact that the agreement and the related disposition included Y as per the original deed. It is, to my mind at least, a curiosity that the petitioner insists that the 55 dispositions do not require rectification, yet the purchasers' rights and obligations can be altered without their consent.

This would not be arguable if the deed of conditions had been set out in full in either the missives or the dispositions. It would be surprising if such a markedly different outcome resulted from a shorthand incorporation of the deed by reference. In short I have difficulty with the proposition that as a result of rectification of the deed alone the dispositions now refer to the altered document.

[8] There are a number of unusual features of the case which create difficulties or at least uncertainties when attempting to fit it into the framework of section 8 of the Act. For example because the deed of conditions was written by one party and was designed to form part of a number of bilateral agreements, on a literal reading of the provision it is possible to say that the deed is covered by the terms of section 8(1)(b) of the Act. The same could be said for any missive which ultimately forms part of a concluded bargain. For myself I consider that sub-section 1(a) is aimed at bilateral reciprocal agreements, and 1(b) at the mechanism by which our law allows a person on his or her own to create legal rights and obligations, namely enforceable unilateral promises. Furthermore it is notable that the legal issue is raised, not by the owners of the apartments, but by those with an interest in the adjacent site. At first sight this seems odd, but it is understandable given the complex background of the car park missives, the ongoing separate litigation presently resting on Lord Doherty's judgment, and the related purpose behind the raising of this petition for rectification. For myself I would not question LAL's right to object, but in the particular and unusual circumstances of the case, including that all of the proprietors enjoy an allocated car park space, and that despite service of the petition on each of them, the court has heard not even a murmur of a dissent, I consider that it would be reasonable to proceed on the basis of implied consent on their part, at least in respect of whatever may follow from the grant of the prayer of the petition. In these circumstances I do not press the above reservations to a

dissent in respect of the view of your Lordships that the court should adhere to the interlocutor allowing a proof before answer, though I would comment that even if the petition is ultimately successful in rectifying the deed of conditions, the absence of rectification of the dispositions may yet cause difficulties for the petitioner.



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OPINION OF LORD PENTLAND

in the Reclaiming Motion

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PHG DEVELOPMENTS SCOT LIMITED (IN LIQUIDATION)

Petitioner and Respondent

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12 February 2021

**Introduction**

[9] This reclaiming motion raises an interesting and important question about the impact of a decree for rectification on third party rights created by other documents to which the rectified document is related.

[10] The reclaimer challenges a decision of the Lord Ordinary to allow a proof before answer on an application for rectification of a Deed of Conditions relating to a residential property development in Portobello, Edinburgh. The petitioner (“PHG”) is a company, now

in members' voluntary liquidation, which was formed to complete a development of 55 residential apartments in 7 blocks on a site known as the Kiln's site, which lies to the south-east of Harbour Road, Portobello ("the Kiln's development"). Beneath the blocks there was to be a basement car park containing 73 car parking spaces. For reasons which will become apparent, it is important to note that this would create a surplus of 18 spaces if each of the apartment owners was allocated a single space.

[11] In the petition, PHG seeks rectification of a Deed of Conditions, executed by it in 2014, to grant and regulate, among other matters, common ownership of a boundary wall, and rights of access to and use of the parking spaces in the basement car park. The petition was served on the 55 apartment owners, a company called Danvic Scotland LLP which is now the proprietor of the basement car park, and the Keeper of the Registers of Scotland. None of these parties lodged answers to the petition. None of them has played any part in the current proceedings, although there has been significant correspondence from the Keeper, to which I will refer later. The only respondent which lodged answers in opposition to the petition was Lothian Amusements Limited ("LAL"), the 57<sup>th</sup> respondent; they are the reclaimer. They were formerly the heritable proprietors of an adjacent development site known as the Arcade.

[12] The purpose of the proposed rectification is stated to be to enable PHG to implement obligations under missives entered into between an associated company and LAL in 2013, in relation to access to and use of some of the car parking spaces by owners of apartments which were to be constructed in the proposed development on the Arcade site.

### **The factual and legal background**

[13] Before the Kilns development was completed the site was owned by a company



associated with the petitioner, The Kiln's Development Limited ("KDL"). KDL was under the control of Mr Daniel Teague. On 9 August 2013, KDL concluded missives ("the car park missives") with LAL for the latter to buy the 18 surplus parking spaces in the basement car park. The intention was that they would be used by the owners of the 18 apartments forming the Arcade development. Accordingly, the missives provided that the sale disposition would provide rights of access to and egress across the car park in order for LAL, and in due course the owners of the Arcade apartments, to take access to the 18 spaces through a door in the eastern wall ("the KDL Doorway") of what was to become block 7 of the Kilns development. The price for the 18 spaces was to be £400,000.

[14] In terms of the car park missives, KDL and LAL were each to execute and register a Deed of Conditions. KDL's Deed was to cover the PHG development, but not the 18 car parking spaces. LAL's Deed was to cover the Arcade development and the 18 car parking spaces; this was on the basis that the 18 spaces would be disposed to them in terms of the missives. Work on the Kilns development began in about 2013. In the course of those works KDL conveyed its interest in the development to the petitioner.

[15] The problem giving rise to the present proceedings arose because a Deed of Conditions executed on 3 December 2014 by the petitioner (not, it may be noted, by KDL) and registered on 12 May 2015, covered the whole of the Kilns development, including the 18 car parking spaces. The Deed provided the future owners of the 55 apartments in the Kilns development with a right to park in any one of the 73 spaces, and rights of access and egress across the whole car park. The Deed also created "Apartment Building Common Parts" and "Development Common Parts". Title to the car park would remain with the petitioner. This was before the registration of any of the sale dispositions of apartments within the Kilns development.

[16] PHG duly completed the Kilns development, including construction of the basement car park. In accordance with the car park missives, the doorway in the eastern wall of the car park was constructed and blocked up with temporary blockwork. Work was completed in about July 2015. The 55 apartments were sold to individual purchasers whose titles were registered in the Land Register. The following description of the subjects sold and references to the Deed of Conditions were included in a specimen disposition of the apartments:

“ALL and WHOLE that ground floor flatted dwellinghouse known as [address] the location of which dwellinghouse is delineated in red on the plan annexed and executed as relative hereto (but excepting therefrom such parts thereof as are Common Parts (as that term is defined in the Deed of Conditions aftermentioned)); Which subjects form part and portion of ALL and WHOLE the subjects Harbour Road, Edinburgh and being the subjects registered in the Land Register of Scotland under Title Number MID51821; Together with (One) the fittings and fixtures therein and thereon; (Two) our whole right, title and interest therein and thereto; and (Three) the whole rights, common, mutual and exclusive (if any) and others more particularly described in the Deed of Conditions aftermentioned; And, there are imported the terms of the title conditions specified in the Deed of Conditions dated 3 December 2015 [sic] to be registered in the Land Register of Scotland under Title Number MID51821...”

[17] In September 2018 LAL brought a commercial action in the Court of Session seeking damages from KDL (and from Mr Daniel Teague as guarantor) for loss and damage claimed to have been sustained as a result of KDL being in material breach of the car park missives. By then the contractual date of entry had passed, LAL had resiled from the missives, and it had ceased to be the proprietor of the Arcade site. Lord Doherty heard a debate on the relevancy of two aspects of the pleadings. LAL contended that KDL was unable to comply with its contractual obligations in two respects. First, it could not grant LAL entry to and vacant possession of the 18 car parking spaces because in terms of the Deed of Conditions all the owners of apartments in the Kilns development had been granted rights to park there as

well as access and egress across all the spaces. Secondly, KDL could not grant a disposition to LAL that included a grant of the LAL car park access because in terms of the Deed of Conditions the eastern wall of the car park was common property of all the apartment owners. KDL for its part contended in the first place that it was able to grant entry to and vacant possession of the car parking spaces and, secondly, that the doorway and temporary blockwork were not common property or, in any event, that in terms of the Deed of Conditions, PHG had reserved a right (in condition 16.2.1(f)) to grant servitude rights to the Arcade proprietors without the consent of the Kilns apartment owners, and was entitled to knock through the KDL Doorway in the eastern wall and grant servitude rights of pedestrian access through it. KDL moved for the action to be dismissed. LAL sought to have certain averments made by KDL excluded from probation.

[18] In his opinion dated 2 July 2019 (*Lothian Amusements Limited v The Kiln's Development Limited and Another* [2019] CSOH 51), Lord Doherty decided the two points debated substantially in favour of LAL. In relation to the car parking spaces, he held that on a proper construction of the Deed of Conditions the servient tenement in relation to both the servitude of parking and the servitude of access and egress was the entire basement car park. Each apartment owner had acquired, by his or her split-off disposition, a servitude right to use one car parking space anywhere in the car park, and a servitude right of access and egress over all the spaces. Accordingly, LAL's averment that KDL was unable to grant it entry to and vacant possession of the car parking spaces was relevant for enquiry at a proof before answer. A submission by KDL that the servitude rights of each apartment owner had been discharged or restricted to a space expressly allocated to that apartment, and did not extend to the 18 Arcade spaces none of which had been allocated to any apartment, could not be addressed because it had not been pled.

[19] As regards the LAL car park access, Lord Doherty held that LAL's argument that the whole of the eastern wall was common property in terms of the Deed of Conditions was well-founded. It was part of the Development Common Parts as defined. The question was whether condition 16.2.1(f) in the Deed of Conditions entitled PHG to knock through the doorway and to grant servitude rights of access through it even though PHG no longer owned it. The apartment owners might be personally bound to authorise and permit PHG to exercise the rights reserved in the Deed of Conditions, but that might in turn depend upon whether any of the original apartment owners had sold on to singular successors. Lord Doherty did not consider that he was in a position to determine those issues without factual clarification and further submissions.

#### **PHG's petition for rectification**

[20] It was against the factual and legal background which I have set out that PHG petitioned under section 8(1)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") for rectification of the Deed of Conditions. In the petition PHG avers that condition 16.2.1(f) was drafted with the aim of ensuring that KDL's obligations in terms of the car park missives could be fully complied with. When the Deed of Conditions was first drafted, all parties had understood that the eastern wall would be a mutual wall between the Kiln's site and the Arcade site. It was only because of LAL's unexpected refusal to allow the foundations for the eastern wall to be built on both sides of the boundary that it had moved to being entirely constructed within the Kiln's site. This had made it possible for PHG inadvertently and unintentionally to make the doorway a common part of the Kiln's development. Moreover, PHG had not intended to grant to the Kiln's apartment owners any right to park on the Arcade car parking spaces or any right of access or egress over

them. It had intended that the Deed of Conditions would not prevent the obligations imposed by the car park missives from being fulfilled and that it would remain possible to convey the Arcade car parking spaces with vacant possession and with access being taken to them through the doorway.

[21] For these reasons PHG avers in its petition that the Deed of Conditions failed to express accurately its intention as the grantor of the deed at the date on which it was executed. In an appendix to the petition, the Deed of Conditions is set out with various amendments which PHG avers are necessary in order for the Deed accurately to express its intention as grantor, and to remove any uncertainty regarding its ability to implement KDL's obligations to LAL under the car park missives.

[22] PHG further avers that it is unnecessary for it to seek rectification of the dispositions granted to the apartment owners, and for this reason it was also unnecessary to obtain their consent in terms of section 8(3A) of the 1985 Act. Alternatively, and in any event, the failure of any of the apartment owners to lodge answers to the petition constituted the necessary consent for the purposes of section 8(3A).

[23] In its answers to the petition, LAL avers that PHG's subjective intention regarding condition 16.2.1(f) was not supported by an objective construction of the terms of the Deed of Conditions as a whole. LAL contends that the petition is incompetent and, in any event, rectification should be refused. The apartment owners had, in good faith, acquired real rights of common property in the wall and servitude rights over the Arcade's car parking spaces which could not be taken away without their consent by rectification of the Deed of Conditions. Section 8(3A) required a positive act of giving consent and was not satisfied by mere silence. Rectification of the Deed of Conditions without rectification of the split-off dispositions would have no practical effect.

**The Lord Ordinary's reasons**

[24] The Lord Ordinary observed that the petition proceeded expressly under section 8(1)(b) of the 1985 Act. The boundary between deeds covered by section 8(1)(a) and those dealt with by section 8(1)(b) was not delineated by whether the deed was unilateral in form, but whether the deed gave effect to an earlier agreement (Gretton and Reid, *Conveyancing*, 5<sup>th</sup> ed 2018, para 21–05). If the deed implemented a previous agreement, it would be covered by section 8(1)(a). A Deed of Conditions could fall into either category. Rectification of a Deed of Conditions granted by a developer to give effect to a minute of agreement between the developer and a company, which had from the outset administered and managed the development, though unilateral in form, correctly proceeded under section 8(1)(a) (*Sheltered Housing Management Ltd v Cairns* 2003 SLT 578). The Deed of Conditions in the present case was similarly unilateral in form, but KDL, not the petitioner, was a party to the missives. As such, it was also unilateral in substance because it did not give effect to any earlier agreement between PHG as developer and any other person. It was executed and registered at a time when none of the apartment owners had yet acquired a registered title to his or her apartment. The petitioner's averment was not that it was granted to give effect to the missives, only that it was not intended to interfere with their implementation. The Lord Ordinary was, therefore, satisfied that the petition was correctly brought under and in terms of section 8(1)(b). The issue was accordingly whether or not the Deed of Conditions failed to express accurately the subjective intention of PHG at the time when it was granted.

[25] The Lord Ordinary went on to state that rectification under section 8(1)(b) would often result in something being taken away from the grantee. For that reason, and the

inherent difficulties in proving the subjective intention of the signatory to a unilateral deed (Scottish Law Commission, *Report on Rectification of Contractual and Other Documents*, No 79 (1983), para 3.8), there required to be very careful scrutiny of evidence led in support of an assertion that a document failed accurately to express the grantor's intention. Prejudice to the grantee did not, however, preclude rectification.

[26] In the Lord Ordinary's opinion, the apartment owners did not require to consent to rectification. Subsection 8(3A) was not applicable. There was no need to seek rectification of the dispositions in favour of the apartment owners. If an order for rectification of the Deed of Conditions was made, the Deed would have effect as if it had always been in its rectified terms. The references to it in the dispositions would therefore be deemed retrospectively to be to the Deed as rectified. There was nothing in the dispositions requiring consequential amendment. It was necessary only that an application be made (in terms of section 8A) to register the order for rectification against the apartment owners' title sheets in order to give (prospective) real effect to the rectification of the Deed. Neither was subsection 8(3A) applicable. Its purpose was to protect third parties acting in good faith (Scottish Law Commission, *Report on Land Registration*, No 222 (2010), para 29.26), which the apartment owners were not. They were grantees who, by virtue of the combined effect of the Deed of Conditions and the dispositions in their favour, had obtained rights the petitioner asserted it was not its intention to grant.

[27] The question of whether the apartments owners' failure to oppose the petition amounted to consent by them did not arise, but if it did that failure would not, in the Lord Ordinary's view, be sufficient to constitute consent for the purposes of section 8(3A). What was required was express consent or consent that could reasonably be implied from the whole facts and circumstances. Mere acquiescence was insufficient.

[28] The petition pled a relevant case for rectification under section 8(1)(b) (*The Governor and Company of the Bank of Ireland v Bass Brewers*, Court of Session, Outer House 1 June 2000, unreported, Lord Macfadyen; *Nickson v Commissioners for Her Majesty's Revenue and Customs* 2017 SC 50). There was an important distinction between a failure to achieve the legal result the grantor intended to bring about by execution of the document, which was amenable to rectification under section 8(1)(b), and a failure to achieve some associated or consequential legal right or wider purpose beyond that to be effected by the document, which was not.

The petitioner had made four averments bearing upon its intention. It intended that: (1) the apartment owners would have no rights over the 18 car parking spaces; (2) the KDL Doorway would not form part of the common parts of the Kilns development; (3) the Deed of Conditions would not prevent the obligations imposed by the car park missives from being fulfilled; and (4) it would remain possible to convey the 18 parking spaces to LAL with vacant possession and access to them through the KDL Doorway. The first two averments met the requirement to identify intention by way of creation of rights, but the latter two appeared to the Lord Ordinary to relate to wider purposes or results. In any event, the absence of an intention to confer on the apartment owners' servitude rights over the 18 spaces or common ownership of the KDL doorway were sufficient. In LAL's action against KDL, PHG had been held to have created the servitude and common ownership rights that it maintained it did not intend to create. That was sufficient to address the requirement *viz.* that the identified intention was not expressed accurately in the Deed of Conditions.

[29] The Lord Ordinary took the view that the petition was not limited to a bare assertion of defective expression. The third and fourth averments I have mentioned in the last paragraph, which were insufficient of themselves to justify rectification, provided the factual explanation of why the Deed of Conditions failed accurately to express the petitioner's



intention. The averments as to how it came about that the KDL Doorway was, as the petitioner claimed, inadvertently included in the common parts of the Kilns development were also relevant by way of explanation of how the grantor's intention came to be defectively expressed.

[30] As to the exercise of the court's discretion on whether to grant an order for rectification, it might be arguable that considerations such as carelessness on the part of the petitioner or its agents or the nature and extent of any prejudice were relevant, but these were matters that could be canvassed, if at all, after enquiry. Neither was it necessary at the stage of a debate to consider the specific amendments to the Deed of Conditions proposed by the petitioner, though it was not necessary for each proposed amendment to be the subject of specific averment.

[31] For these reasons the Lord Ordinary repelled LAL's attack on the relevancy and specification of the petition for rectification and appointed the case to a proof before answer.

### **The parties' submissions in the Inner House**

#### ***Reclaimers (LAL)***

[32] LAL submitted that it could be established by different analyses of the statutory scheme for rectification that the Lord Ordinary erred in holding that section 8 of the 1985 Act permitted the loss of real rights on an offer to prove mere unilateral error of expression. His conclusion meant that real rights acquired in good faith by the apartment owners could be taken away without their consent or showing that the dispositions in their favour failed to reflect the common intention of an agreement between them and the petitioner, ie the individual missives to which the dispositions gave effect. That startling consequence could not be and was not correct in law. LAL's core proposition was that real property rights held

by registered proprietors on the basis of titles incorporating rights set forth in a Deed of Conditions could not be defeated or altered merely on proof that the Deed of Conditions did not express accurately the intention of the party granting it.

[33] A registered deed intended to give effect to a prior agreement, such as each of the dispositions in favour of the apartment owners, could only be rectified directly in terms of section 8(1)(a) or indirectly in terms of section 8(3). If the Deed of Conditions did not reflect the intention of the petitioner as grantor, it was then necessary to show either that each sale disposition: required consequentially to be rectified (s 8(3A)); or might itself be capable of rectification in terms of section 8(1)(a), requiring proof that the petitioner did not accurately express the common intention of the parties to the agreement in terms of which it had been granted. On the Lord Ordinary's analysis, the apartment owners had neither form of protection intended by the 1985 Act to be conferred on grantees. The contractual background indicated that an application for rectification of the Deed of Conditions never ought to have arisen in circumstances where the petitioner could point merely to its own intentions as to its content. Fundamentally, however, the titles of the individual apartment owners could not be rectified on proof merely that the Deed of Conditions did not reflect the unilateral intentions of its grantor, who could feasibly have been a third party.

[34] Implicit in the Lord Ordinary's analysis was the view that the rights "taken away" from grantees were "given" by the Deed of Conditions. That was wrong. The apartment owners' real rights were acquired by the grant and subsequent registration of dispositions, which incorporated the Deed of Conditions in unrectified form. The Deed of Conditions of itself conferred no property rights on the apartment owners. The Lord Ordinary had fallen into error in holding that rectification would have no effect on the individual titles of the apartment owners.

[35] Further, the petitioner's averments were irrelevant or at least materially lacking in specification. Whilst the question whether there was a failure to reflect the intention of the grantor was ultimately one of fact on the evidence (*Bank of Scotland v Graham's Trustee* 1992 SC 79 at 88), relevant and specific averments supporting the claim of defective expression were nonetheless required (*Nunn v Nunn* 1997 SLT 182 at 185A). A particularly high standard of proof was necessary in relation to a case of rectification of unilateral deeds, mere assertion being insufficient (*Scottish Law Commission, Report on Rectification of Contractual and Other Documents*, No 79 (1983), paras 3.6 -10; *Hudson v St John* 1977 SC 255; *Patersons of Greenoakhill v Biffa Waste Services* 2013 SLT 729, paras [45]-[47]).

[36] Standing the need for detailed, clear and specific averments in this kind of case, the petitioner's averments of primary fact did not adequately, if at all, set out grounds upon which it might be proved that the Deed of Conditions failed accurately to express its intention at the date of execution. The averments provided no factual foundation for the wholesale re-casting of the Deed proposed in Statement 8 and the Appendix to the petition. They did not give proper or fair notice; thus the matter should be determined on the pleadings.

[37] Section 8 of the 1985 Act was not intended to allow contracts or unilateral deeds to be "re-drawn" to reflect some very general or wider "intention". The remedy was not available to produce a result which the grantor or some other person now happened to regard as being unsatisfactory, for example, as a result of some factual or legal circumstance having been overlooked (*Co-operative Wholesale Society v Ravenseft Properties (No 3)* 2003 SCLR 509; *Nickson v Commissioners for Her Majesty's Revenue and Customs, supra*). The petitioner was required to make relevant, clear and specific averments as to its intention at the date of the grant of the Deed in terms of the legal result sought to be achieved. The averments in

Statement 7 of the petition lacked specification to the point of irrelevancy. They were no more than a bare assertion of defective expression. They did not provide a proper basis for the leading of any evidence to prove facts beyond that assertion. There was no basis for enquiry in relation to the averment that the Deed failed accurately to express the petitioner's intention at the time it was granted. For example, it was averred that it was the intention that the missives would be complied with, but the petitioner was not a party to them. There were no averments as to why, or on what basis, it possessed the intention in question. It did not and could not aver that the Deed was granted pursuant to the missives, which required agreement between KDL and LAL as to the terms of the Deed.

[38] The averments in Statement 5 of the petition regarding the intention underlying Condition 16.2.1(f) of the Deed were likewise irrelevant and materially lacking in specification. That a draft was sent to LAL's solicitors was nothing to the point; that did not bear on the petitioner's intention. There was no averment supporting the existence of any common "understanding" between "all parties" nor were such parties identified. Nothing was averred regarding what happened or ought to have happened upon the "unexpected refusal" of LAL to allow the eastern wall to be built on both sides of the boundary, or how an error of expression resulted from the wall being built wholly on the petitioner's side. The averment that the "structure and scheme of the Deed of Conditions" did not "objectively or subjectively" support an intention to make the KDL Doorway a Common Part of the Development was necessarily irrelevant for the reasons given by Lord Doherty. Further, the averments in Statement 5, though irrelevant on their own terms, were concerned solely with the question of the KDL Doorway, not the parking servitude granted to the apartment owners.

[39] Finally, the court's power to rectify was discretionary (*Norwich Union Life Insurance Society v Tanap Investments VK (in liquidation)* 2000 SC 515; *Bank of Scotland v Brunswick Developments (1987)* 1997 SC 226). In the exercise of that discretion, carelessness on the part of an applicant could be a bar to rectification (*Commission for the New Towns v Cooper (Great Britain)* [1995] Ch 259). It was incumbent on the petitioner to make averments in support of the exercise of discretion in its favour, beyond a bare assertion of error. Such averments should, for example, negate carelessness in the drafting of the Deed on the part of the petitioner or its representatives.

***Respondent (PHG)***

[40] The petition relevantly set out grounds for an order for rectification under section 8(1)(b) of the 1985 Act. The Deed of Conditions was unilateral in both form and substance, and did not give effect to an earlier agreement between the petitioner and any other person. Accordingly, no reliance was placed on section 8(1)(a), and the issue to be determined was whether or not the Deed failed to express accurately the subjective intention of the petitioner at the time it was granted.

[41] The petition sought rectification of the "original document", being the Deed of Conditions, under and in terms of section 8(1)(b). The petition did not seek to rectify, directly or indirectly, any other registered document, such as the dispositions in favour of the apartment owners. There was no need to re-interpret section 8(3A) in the manner proposed by LAL in order to protect the interests of the apartment owners. Their interests were fully protected by service of the petition. If any of them had considered rectification was prejudicial to their interests, they could and should have lodged answers. This protection was substantive, not illusory. Even if prejudice existed, that did not give the

grantee a right to veto rectification; it was only relevant to the exercise of the court's discretion.

[42] It was not necessary to rectify any other document registered in the Land Register, such as the dispositions in favour of each apartment owner. The reference to the Deed therein would be deemed retrospectively to be to the Deed in its rectified terms. The dispositions merely imported the terms of the Deed and did not repeat any of them.

[43] As section 8(4) of the 1985 Act provided that once the Deed was rectified it "shall have effect as if it had always been so rectified", the references to it in the dispositions would be to the rectified Deed. If an order for rectification was granted, the Deed would have effect as if it had always been in its rectified terms. This was clear from the terms of section 8(4). Nothing in the dispositions would require consequential amendment.

[44] As the dispositions were not being rectified, it was not necessary for the petitioner to obtain the consent of the apartment owners under section 8(3A). That section applied only to a document "registered in the Land Register of Scotland in favour of a person acting in good faith". The only documents registered in the Land Register in favour of the apartment owners were their dispositions. The Deed was not in their favour and was registered before any of the dispositions. It was a unilateral document setting "forth in writing the conditions and real burdens under which the said apartments are to be held ..." (Deed of Conditions, preamble, para 3).

[45] LAL confused rectification of documents registered in the Land Register with updating the title sheets as part of the system of registration. The decree of rectification would be registered against all of the affected title sheets, which would be updated by the Keeper through the insertion of references to the decree in the Burdens Sections (Land Registration etc (Scotland) Act 2012, sections 22 and 26). Only then would the retrospective

rectification of the Deed have real effect (section 8A). There was no requirement for an application to be made by or with the consent of the owner of the individual property. All of the conditions for registration can be satisfied. The title sheet was a creation of statute, distinct from the documents required to be registered. It recorded the registered documents relevant to a particular title (2012 Act, sections 3 to 10). As they were not registrable, section 8(3A) did not apply to the administrative process whereby the Keeper updated the title sheets. If the Keeper considered it was inappropriate to register the decree of rectification against all of the title sheets, this would have been stated in the letter from the Scottish Government Legal Directorate on her behalf dated 4 November 2019. It was likewise reasonable to assume that the Keeper would have stated that it was necessary to rectify any other registered documents if that was a requirement. The Keeper's apparent agreement with the petitioner was a weighty factor in support of this being the correct approach.

[46] The petitioner had pled a relevant and specific case. Relevancy and specification had to be determined in the context of an application in terms of section 8(1)(b). That section covered situations where the language used was precisely what the grantor intended to use but did not bring about the legal result sought (*The Governor and Company of the Bank of Ireland v Bass Brewers supra*, para [22]). The requirements of specification would depend on the nature of the case, what the other party was already aware of and might be taken readily to understand (*Richards v Pharmacia Ltd* 2018 SLT 492, para [47]). Here, the respondent had detailed knowledge of the property developments and of the missives, a close commercial relationship with KDL and the petitioner, and its solicitor had received copies of the draft Deed of Conditions.

[47] The Lord Ordinary correctly held that the petition met the requirements of relevancy enunciated in *Nickson v Commissioners for Her Majesty's Revenue and Customs supra*. First, it was averred that the petitioner intended that the Deed would not prevent the obligations imposed by the missives being fulfilled and that it would remain possible to convey the 18 car parking spaces with vacant possession and access through the KDL Doorway (Statement 7). The petitioner clearly and unequivocally averred that as grantor, its intention at the time of execution was that: the apartment owners would have no rights over the 18 spaces; the KDL Doorway would not form part of the Common Parts of the Development; the Deed would not prevent the obligations imposed by the car park missives being fulfilled; and it would remain possible to convey the 18 spaces with vacant possession and access through the KDL Doorway. Nothing more was required. It was not necessary to aver what evidence would be relied upon to prove the averred facts, it being well-established that it is the facts, not the evidence that will prove the facts, that require to be averred. Second, it was averred that the legal effect of the language used in the Deed of Conditions to express the petitioner's intention did not achieve the result intended because the apartment owners acquired servitude rights over the 18 spaces and the KDL Doorway formed a Common Part of the Development, thereby making it impossible that the obligations imposed by the car park missives could be fulfilled. This was the effect of Lord Doherty's opinion in LALs' action against KDL, as was clearly averred at Statement 7. Specifically, it was averred that the petitioner did not intend to grant to the apartment owners any rights to park on the 18 spaces or of access and egress over them, or to make the KDL Doorway part of the Apartment Building Common Parts or part of the Development Common Parts. The inference to be drawn from these averments was that errors in drafting the Deed of Conditions resulted in the failure to express the intention of the grantor. Such drafting



errors were not a bar to rectification (*The Governor and Company of the Bank of Ireland v Bass Brewers, supra*, para [22]); rather, they were a reason why the statutory remedy of rectification was created.

[48] The averments provided a relevant basis for the order sought. What was proposed was not a comprehensive re-writing or re-casting of the Deed of Conditions. The proposed rectification was narrow in scope and focused upon removing the KDL Doorway from the Common Parts and any servitude rights over the 18 spaces. All other provisions were to be left in their original terms.

[49] As regards the standard of proof, the Lord Ordinary had correctly identified that the court was expected to give very careful scrutiny to the evidence led in support of an assertion that a unilateral document failed accurately to express the grantor's intention, and if it appeared that a grantor had simply had a change of mind or wishes that he or she had done something differently, there would be an insufficient legal basis for rectification. He did so under reference to the Scottish Law Commission's *Report on Rectification of Contractual and Other Documents* (No 79 (1983)), which noted that proof in this type of case was inherently more difficult to establish and that bare assertion that the terms were not what the grantor intended was insufficient.

### **Analysis and decision**

[50] Section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provides *inter alia* as follows:

“8 Rectification of defectively expressed documents.

(1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—

(a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made; or

(b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,

it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.

(2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral.

(3) Subject to section 9 of this Act, in ordering the rectification of a document under subsection (1) above (in this subsection referred to as “the original document”), the court may, at its own instance or on an application made to it and in either case after calling all parties who appear to it to have an interest, order the rectification of any other document intended for any of the purposes mentioned in paragraph (a) or (b) of subsection (1) above which is defectively expressed by reason of the defect in the original document.

(3A) If a document is registered in the Land Register of Scotland in favour of a person acting in good faith then, unless the person consents to rectification of the document, it is not competent to order its rectification under subsection (3) above.

(4) Subject to sections 8A and 9(4) of this Act, a document ordered to be rectified under this section shall have effect as if it had always been so rectified.

...”

[51] Section 8A of the 1985 Act provides as follows:

“8A Registration of order for rectification

An order for rectification made under section 8 of this Act in respect of a document which has been registered in the Land Register of Scotland—

- (a) may be registered in that register, and
- (b) does not have real effect until so registered.”

[52] As they each made clear in the course of the summar roll hearing, both parties accept that the Deed of Conditions falls within the class of documents which are, in principle, amenable to rectification under the power conferred on the court by section 8(1)(b) of the

1985 Act. This is because the Deed of Conditions is a document intended to create rights, for example servitude rights and rights of common property, and because it is not a document falling within section 8(1)(a). I agree with the stance that parties have taken up on this issue.

[53] In *The Governor and Company of the Bank of Ireland v Bass Brewers* (Outer House, 1 June 2000 unreported, para [22]) Lord Macfadyen considered the meaning and effect of section 8(1)(b):

“The issue raised by (counsel for the defenders) is one of the proper construction of section 8(1)(b). The resolution of that issue ought in my view to be sought in the first instance in the language of the provision. It seems to me that it is plain that the subsection directs the court to consider first what the grantor intended by way of the creation, transfer, variation or renunciation of rights. That is, in my view, concerned with the substance of what the grantor intended to achieve as well as the form of the document by which he intended to achieve it. The natural form of the answer to the question to which the provision invites attention is that the grantor intended to bring about a particular legal result rather than that he intended to grant a document expressed in particular words. Once the content of the grantor's intention has been identified, attention turns to the document as actually expressed, and the question that must be addressed is whether it expresses accurately the intention already identified. That question can in my view be paraphrased by asking whether the legal effect of language actually used in the deed to express the grantor's intention is to achieve the result that the grantor intended to bring about. To exclude rectification where the language used is the language that the grantor intended to use but the legal result is different from the legal result that the grantor intended to achieve would reduce the role of the remedy to little more than the correction of clerical errors. There is, in my view, no reason in the language of the provision to read it in such a narrow way. Section 8(1)(b) no doubt covers cases where there is a discrepancy between the language used in the document and the language that the grantor intended to use, although I doubt whether rectification would be granted if the discrepancy in language did not produce a difference in legal effect. In my opinion, however, it also covers cases where the language used is precisely the language that the grantor intended to use, but that language does not bring about the legal result that the grantor intended to achieve thereby.”

[54] More recently, Lord Turnbull approved and followed Lord Macfadyen's views in

*Nickson v Commissioners for Her Majesty's Revenue and Customs* 2017 SC 50 at paragraph [45]:

“The application of sec 8(1)(b) was examined by Lord Macfadyen in *Governor and Company of the Bank of Ireland v Bass Brewers Ltd and ors*. Following his approach, the first question to consider is what the grantor intended by way of the creation,

transfer, variation or renunciation of a right. As Lord Macfadyen observed, the natural form of the answer to the question to which the provision invites attention is that the grantor intended to bring about a particular legal result, rather than that he intended to grant a document expressed in particular words. Once the intended legal result has been identified the court should turn its attention to the document as actually expressed and ask itself whether it expresses accurately the intention already identified. In other words, the second question becomes, has the legal effect of the language actually used in the deed to express the grantor's intention achieved the result that the grantor intended to bring about."

[55] In applying these principles in the present case, it is important to recall that the question before this court, as it was before the Lord Ordinary, is whether the petitioner's averments are suitable to be remitted to probation, that is whether they are relevant and whether they are set out with sufficient specification to justify a factual inquiry being held into whether the averments can be proved. The test for remitting averments to probation is not, of course, a high one; the case should only be struck out at the stage of considering relevancy if the claims advanced in the petition must necessarily fail (*Jamieson v Jamieson* 1952 SC (HL) 44 at 50, per Lord Normand, and at 63, per Lord Reid).

[56] With this test in mind, I turn to examine the averments which are critical to the petitioner's case. In statement IV the petitioner avers that conditions 1.1 and 2 of the Deed of Conditions created Apartment Building Common Parts and Development Common Parts. Condition 5.2 conferred rights and obligations on the apartment owners in respect of the basement car park. In particular, condition 5.2.3 gave each apartment owner the right to use one car park space per apartment; and condition 5.2.4 gave each apartment owner a right of vehicular and pedestrian access across the car park. Condition 16.2.1(f) reserved to the petitioner the right to grant to the proprietor of the Arcade servitude rights over any part of the Kilns development in relation to a right to knock through any part of the eastern

boundary wall of the car park to form or construct a doorway and grant servitude rights of pedestrian access through the doorway.

[57] In statement V the petitioner avers that the right in condition 16.2.1(f) was reserved to the petitioner because it was anticipated that the Arcade would be developed for residential purposes and that access to the car park and use of certain car parking spaces would be required in order to facilitate the development.

[58] After making averments about the outcome of the commercial action before Lord Doherty, the petition then goes on to aver that the Deed of Conditions failed to express the intention of the petitioner as the grantor of it at the date on which it was executed. It is averred that the petitioner did not intend to grant any right to the apartment owners to park on the 18 spaces or to grant them any right of access and egress over them when it executed the Deed of Conditions. Nor did the petitioner intend to make the KDL Doorway part of the Apartment Building Common Parts or part of the Development Common Parts when it executed the Deed of Conditions. As grantor, when it executed the Deed of Conditions, the petitioner intended that the apartment owners would have no rights over the 18 spaces and that the KDL Doorway would not form part of the Common Parts of the Development. The petitioner intended that the Deed of Conditions would not prevent the obligations imposed by the car park missives from being fulfilled; and that it would remain possible to convey the 18 spaces with vacant possession with access through the KDL Doorway.

[59] Like the Lord Ordinary, I consider that the petitioner does have a relevant and specific case on averment. In its pleaded case the petitioner identifies a document that was intended to create rights, *viz.* the Deed of Conditions. That document is accepted, on both sides of the present case, not to be one falling within section 8(1)(a). The petitioner then sets out in some detail, in the averments which I have summarised, that the document fails in a

number of respects to express accurately the petitioner's intentions at the time it was executed. *Prima facie* it follows, as it seems to me, that the petitioner has pled a case that is suitable to be remitted for a factual inquiry, at which evidence can be led to try to establish the petitioner's claims and where such evidence can be challenged.

[60] The objection taken by LAL to the relevancy of the petitioner's case is essentially based on the effect that the proposed rectification will have on the titles of the apartment owners. It is said that certain rights which the apartment owners possess by virtue of the split-off dispositions granted in their favour will be retrospectively taken away and that to do so is contrary to principle. I am unconvinced that this is a line of argument that is properly open to LAL since they do not rely on any adverse impact of the proposed rectification on their own title, but rather on the alleged adverse effect on the titles of third parties, none of whom has objected to the proposed rectification by contesting the petition. But at a deeper level it seems to me that the argument is misconceived in principle. It ignores the crucial effect of section 8(4) of the 1985 Act, which provides that a document ordered to be rectified under this section shall have effect as if it had always been so rectified.

[61] The effect of section 8(4) in the present case would be that in the event that the petitioner succeeds in proving the factual averments to which I have referred, the Deed of Conditions would have effect as if it had always been in its rectified terms. The key question is what the effect of that would be on the titles held by the apartment owners. LAL's contention is that there could be no effect on them because the dispositions, once granted and registered, cannot be altered retroactively unless they are themselves made subject to orders for rectification. The references in the dispositions to the Deed of Conditions must continue to be read as references to the Deed of Conditions in its unrectified terms, despite

the order for rectification of the Deed. It seems to me, however, that this approach would undermine the architecture of the carefully constructed statutory rectification scheme. Its purpose is to allow certain defined types of legal instruments to be rectified so that they accurately reflect the intentions of the parties to them, in the case of bilateral instruments, and of the grantor in the case of unilateral instruments. As the Scottish Law Commission recognised in its consultative memorandum on *Voluntary Obligations, Defective Expression and its Correction* (No. 43, 1979, pp. 46 and 47) conferring retrospective effect gives effect to the contracting parties' common intent (in the case of a bilateral instrument) in all its aspects.

The Commission cited what its then Chairman, Lord Maxwell, said on the point in *Hudson v St John* 1977 SC 255 at p. 90:

"Moreover in my opinion the principle operates to correct the mistake not merely from the date when the correction is made but retrospectively from the date when the mistake was made. This I think is logical, since the purpose is to put the parties in the position in which they intended to be and, so far as emerges from the authorities, this is what the Court has in fact done. For example in *Krupp v Menzies* [1907 SC 903] the action in which the defence of mistake was held relevant was for accounting and payment in respect of the period from the date of the minute of agreement containing the alleged mistake and in cases such as *Anderson v. Lambie* [1954 SC (HL) 43], where the remedy of a bare reduction has been all that is required to effect the correction, the effect of reduction is (possibly subject to some conditions) the same as if the defective deed had never been granted."

[62] It is of interest also to note that the Commission proceeded on the basis that the principle of retroactivity might affect not only the parties *inter se*, but also relationships with third parties and outside bodies, such as taxation authorities. This was illustrated by the case of *In re Colebrook's Conveyances* [1972] 1 WLR 1397. In that case by three conveyances in 1954 and 1955 land was conveyed to the plaintiff and his son as joint tenants. In 1962 the son died and the plaintiff, as survivor, became accountable for estate duty in respect of his son's share of the land. Evidence was led that the plaintiff and his son had intended that the share

of each in the land conveyed should pass on death to his personal representatives – in fact duty had been paid out of the son’s estate in respect of the half share. The plaintiffs sought rectification by substituting the words “tenants in common” for “joint tenants”, so that the effect of the conveyances would be that the plaintiff and his son had always been tenants in common of the land in question and whereby the plaintiff would no longer be liable for estate duty on his son’s share. In the circumstances, rectification would be meaningless unless it had retroactive effect. Having accepted the evidence and having made a full consideration of questions of equity, the court granted an order for rectification as asked for.

[63] The Commission considered that the approach taken in *Craddock Bros v Hunt* [1923] 2 Ch 136 was also instructive in this context. At page 152 the Master of the Rolls, Lord Sterndale said this:

“After rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had been originally drawn in its rectified form.”

[64] Lord Justice Warrington at page 160 added the following:

“It seems to me that, on principle, if an instrument of whatever nature is rectified it ought to be treated as if the necessary alteration had actually been made with the pen and had been part of the document at the date of its completion.”

[65] When it came to make its eventual recommendations in its report (*Report on Rectification of Contractual and Other Documents*, Scot Law Com No 79, 1983) the Commission, which by this stage had decided to recommend the extension of the new power of rectification to unilateral as well as to bilateral instruments, noted at paragraph 7.1 that in cases where rectification had been sought and granted its effective date might be of great practical importance as, for instance, it could alter the tax liability of one of the parties. All consultees who commented on the Commission’s provisional recommendation agreed with



the proposed approach, “which would return the parties involved to the position originally intended.”

[66] All this leads me to conclude that where rectification has been ordered, the end result is that the rectified instrument is deemed by law to have always been in its altered terms. This affects third parties just as much as it does the party or parties to the original instrument. So the references in the split-off dispositions to the Deed of Conditions can thereafter only be understood and applied as being references to the rectified Deed; it is as if from the effective date of rectification the unrectified Deed of Conditions has ceased ever to exist. If the law deems it never to have existed in its original terms, but always in its rectified terms, it follows that the references to the Deed in other documents, such as the split-off dispositions, can only be to the rectified Deed. Retroactive rectification must be effective for all purposes. This is, in my view, a crucial feature of the statutory rectification scheme.

[67] The other points raised by LAL can be disposed of more briefly.

[68] First, the express consent of the apartment owners to the proposed rectification is not required. There is no need for PHG to seek an order for rectification of the split-off dispositions granted to the apartment owners.

[69] Secondly, section 8(3)(a) of the 1985 Act is not engaged since the court is not being invited to order rectification of the dispositions.

[70] Thirdly, once the decree for rectification has been registered in the Land Register the Keeper will be in a position to register the decree against all the affected title sheets, such as those of the apartment owners; this is the procedure envisaged by section 8A of the 1985 Act. That step will give the decree real effect against the affected title sheets. The title sheet is a creation of statute; it records the registered documents that are relevant to a particular

title (see sections 3 to 10 of the Land Registration etc. (Scotland) Act 2012). Nothing will have to be done to the split-off dispositions to take account of the proposed rectification; the wording used in them will be unaltered. The purpose of the amendment made by section 8A of the 1985 Act was to improve the “fit” between the document rectification provisions in the 1985 Act and the land registration system, with a view to preserving the integrity of the Land Register (see Scottish Law Commission *Report on Land Registration* (Scot Law Comm No 222) chapter 29). The Commission recommended *inter alia* that (a) rectification of a deed should not make the Land Register inaccurate; (b) when the Register was changed to give effect to a document rectification order, the change should be by way of registration, not rectification; and (c) the consequences of a document registration order should not precede that registration: the real effect of rectification should accordingly take place at the time of registration. In the present case, there is no need to rectify any of the split-off dispositions because their terms are *habile* to refer to the rectified Deed of Conditions. But so far as the Land Register is concerned, in the event that an order for rectification of the Deed of Conditions is made, this must be registered so that the title sheets relating to the individual apartments are accurate and, in particular, reflect the fact that the Deed of Conditions has been rectified by order of the court. In the circumstances of the present case, where none of the apartment owners has any objection to what is proposed, this may be seen as a natural and appropriate consequence of the rectification of the Deed of Conditions.

[71] Fourthly, there is nothing in the pleading points taken on behalf of LAL. The basis of the case brought against them by PHG is made clear in the petition. I am in complete agreement with the Lord Ordinary on the various relevancy and specification points raised by LAL. The taking of pleading points in proceedings before the commercial court is discouraged.

[72] For these reasons I would refuse the reclaiming motion and remit to the Lord Ordinary to proceed as accords. I would reserve all questions of expenses.