SHERIFF APPEAL COURT

[2021] SAC (Civ) 29
HAM-A625-18

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

DAVID & ANDREA BRYSON

Pursuers and Respondents

against

PAUL & EVONNE SALMOND

Defenders and Appellants

Pursuers and Respondents: Manson, advocate; Anderson Strathern LLP
Defenders and Appellants: Lindsay QC; Ennova Law

18 August 2021

Introduction

[1] The pursuers and respondents ("the respondents") are the heritable proprietors of One and Five Floors Farm, Stonehouse Road, Strathaven. The defenders and appellants ("the appellants") have been the heritable proprietors of Two Floors Farm since 29 September 2017. Two Floors Farm was formerly comprised in the respondents' title to a wider area at Floors Farm. The present appeal relates to the proper interpretation of a real

burden imposed upon the appellants' property in favour of the respondents' property, Five Floors Farm.

[2] The real burden in question, 5.2, is in the following terms:

> "Save in the case of manifest error, the sum or sums due by the Two Floors Farm Proprietors to the Five Floors Farm Proprietors from time to time in respect of the maintenance and repair of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System will be established by certificate signed by the Five Floors Farm Proprietors and sent by Recorded Delivery or Registered Post to the Two Floors Farm Proprietors, the certificate of postage being sufficient evidence that such certificate has been received by the Two Floors Farm Proprietors."

[3] Real burden 5.2 is consequential upon real burden 5.1, which is in the following terms:

> "The Two Floors Farm Proprietors will be responsible for, and will pay promptly to the Five Floors Farm Proprietors, an equitable share of the cost of maintenance and repair of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System, and which equitable share shall be based on an equality of contribution by the number of parties and proprietors (declaring that for as long as the One Floors Farm Property and the Five Floors Farm Property are owned by the same party or parties, that party or parties shall be regarded as together constituting one proprietor for the purposes of this paragraph) entitled to exercise proprietorial or formal servitude rights in respect of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System at any one time."

[4] After what may be described as a number of false starts, the respondents prepared and signed a certificate (which is dated 11 December 2019) in terms of which £8,945.41 was certified as due for payment by the appellants (hereinafter referred to as "the Certificate"). That certificate was subsequently sent to the appellants by Recorded Delivery Post on 10 January 2020. It is that certificate upon which the present proceedings are based. It is notable that the proceedings were commenced in December 2018.

The sheriff's judgment

[5] Certain matters were debated before the sheriff which were not argued before this court. In relation to the two matters that this court is required to determine, namely, the proper interpretation of real burden 5.2 and whether or not the Certificate issued thereunder contains one or more manifest errors, the relevant passages of the sheriff's judgment merit being set out in full.

[6] On the proper interpretation of real burden 5.2 and the question of the finality of a certificate issued thereunder, the sheriff said this:

> "[23] The primary burden governing payment of the shared maintenance costs incurred at the joint properties is that to be found in the title deeds of the different properties. In the defenders' case, this is expressed in Burden 5.2. Parties have, therefore, entered into an arrangement whereby the defenders' property was conveyed to them on these terms. Establishment of the sum due by the defenders to the pursuers is posited upon a certificate being sent by the pursuers to the defenders. Save in the case of manifest error, the sum is established in this manner. While the defenders have argued that the certificate was not intended to have finality and that it could be challenged generally, it is difficult to read the burden in any meaningful way apart from that the sum was to be established by service in the prescribed manner unless there had been a manifest error."

[7] On whether or not the Certificate contained a manifest error, the sheriff said this:

> "[24] Taking manifest error as being something which was plain and obvious or easily demonstrable without extensive investigation, it ought to be a matter which was readily apparent and which would not require extensive investigation. In expanding upon the alleged manifest errors, the defenders aver in Answer 12 that the pursuers had failed to specify how the purported works constituted maintenance in terms of the titles. They say that no invoices, beyond those of the pursuers' own company, had been provided. They add that no receipts for outlays have been provided. There is said to be a lack of specification, duplication, upgrades rather than repairs and maintenance, a lack of vouching that tradesmen were required, an excessive number of hours devoted to projects and an excessive hourly rate.
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> [25] Such challenges are in general ones which would require evidence being led in order to reach a resolution. The defenders' challenges would require factual investigation, often extensive, which was indeed what the defenders sought in moving for a proof before answer. The challenges could not be said to be plain and obvious or easily demonstrable without extensive investigation. One which might have seemed obvious and readily ascertainable was duplication. However, on

> examination of the pleadings they disclose that there is a factual dispute as to whether there is such duplication. For example, while there is said to be duplication of jet washing of pillars and gates, the pursuers aver that one relates to the pillars and the second item concerns the mid-gates. Similarly, the defenders aver that there appears to be duplication of charges for time spent by the first pursuer investigating faults with the mid-gates and a later item. The pursuers aver that the second item refers to a time when the first pursuer attended to repair a fault in the mid-gates which the first defender had reported. Thus, it is not obvious that this is duplication since the pursuers aver that they were separate matters. While there may be assertion of duplication, therefore, there is no obvious double counting such that it is apparent that there has been some manifest error. By their nature, these were not mere oversights or blunders capable of easy correction. Being potentially disputed facts or differences of opinion, they would require evidence and submission as to how these differing versions were to be applied. It is a contested factual dispute of this nature which the burden is designed to avoid.
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> [26] The variety of challenges and the type of challenge which the defenders have raised to the sums claimed to have been due in the certificate requires careful analysis in order to evaluate whether any would warrant going to proof. While numerous faults are propounded with the work which the pursuers have listed in the spreadsheet, they have the nature simply of a general list of disputed items of work. In order to have an enquiry into the challenges, there would have to be a manifest error and, while recognising that many flaws are alleged, I do not detect any which would be categorised as such."

[8] The sheriff concluded that the Certificate established the sum due by the appellants in respect of the maintenance and repair of the Access Road, the General Drainage Pipes, the Security Gates, the Gate Equipment and the Biodisk System and that no manifest error was apparent. The sheriff granted decree *de plano* and the found the appellants liable to the respondents in the expenses of the action.

Grounds of appeal and answers

[9] The appellants initially advanced four grounds of appeal. In advance of the hearing of the appeal they gave notice that they did not intend to rely upon two of those. The grounds of appeal argued by the appellant are set out in the following two paragraphs.

[10] The appellants argue that the sheriff erred in law in holding that the Certificate was binding and final and could only be challenged by the appellants on the grounds of manifest error. The sheriff ought to have held that the Certificate was not final or binding or conclusive; and that the sums certified by the respondents could be challenged by the appellants on any relevant ground, regardless of whether or not they were a manifest error. The sheriff erred in law in his interpretation of the meaning and effect of real burden 5.2. In particular, the sheriff erred in failing to hold that the use of the word "established" in the real burden did not result in the Certificate becoming final, binding and conclusive. As a result of the strong common law presumption that remedies for breach arising in terms of general law are not excluded unless clear express words to that effect are used, the Certificate would only be final, binding and conclusive if the real burden at issue expressly provided for this. It does not. The word "established" is not a synonym for "final" or "binding" or "conclusive". Accordingly, the Certificate is not binding upon the appellants and the grounds of challenge open to them are not limited to manifest errors.

[11] The appellants also argue that the sheriff erred in law in holding that none of the grounds challenging the sum certified were manifest errors. The sheriff ought to have held that all of these grounds were manifest errors. The sheriff erred by misunderstanding and misapplying the test of manifest error to the appellants' averments. The sum certified must be prepared in good faith and in accordance with the terms of the real burden at issue. Errors in judgment cannot be challenged but errors in figures and obvious blunders can be challenged. The sheriff erred in failing to recognise that many of the grounds of challenge raised issues of bad faith and that others contended that certain of the items did not fall within the scope of real burden. The remaining grounds of challenge identified errors in figures and obvious blunders which could be determined by the court without a lengthy

enquiry into the facts. None of the grounds of challenge averred by the appellants raised issues of disputed judgment nor did they raise matters which admitted of a difference of opinion. Accordingly, all of the grounds of challenge to the sum certified fell within the scope of a challenge limited to manifest error.

[12] In answer, the respondents argue that the sheriff had been correct in rejecting what the respondents categorised as the sterile and artificial construction of the terms and effect of real burden 5.2 advanced by the appellants. The sheriff was correct to hold that the language adopted by the draftsman of the titles disclosed a clear intention to render the terms of the Certificate binding in "establishing" the liability of the appellants to pay a particular sum unless there is a manifest error. The sheriff recognised that the use of "establish" together with the caveat of "manifest error" demonstrates very plainly that the purpose of the provision is to establish a final and conclusive mechanism for ascertaining the payment obligations of the appellants. The sheriff was correct to conclude that it was difficult to reach any other conclusion. The "save in the case of manifest error" excepting provision would serve no obvious purpose if the real burden did not mean that a conclusive ascertainment had otherwise been achieved.

[13] In response to the manifest error ground, the respondents argue that the sheriff acted properly in rejecting the contention that the appellants had pled a relevant basis to prove "manifest error". The sheriff adopted and then applied the meaning which the courts have given to the phrase "manifest error". In applying the meaning of "manifest error" to the appellants' pleadings, the sheriff was correct to conclude that the appellants' approach would serve to rob the provision of its content and purpose. The sheriff had been correct to conclude that there were no "plain and obvious" oversights or blunders in the Certificate. The sheriff gave effect to the purpose of this part of the scheme in the relevant titles, which is

to facilitate an efficient method by which payment for the necessary works would be recovered speedily.

Decision

[14] The determination of this appeal turns upon the answers to two questions. First, is a certificate issued under real burden 5.2 final and binding, save for manifest error? Second, assuming the first question is answered in the affirmative, does the Certificate contain a manifest error or errors?

[15] The first question is a straightforward one. Real burdens fall to be construed in the same manner as other provisions of deeds which relate to land and are intended for registration (see section 14 of the Title Conditions (Scotland) Act 2003). The approach to the interpretation of property deeds (and therefore real burdens given the terms of section 14) is that the words used in the deed should be given their ordinary meaning and interpreted in accordance with the intention of the parties so far as that intention is objectively ascertainable, (Gordon & Wortley, *Scottish Land Law* 3rd ed., Vol II at paragraph 24-61).

[16] The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case (which this is not), that meaning is most obviously to be gleaned from the language of the provision.

[17] The language of real burden 5.2 is, in our view, clear. To interpret it in the manner proposed by the appellants would defeat the clear objectives of the clause. There are two particular matters of note. First, the sum due by the appellants to the respondents is "established" by a certificate signed by the respondents. One of the Oxford English Dictionary definitions of "establish" is "to place beyond dispute; to prove (a proposition, claim, accusation); rarely with personal object and complement." In the present case, the

sum claimed is placed beyond dispute, save in the case of manifest error. Second, the appellants' argument shears of any effect that words "Save in the case of manifest error" where they appear at the outset of the real burden at issue. Those words would be wholly redundant if the appellants were correct in their assertion that the grounds of challenge are not limited to manifest errors. The Certificate, issued under real burden 5.2, is final and binding, save for manifest error.

[18] We do not accept the appellant's proposition that, to have the effect contended for by the respondents, the real burden required to state that the Certificate was to be "final, binding and conclusive." We accept that the words used satisfy the requirement expressed by Lord Diplock in *Gilbert-Ash Northern Ltd* v *Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717 that clear words are required to overturn the presumption that available remedies are not excluded. Neither do we accept the argument that the words used are in some way ineffectual so as to prevent the Certificate of the respondents from being effective on public policy grounds. We are of the opinion that there is no policy ground which precludes a certificate issued by an interested party from being conclusive. The appellants chose to purchase Two Floors Farm in the knowledge of the terms of real burden 5.2. Had they been unwilling to accept the terms of that real burden they would not have proceeded with the purchase. Having chosen to do so, the appellants cannot now complain on policy grounds.

[19] We turn to the second question, does the Certificate contain a manifest error or errors? The Certificate was accompanied by a spreadsheet which parties agreed the court was entitled to have regard to. Neither the terms of the Certificate nor the terms of the spreadsheet is in dispute. It is, therefore, possible for this issue to be dealt with, without enquiry.

[20] In *Macdonald* v *Livingstone* [2012] CSOH 31, Lord Malcolm considered the meaning of the expression "manifest error". At paras [8] and [9] he said this:

> "[8] There are many cases which discuss 'manifest error' or similar phrases in varying contexts. In Montgomery v Cameron & Greig and Others [2007] CSOH 63, Lord Reed referred to para 10-73 of the 18th edition of Lindley & Banks on Partnership. It quotes an earlier edition of the work in which Lord Lindley discussed partnership accounts which are conclusive in all but obvious and manifest errors. The exception applies to 'errors in figures and obvious blunders, not to errors in judgement'. Lord Lindley continued by explaining that 'all errors are manifest when discovered; but such clauses as those referred to here are intended to be confined to oversights and blunders so obvious as to admit of no difference of opinion.' … Lord Reed continued (para 32):
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> > 'Provided termination accounts are prepared in good faith in accordance with the agreement, they are therefore binding on the partners. That would be so even if the valuation of the assets and the termination accounts did not represent their fair market value …'
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> [9] In the present case an assertion by the first defender that the accounts as settled by the expert are wrong will not supersede the parties' agreement to be bound by the decision of the expert. This holds true even if the assertion is well-founded. Were it otherwise, the agreement to be bound by the decision, except in the case of a manifest error, would be robbed of any meaning or content. It is not sufficient to argue and then prove that the decision is wrong. Before a challenge is allowed, there must be an error which is obvious and clear beyond reasonable contradiction …"

[21] The appellants' challenges to the sum certified that are predicated upon the good faith of certain items are misconceived. The appellants say that because of a "complete lack of vouching and absence of specification", they are disputing whether or not these items were actually carried out. Adopting such an approach would, as noted by Lord Malcolm, rob real burden 5.2 of any meaning or content. The Certificate would not establish the sum due by the appellants to the respondents. On the appellants' argument, all a recipient of such a certificate would need do is assert that certain of the certified work had not been carried out, thus entitling them to enquiry. That is misconceived standing the proper

interpretation of real burden 5.2. Ultimately, senior counsel for the appellants accepted that the appellants' averments fell short of what was required for a good faith challenge.

[22] The appellants remaining challenges are that certain items cannot be recovered in terms of real burden 5.2 as they fall out with its scope. As such, they argue that the Certificate was not prepared in accordance with the terms of real burden 5.2. In light of the absence of any dispute as to the terms of the Certificate or the accompanying schedule it is open to this court to determine where there is an error which is obvious and clear beyond reasonable contradiction. The items put in issue in this matter are those set out in answer 12(c), (d), (f), (g), (i), (l), (n), (p), (q) and (r). We consider each in turn.

[23] Answer 12(c) relates to items 5 - 7 in the schedule. The work in question relates to the removal and replacement of the mid-gate. The appellants' position is that this is neither a repair nor maintenance. Whilst it is within reasonable contemplation that the replacement of certain elements of the gate mechanism might be required as part of a repair to the gates, the complete replacement of the gate is not contemplated by real burden 5.2. The inclusion of this work within the sum certified amounts to a manifest error.

[24] Answer 12(d) relates to item 8 in the schedule. The work in question relates to the hypochlorite jet wash and road sweep of the mid-gate gate and sandstone pillar. The work in question is maintenance of the Security Gates. The inclusion of this work within the sum certified does not amount to a manifest error.

[25] Answer 12(f) relates to items 10 and 11 in the schedule. The work in item 10 relates to certain works to the top gate. It is within reasonable contemplation that the replacement of certain elements of the gate mechanism might be required to repair the gates. The inclusion of this work within the sum certified does not amount to a manifest error. The work in item 11, namely, "fault find diagnose replace relay for top gate maglock release" is a

repair of the Security Gates. The inclusion of this work within the sum certified does not amount to a manifest error.

[26] Answer 12(g) relates to item 12 in the schedule, which comprises work to the top-gate, namely, gate and sandstone pillar hypochlorite jet wash and road sweep. The position in relation to work of this nature is as set out in para [24] above. The work in question is maintenance of the Security Gates. The inclusion of this work within the sum certified does not amount to a manifest error.

[27] Answer 12(i) relates to items 15 - 18 in the schedule. The items in question relate to the installation of a new kiosk for the Biodisk system. The complete replacement of the kiosk is not within the scope of real burden 5.2. It is not work of repair of maintenance. The inclusion of this work within the sum certified amounts to a manifest error.

[28] Answer 12(l) relates to items 21 - 24 in the schedule. Items 21, 22 and 23 relate to the new Biodisk system kiosk. For the reasons set out in para [27] above the inclusion of this work within the sum certified amounts to a manifest error. Item 24 relates to the supply of 3 meters to accurately calculate electricity usage and the appropriate split of costs between the Biodisk units and the electric gates. That is neither work of repair or maintenance. The inclusion of this work within the sum certified amounts to a manifest error.

[29] Answer 12(n) relates to items 29 - 34 in the schedule. No sum is, in fact, claimed from the appellants in relation to these items. We need not comment further upon them.

[30] Answer 12(p) relates to items 42 - 44 in the schedule. Item 42 is in respect of a quarterly clean out/removal of debris from channel drain including silt trap basket and outflow pipe. Item 43 is in respect of the annual road gulley cleaning. Item 44 is in respect of annual road cleaning and clearing, including weed removal. The challenge in respect of these three items is that the time spent relative to them was excessive. It cannot be said that

these are errors which are obvious and clear beyond reasonable contradiction. The inclusion of this work within the sum certified does not amount to a manifest error.

[31] Answer 12(q) relates to item 45 in the schedule, namely, annual weed killing. The weed killing is connected to a matter covered by the real burden, namely, the Access Road (unlike, for example, item 44 - see para [30] above). The inclusion of this work within the sum certified does not amount to a manifest error.

[32] Answer 12(r) relates to items 46 and 47 in the schedule. The work in question relates to the installation of new electric cables. That is neither work of repair or maintenance. The inclusion of this work within the sum certified amounts to a manifest error.

Disposal

[33] In light of the conclusions reached in paras [23], [27], [28], and [32] above that the Certificate contains a number of manifest errors. In our view, an action predicated upon the Certificate cannot succeed. For reasons that are not immediately apparent, the appellants invited this court to allow a proof before answer, restricted to quantum. In light of the conclusion we have reached we see no purpose in acceding to such a motion, however, the case will be put out by order to enable parties to address the court on further procedure in light of the conclusions we have reached.