SHERIFF APPEAL COURT

2021 SAC (Civ) 11
LIV-A59-16

Sheriff Principal D L Murray
Sheriff Principal D C W Pyle
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by Sheriff Principal D L Murray

in appeal by

TURCAN CONNELL (TRUSTEES) LIMITED

and

THOMAS AITKEN CLARK

in the cause

WEST LOTHIAN COUNCIL

[Pursuer/Respondent]

against

TURCAN CONNELL (TRUSTEES) LIMITED

and

THOMAS AITKEN CLARK

[Defender/Appellants]

Pursuer/Appellant: Walker QC; Turcan Connell
Defender/Respondent: Davie QC; West Lothian Council

19 February 2021

[1] In 1986, Lothian Regional Council ("LRC"), the statutory predecessors of the respondent, disponed Westmuir Farm, on the outskirts of West Calder, to George Anderson Aitken Clark ("George Clark") by a feu disposition dated 7 November

1985 and recorded GRS Midlothian on 30 May 1986 ("the feu disposition"). George Clark died on 23 November 2011. The appellants are his executors. Following proof, the sheriff found on 3 June 2020 that the feu disposition granted by LRC in favour of the late George Clark created an enforceable, standalone, contractual obligation on the appellants to give the respondent notice of any intention to sell the feu or a specified part of the feu and enable the respondent to trigger a right of pre-emption in respect of the feu or a specified part thereof.

[2] The appellants appeal against that decision. Two issues arise in the appeal. The first is whether the right of pre-emption created in the feu disposition survived the abolition of the system of feudal land tenure on 28 November 2004 by section 1 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 ("the 2000 Act"). If that question is answered in favour of the respondent, the second question to be answered is whether a letter of 17 December 2015 sent recorded delivery by Turcan Connell as the appellants' agents to the respondent constituted a valid notice of the intention of the appellants to sell a specific part of the feu and triggered the right of pre-emption under Clause (SIXTH) of the feu disposition.

Submissions for the appellants

[3] Senior counsel invited the court to recall the interlocutor of 3 June 2020 and to pronounce decree of absolvitor in favour of the appellants. He adopted his written submissions. The sheriff erred in law in finding that the feu disposition created an enforceable contractual obligation on the appellants to give notice of an intention to sell part of the feu and to permit the respondent to trigger a right of pre-emption. The appellants accepted that a feu disposition can operate as a contract between the original parties to it.

The appellants also accepted that the respondent acquired all and any subsisting contractual rights formerly held by LRC. The sheriff had erred in his interpretation of that contractual right. The sheriff should have found that any contractual right formerly held by LRC was as a matter of contractual interpretation only habile to be exercised by LRC as superior. Following the abolition of the feudal system of land tenure in Scotland on 28 November 2004 and in particular the coming into force of sections 1 and 17 of the 2000 Act the interest of the feudal superior formerly held by LRC was abolished. The pursuer did not opt to register a notice under section 18A of the 2000 Act which allowed for the preservation of a personal real burden known as a personal pre-emption burden. No personal pre-emption burden was created and the real burden was extinguished in terms of Section 17(1)(a) of the 2000 Act. It was not in dispute that the real rights of pre-emption have been abolished and the respondent relied on a contractual right.

[4] This court therefore required to interpret the terms of the feu disposition to determine the contractual right which LRC acquired. The recent case law on interpretation of contract could be summarised as follows. The court required to ascertain objectively the intention of the parties to the contract at the time they contracted by determining what a reasonable person having the background knowledge of the parties would have understood from the language used by them. The meaning of the words used must be assessed having regard to all the relevant parts of the agreement and the background knowledge of parties. The exercise of construction is a unitary exercise, which should be both purposive and contextual. The factual and legal context is important. In the event that there is more than one possible construction of the language used the court is entitled to prefer the one which is consistent with business common sense, but must also be alive to the possibility that a party may have entered into a bad bargain from their perspective.

[5] The court required, following these rules of construction, to determine the proper interpretation of the feu disposition and whether or not, objectively construed, the parties to it intended to create unrestricted personal contractual rights or, as the appellants submitted, only rights qua superior. Clause (SIXTH) was in the following terms:

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

Properly interpreted, the right obtained by LRC was a real right of pre-emption as superior. No standalone contractual right of pre-emption was created. That interpretation was supported by the words actually used. Clause (SIXTH) expressly referred to the beneficiary of the pre-emption right as "the superiors". This was to be contrasted with other parts of the deed where LRC was described as "we", "us" or "our". That supported the construction

that the parties have in Clause (SIXTH) chosen to delimit the identity of the party benefitting from the right of pre-emption to the superior. Properly construed and respecting the words used, the sheriff should have found that the contractual right formerly held by LRC was only habile to be exercised by LRC for as long as it was simultaneously the superior. The parties to the feu disposition did not know in 1985 that feudal tenure, and consequently the superiority, was going to be abolished by the 2000 Act, but that was nothing to the point.

[6] Once successfully created as a real right, as it was on the recording of the feu disposition, the right of pre-emption enjoyed by LRC must run with the land and cannot sensibly also be assigned as a matter of contract to someone other than the holder of a real right; that because two separate entities could otherwise both hold the same right of pre-emption which would be unfeasible. The sheriff's approach created an absurdity as it gave rise to a hypothetical possibility that LRC could have transferred its contractual right of pre-emption to one party while transferring its heritable right of pre-emption qua superior to another party. When LRC lost its superiority, either on transfer or abolition, it also therefore lost its contractual right of pre-emption because that is what the parties intended as a matter of contractual interpretation. The sheriff was in error in holding that Clause (SIXTH) of the feu disposition created a right that could be exercised independently of the superiority. The sheriff had correctly found that following the abolition of the feudal system by the 2000 Act the respondent was not the superior and was accordingly wrong to hold that despite not being the appellants' superior the respondent retained a contractual right.

[7] The sheriff ought to have held that section 75(1) of the 2000 Act is a saving provision, preserving contractual rights and obligations unaffected. Properly construed, section 75(1) does not create new contractual rights or obligations where none was originally created in the feu disposition, and it does not expand those contractual rights beyond their original

scope. The original scope of any contractual right held by LRC was limited. Section 75 left that contractual right unaffected. Once the superiority was abolished there was no enforceable contractual right of pre-emption because that is what the parties can be taken objectively to have intended.

[8] Finding in fact and law 2 should be recalled and this court should substitute: "The contractual right of pre-emption was exercisable only by a party entitled to the superiority."

[9] Esto the foregoing is incorrect, the sheriff erred in his treatment of the significance of section 18A of the 2000 Act. Section 18A provides a mechanism to allow a superior and his successors who benefit from the real right of pre-emption to preserve it once it is abolished as a real right in the form of a personal pre-emption burden, which he or they can assign to others. The underlying intention of Parliament in the 2000 Act was to abolish the feudal system of land tenure. It was seeking to remove a system where a feudal superior could exercise power and control over others whom otherwise would have a full and complete control over their land and property. Section 18A was enacted as an exception to that general objective. If a superior elected not to use section 18A to preserve its right, it can be taken to have been content to allow those rights to be abolished. Even if it was open to accept that the feu disposition created a contractual right, the scheme of the 2000 Act meant that the only way for a superior or his successors to preserve a right of pre-emption created in a feu disposition was by service of a notice under section 18A.

[10] The appellants' second argument, which only arises if the first argument is unsuccessful, was that the sheriff erred in his consideration of the notice served by the defenders by letter of 17 December 2015. That argument had various stages. In the first place this court could and should overturn the finding of the sheriff that there was no brown tinting on the plan annexed to that letter, if the court identified there to be brown tinting.

Even if this court upheld the sheriff's finding that there was no brown tinting on the notice plan, he required to consider how the reasonable recipient would understand the notice. The submission of the respondent under reference to *Hoe International Limited* v *Andersen* 2017 SC 313 at 32-36 was misconceived. The notice under Clause (SIXTH) simply required notice of a desire by the appellants to dispose of part or all of the feu. Service of the notice has the effect of potentially triggering a process which could lead to a change in parties' respective rights. Control of the process rests with the respondent. It required the respondent, having received a notice, if it wished to repurchase the feu or a specified part thereof, to serve a counter notice. It is the service of the counter notice which fundamentally affects the parties' rights. Following *Hoe International Limited* the impact of the notice sent by the appellants is less drastic, and because of the requirement for this second step considerable latitude should be given when considering the validity of the original notice. Even if it was accepted that there was no brown on the plan, the notice did sufficiently specify the part of the feu which related to a valid notice; that was because the plan clearly contained an area coloured red and there was no suggestion of any brown colouring outside the area coloured red. The area coloured red adequately specified the area being referred to and the test for prima facie validity as a notice was met. Findings in fact and law 4 and 5 (a) should therefore be recalled

[11] On that basis one turned to stage two and the reasonable recipient test. The sheriff was in error in holding that the letter of 17 December 2015 could not be understood by a reasonable recipient. He had misunderstood or failed to have regard to the reasonable recipient test as set out in *Batt Cables plc* v *Spencer Business Parks Limited* 2010 SLT 860, paragraphs [22]–[27]. Even assuming there was no brown on the plan, the reasonable recipient would conclude that the feuar's desire was to sell everything coloured on the plan

and nothing else. That analysis was risk-free to the reasonable recipient because the price to be paid is fixed by the value of the land being transferred, and the respondent would never have to pay more for the land than it was independently assessed as being worth. Approached properly, the sheriff ought to have held that even if there was no brown on the plan there was no area to be identified in addition to the red area. Notice was only being given of a desire to sell the area coloured red and as such the letter of 17 December 2015 constituted a valid notice. The correct action was for the respondent if it wished to purchase the land to serve notice that it wished to purchase the area coloured red. It was not in dispute that the letter of 23 December 2015 from the respondent was not a notice that it intended to purchase the land offered for sale by the appellants.

[12] The sheriff was led into error by the pursuer's submissions anent sections 82 and 84 of the Title Conditions (Scotland) Act 2003 ("the 2003 Act"). These submissions conflated the notice required by the contractual pre-emption clause with an offer to sell as described by sections 82 and 84 of the 2003 Act. The sheriff should have held that the notice issued by letter of 17 December 2015 was simply a contractual notice as required by the subsisting contractual pre-emption clause. The letter of 23 December 2015 did not challenge the terms and conditions of any offer. The respondent plainly did not think the notice of 17 December 2015 was an offer to sell, as demonstrated by the terms of the letter of 23 December 2015. In these circumstances the sheriff was in error in making finding in fact and law6 which should be recalled.

Submissions for the respondent

[13] The respondent invited us to uphold the decision of the sheriff and adhere to his interlocutor of 3 June 2020, sustaining the second, third and sixth pleas in law for the

respondent and to repel the pleas in law for the appellants, their motion and the appeal. Senior counsel adopted her written submissions. The sheriff had correctly identified that the issue of whether a contractual pre-emption right was created in the feu disposition is essentially a matter of law. The appellants had provided no authority for the assertion that any contractual pre-emption right could be exercised by the respondent only as superior. That assertion lies in the erroneous construct that the disponer and disponee in a feu disposition become the superior and feuar to the exclusion of any other legal relationship. The nomenclature of a particular role does not delimit the legal relations. The appellants' proposition that properly interpreted the right of pre-emption can only be exercised qua superior was simply incorrect.

[14] It was artificial to suggest that the contractual right in the feu disposition could only be exercised qua superior. There is nothing in the deed that suggested the right is restricted in that way. The agreement was that LRC would have a first right of refusal if George Clark was to dispose of all or part of the subjects. The use of the word "superior" was a perfectly natural descriptor. Nothing in the deed supported the restrictive interpretation proposed by the appellants. If, as the appellants submitted, there was no expectation of the abolition of the feudal system when the deed was granted in 1985, nothing turns on LRC being described as superiors. "Superior" is not defined in the deed; LRC are not defined as superiors. The use of "superior" in that clause does not require it to be given any special status or meaning. It is no more than a way of referring to a party. When it is used in Clause (SIXTH) it is used to identify the right of that party, a right which will continue on into the future. Likewise, nothing turns on the use of "we" or "us" being used to describe the granter in other aspects of the deed.

[15] The appellants suggested that it was an absurdity for there to be a contractual right exactly co-extensive with the superiority and arising independently of each other. No such proposition had been raised by anyone in connection with the introduction of the 2000 Act. As far as senior counsel was aware it had never been suggested that trying to preserve contractual rights would give rise to competing contractual and feu rights, or that there was an inherent absurdity in the preservation of contractual rights. The purpose of the 2000 Act was to remove feudal land tenure. It was not seeking to remove contractual rights. Section 75 allowed rights to continue without a superior being required to take specific action to preserve such rights. Section 75 was straightforward in its terms. It is entitled "Saving for contractual rights" and provides:-

> "(1) As respects any land granted in feu before the appointed day, nothing in this Act shall affect any right (other than a right to feuduty) included in the grant in so far as that right is contractual as between the parties to the grant (or, as the case may be, as between one of them and a person to whom any such right is assigned).
> (2) In construing the expression "parties to the grant" in subsection (1) above, any enactment or rule of law whereby investiture is deemed renewed when the parties change shall be disregarded."

[16] The sheriff was correct to accept the submissions by the respondent that section 75(1) of the 2000 Act would be otiose should the feu disposition not also constitute a contract between the original parties. There would be no purpose in such a saving position if the argument of the appellants was correct: that any contractual right under the feu disposition could only be exercised qua superior and was thus unenforceable post feudal abolition. The sheriff correctly identified that rights created under property law co-exist and complement each other. Those rights arise in the factual context of the relationship between the parties. The converse is not true; the rights are not standalone and can be carved out independent of the context within which they arise. The respondent has a right of pre-emption under and in

terms of the feu disposition which arises by agreement between the parties to that deed, as to how the relationship is to be regulated.

[17] The purpose of section 18A was to deal with prospective unfairness if action could not be taken to preserve a contractual right, where that right had been sold to a third party. The respondent did not seek to preserve their pre-emption right by notice provided for under and in terms of section 18A of the 2000 Act. They did not require to do so. The appellants incorrectly suggest that this was the only manner under and in terms of the 2000 Act for a superior to preserve a feudal right of pre-emption. That is to ignore that the respondent's case is based upon a contractual right of pre-emption which remains enforceable against the original vassal. Sections 18A and 75 are drafted to deal with different situations. Section 75 is the clause with broader application and is applicable to this case. There is no error of law in the sheriff's decision to grant declarator that a contractual right of pre-emption in their favour is established in the feu disposition.

[18] In the grounds of appeal the appellants argue that the sheriff erred in holding that the notice did not comply with the requirements of Clause (SIXTH) is expressed in two parts. In the first place it is suggested that the sheriff erred in not recognising that there was an area tinted brown on the plan annexed to the letter of 17 December 2015. In the second place, even if the plan did not contain a brown area, it was still an effective notice of pre-emption. The sheriff was entitled to use his own eyes to reach a view as to whether there was no brown area visible on the plan attached to the letter of 17 December 2015. He was entitled to conclude that no brown area was visible on the plan to the naked eye. The appellants suggest no basis on which this court should interfere with that decision. The appellants did not suggest that the sheriff had misdirected himself on the basis of evidence led; indeed, they could not do so because the transcripts are not lodged. In *Hamilton* v *Allied*

Domecq plc [2005] CSIH 74, where the Inner House overturned the decision of the Lord Ordinary, they did so having considered the transcripts of the evidence. The appellants did not specify any error in the sheriff relying on his own view of the plan, or his preferring the evidence of the witnesses for the respondent. Nor was it suggested that the advantage drawn by the sheriff in hearing the evidence was insufficient to explain or justify his conclusion such that the appellate court should interfere with that decision. There was no error in law in the sheriff having made finding in fact and law 4.

[19] On the second argument the appellants maintained the letter of 17 December 2015 constituted a valid notice both in terms of (i) formal validity of the notice and (ii) the reasonable recipient test. The sheriff had correctly identified that strict compliance was required with the terms of the pre-emption clause, *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* 1997 AC 749. He further noted that it requires notice to be given in the event that the appellants wish to dispose of the feu "or a specified part thereof". The sheriff was correct to determine that it was an essential requirement that notice contained such specification. Clause (SIXTH) of the feu disposition is explicit; it sets out the notice to be served and the requirement to identify the specific part of the land to be sold. In *Ben Cleuch Estates* v *Scottish Enterprise* 2008 SC 252 a break notice was held not to be formally valid as it had the wrong landlord's name, even where the notice had ended up in the hands of the actual landlord. By analogy, that demonstrates the importance of precision about the extent of land which was to be sold. The letter of 17 December 2015 did not constitute the required notice as it failed to specify the land to be sold. The action of the respondent in sending the letter of 23 December 2015 was exactly the action which could have been expected of a reasonable recipient seeking clarification of the position.

[20] The appellants do not engage at all with the sheriff's contention that there required to be proper specification in the notice. The appellants' contention that specification of the area does not require to be accurate or complete simply cannot be correct. The notice seeks to alter the legal relationship between the parties. *Hoe International Limited* makes clear that strict compliance with what is prescribed in the contract is required. There was clear prejudice to the respondent who was unable to identify the part of the land offered for sale because that had not been properly specified by the appellants.

[21] On that basis the reasonable recipient test does not arise. The appellants now argue that the sheriff ought to have held that a reasonable recipient would simply have ignored the reference to brown and treated the notice as only referring to the area coloured red. That was not a position which was put to the sheriff in the appellants' written submissions following the proof before answer. No legal or factual basis was proposed to suggest why the sheriff ought to have taken such an approach. That argument was inherently inconsistent with the appellants' primary argument in which the appellants maintain that there is an area showing brown on the plan attached to the letter of 17 December 2015. It is not suggested, contrary to the position in *Mannai Investment Co Ltd*, that if the matter is considered objectively it can be inferred from the knowledge of surrounding circumstances what area is being offered for sale. There is no basis on which the supposed reasonable recipient would be able to infer that the reference to a brown area should simply be ignored.

[22] The argument proposed in terms of sections 82-84 of the 2003 Act only arises if the court finds that the letter of 17 December 2015 constituted a valid notice. The appellants suggested that the sheriff had conflated the contractual notice required under the pre-emption right contained in the feu disposition and an offer to sell as provided for in the legislation. At paragraph 70 of his Note the sheriff makes clear that he has considered that

specific point. He identifies that it is not clear whether section 84 can apply to a contractual right, and he highlights that this is not a matter which appears to have been previously determined. The sheriff proffered his opinion on the application of the 2003 Act on the hypothesis that his original conclusion on the validity of the notice was incorrect. He concluded that sections 82–84 are sufficiently widely framed to include the pre-emption rights which were continued as contractual rights. Adopting that approach, he accepted that the letter of 17 December 2015 was habile to be an offer to sell under the 2003 Act. He then found after reviewing the whole context that the respondent's letter of 23 December 2015, which in terms invited the appellants to issue an offer

> "to sell in terms of section 84 of the [2003 Act]", was a counter notice informing the appellants that the terms of the letter of 17 December 2015 were unreasonable in terms of section 84(5)(b).

That was a valid interpretation of the law as applied to the facts of this case. It was supported by the legal opinion obtained on behalf of the appellants. The sheriff had not erred in adopting that interpretation in this regard.

Decision

[23] The first matter to be addressed is whether the sheriff was correct to decide that Clause (SIXTH) of the feu disposition, the terms of which are set out above, created a contractual obligation between the original contracting parties or their successors notwithstanding the abolition of feudal tenure by the 2000 Act. We find no error of law in the sheriff's conclusion. We accept the sheriff's analysis that a feu disposition is also a contractual document. Conveyancing 5th Edition by Professors Gretton and Reid provides at section 11-21:

> "As well as being an executory deed, conveying the land, (and the writs and rents), a disposition is also a contract imposing obligations, usually on the granter but sometimes on the grantee."

And at 11-24:

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

And, perhaps more relevantly, at 14-30:

> "Sometimes, when land is split off and sold, the seller reserves the right of first refusal in a subsequent re-sale. This gives the option of buying back before the land is sold to someone else … Sometimes a pre-emption is contractual in nature but more usually it is included within a conveyance with the idea (not always successfully realised) that it should be a real burden."

[24] The sheriff records that the explanatory notes to section 17 of the 2000 Act state:

"Even after abolition, a feudal superior will be able to enforce the terms of a feudal deed against the original vassal in so far as such terms are contractual."

Likewise the explanatory notes to section 75 of the 2000 Act state:

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

[25] Section 54 makes it clear that feudal abolition will extinguish (subject to exceptions) all rights and obligations of a superior which are held simply by virtue of being the superior. It is not intended to extinguish contractual rights and obligations whether created in feudal deeds or otherwise. Section 75 makes it clear that even after abolition a former superior will be able to enforce the terms of a feudal deed against the original vassal insofar as such terms

are contractual. In the instant case the respondent is the statutory successor of the superior and the appellants are the executors of the vassal, the late George Clark.

[26] The appellants' assertion that it leads to absurdity for a feu disposition to also result in the creation of contractual obligations is difficult to reconcile with their acceptance that such a contractual right exists pre-registration, before any real right is constituted. In this case the date of entry in the feu disposition was 2 July 1984 and the date of registration was nearly two years later on 30 May 1986. As noted by the sheriff, it is also contrary to the Opinion prepared for the appellants by Professor Paisley, who stated at 2.1:

"The pre-emption stated above is now no longer a real burden and is merely contractually enforceable… "

And at 2.4:

"…this is not a real burden it is a notice given in terms of a contract as the pre-emption has ceased to be enforceable as a real burden."

The sheriff made reference to section 61 of the 2003 Act which he found had no relevance as it only applied to deeds registered after the appointed day. We observe that its introduction so as to prevent dual validity as both contract and real burden in future is a recognition that prior to the commencement of the section such dual validity was recognised, which further undermines the appellants' argument. We therefore refute the suggestion of the appellants that a separate right in contract would lead to an absurdity. That contention is without merit.

[27] Applying the canons of contractual interpretation we reject the appellants' contention that the use of the word "superior" in Clause (SIXTH) means that the right of pre-emption which is created is only available to be exercised by the superior. The principles of construction as summarised by the appellants, which were accepted by the

respondent, and with which we do not demur, do not support the interpretation sought by the appellants. The words clearly create the right of pre-emption and there is nothing which supports the appellants' argument that the use of the word "superior" had the effect of limiting the capacity in which the right is to be exercised. There is nothing in the words used in the feu disposition or identified in the background knowledge of the parties which supports that interpretation. Business common sense does not suggest that the right of pre-emption was restricted to LRC in the capacity of superiors. Contrary to the argument of the appellants, LRC's right of pre-emption was not restricted to being a real right only to be exercised by them in their capacity as superiors. Properly interpreted, the terms of Clause (SIXTH) of the feu disposition provides LRC with a contractual right of pre-emption.

[28] Section 75 of the 2000 Act makes clear that as a matter of law such a contractual obligation continues. Professor Reid in The Abolition of Feudal Tenure in Scotland at paragraph 2.6, which deals with the abolition of superiors' rights, states in terms under reference to section 75:

"…where on the appointed day, the original vassal is still in place, the burdens remain enforceable by the former superior as a matter of contract."

Here the appellants are in the shoes of the original vassal as title remains in the name of George Clark. For the interpretation proposed by the appellants to be sustained it would in our view have been necessary that it was expressly stated that the right was only exercisable by LRC in their capacity as superiors. There was no evidence put before the sheriff of whether parties had in mind the abolition of feudal tenure when the feu disposition was granted, but the respondent did not challenge the hypothesis that LRC and George Clark would not have been contemplating, at the time the sale was agreed, the abolition of feudal tenure. That nearly two years passed between the date of entry and the date of registration

might support the view that the parties contemplated a contractual right of pre-emption, no matter any change to the law of feudal tenure.

[29] We find no error in the sheriff's finding in fact and law 2 that the right of pre-emption contained in the feu disposition between LRC and George Clark continues as a contractual obligation between the original contracting parties and their successors. No appeal is taken against the sheriff's conclusion that the parties to this action are bound by the contractual obligations, the respondent as statutory successor to LRC and the appellants as executors of the late George Clark. As a matter of law the feu disposition did create a contractual right of pre-emption in favour of the parties to the deed which remains enforceable between the appellants and respondent as successors to the original parties.

[30] We then turn to the effect of the letter of 17 December 2015. We consider the letter to be manifestly defective. It makes reference to an area covered red and brown and we have no hesitation in accepting the sheriff's analysis which conforms to our own examination of the plan annexed to the letter that there is no brown visible on the plan attached to the letter. We consider that the failure of the appellants to identify the "specific part of the feu" which they sought to sell rendered the letter of 17 December 2015 invalid. Transcripts of evidence were not provided and in these circumstances we conclude, particularly where we agree with the sheriff's observations on the plan, the court is not entitled to go behind the sheriff's view of the parole evidence of the appellants' witness Mr Wright and the respondent's witnesses, Ms Richardson, Mr Carlton and Mr Doran.

[31] It is difficult to read the letter of 17 December 2015 other than as an attempt to give notice in terms of Clause (SIXTH). Senior counsel was unable to explain why the appellants' solicitors had written the letter of 17 December 2015. His initial response to the question that it was sent in error was contradicted by his esto argument that it constituted an effective

notice. No evidence was presented to the sheriff from the author of the letter to explain why they had described the plan annexed to the letter as coloured red and brown, or why there was any need for two colours to be used. Regrettably the effect of the reference to areas coloured brown and red was simply to cause confusion when, as the respondent generously put it, no brown area could be clearly seen on the plan.

[32] The appellants' subsidiary argument was to invoke the reasonable recipient test to challenge the effect of the respondent's reply of 23 December 2015. We consider that the action of the respondent in sending the letter of 23 December 2015 reflected the action which could have been expected from the reasonable recipient. They could not establish the extent of the specified area and they sought clarification of the position. There is no merit in the appellants' contention that the reasonable recipient would conclude that the appellants' desire was to sell everything coloured on the plan and nothing else or that the reasonable recipient should have responded on the basis that the letter of 17 December 2015 was valid and triggered the right of pre-emption. Having regard to *Hoe International Limited* and *Batt Cables plc*, the obligation was on the appellants to make it entirely clear which area of land they were considering selling. We therefore find no error in law in the sheriff's conclusion that the letter of 17 December 2015 was not a valid notice. If there was a failure in this case of a party to respond in the manner of a reasonable recipient, that was the failure of the appellants to respond to the respondent's letter of 23 December 2015.

[33] Given the finding that the letter of 17 December 2015 did not constitute a valid notice the need to consider the application of sections 82-84 of the 2003 Act does not arise. We should simply observe, without determining the matter that section 82 provides:

"Sections 83 and 84 of this Act apply to any subsisting right of pre-emption constituted as a title condition which–

(a) was originally created in favour of a feudal superior; or

(b) was created in a deed executed after 1 September 1974,"

This is broadly framed and sections 83 and 84 may well be applied to contractual rights of pre-emption which remain enforceable.

[34] The appeal is refused. Parties were agreed that the normal rule that expenses should follow success should apply. They also jointly moved that sanction be granted for the employment of senior counsel for the appeal and invited us to deal with the expenses at first instance. In these circumstances, we shall award the expenses of the appeal in favour of the respondent with sanction for the employment of senior counsel. The sheriff had not dealt with the expenses in the sheriff court action and again we will award the expenses at first instance insofar as not already dealt with in favour of the respondent with sanction for the employment of junior counsel at first instance. We also certify Mr Doran as an expert witness for the respondent.