

Real burdens of Use: Are they of any value ?

Barker v. Lewis Sheriff Court, Cupar, Sheriff Principal Dunlop Q.C. 5 March 2008

The Facts

B, S, W and D were owners of houses converted from steadings. They had all bought from the same developer. Each house had real burdens imposed by the same deed of conditions. The burdens included an obligation to use the house and garage as a domestic dwellinghouse with relative offices for use by one family only and no other purpose whatsoever

The deed provided that it was to be enforceable by the other owners in the development for the protection of the amenity of the development.

D bought her house with the purpose of running a bed and breakfast business from it. She obtained the consent of the developer to her proposal but not the consent of the other owners. Having taken entry in December 2004 within a couple of weeks she informed B that she intended to operate the business. The matter was discussed at a residents' meeting. In summer 2005 she began to operate her business. She took about 250 guests a year. There was an increase in traffic on the common access road and private road within the development, with some guests parking inappropriately or driving inappropriately to and from the Steading, some guests went to the wrong house, there was increased noise in the development with guests coming and going, a general loss of privacy and peace stemming from the presence of guests both when they were walking about outside the defender's property and when they were inside as the pursuers' living areas were visible from guests' bedrooms. The parking was in the heart of the steading development.

B, S, and W sought an interdict to enforce the real burden and prevent D from continuing with her business. They had to show in terms of section 8 of the Title Conditions (Scotland) Act 2003 that failure to comply with the burden was resulting in or would result in material detriment to their enjoyment of their properties.

The Sheriff's Decision

Sheriff Evans decided (2007 S.L.T. (Sh.Ct.) 48) that

- (1) D had breached the real burden to use her house as a domestic dwellinghouse with relative offices for use by one family only and no other purpose whatsoever;
- (2) In considering whether there was "material detriment to the enjoyment of the person's ownership or right in the benefited property" the court must be satisfied that the result has been, or will be, more than just sentimental, speculative, trivial discomfort or personal annoyance and that it amounts to a substantial inconvenience or annoyance, as judged by the objective standard of what would affect a proprietor of ordinary sensibility and susceptibility and taking into account both the existing character of the locality affected and the extent to which the benefited and the burdened properties are geographically interconnected;
- (3) given that during 2006 only 10 % of the 320 days had any adverse incidents noted by B quantitatively there was no material detriment to their enjoyment;
- (4) qualitatively speaking, the occupation of D's house and the comings and goings were no greater than it would have been had D's house been fully occupied by a large family and while the court could sympathise with B,S, and W's complaints of loss of enjoyment on a personal, human level, collectively they did not amount to a material detriment in any qualitative sense. All the various incidents complained of could be characterized as trivial, in the sense that they did not lead to any serious harm, were over either in seconds or minutes and some of them were due to a coincidence of circumstances that is not likely to be repeated.

(5) as D was intending to keep guest numbers to current levels it had not been shown that her future bed and breakfast use would result in material detriment to B,S or W's enjoyment of their premises, and refused interdict.

The Sheriff Principal's Decision

B, S, and W appealed to the sheriff principal contending that the sheriff had misinterpreted the meaning of "material detriment" when he held that it was equivalent to substantial detriment.

Sheriff Principal Dunlop Q.C. decided

(1) the sheriff had erred in law in interpreting "material detriment" as being substantial inconvenience or annoyance, and whether detriment was "material" was to be decided on the facts of the individual case;

(2) on the facts found by the sheriff and taking account of the sheriff's description of the facts as "trivial" the detriment to B, S, and W was not material, they therefore failed to satisfy the requirement of interest to enforce laid down in the 2003 Act and refused the appeal.

Comment

The sheriff's decision as to the meaning of "material" was much criticised, not merely by among others Professor Reid in (2007) 11 Edinburgh Law Review. Professor Reid was instrumental in the Scottish Law Commission report on Real Burdens which led to the 2003 Act. The report makes it clear that the intention of the Commission was that the Act merely codify, not reform, the common law test for interest to enforce a real burden. Little could they have thought how this might open up a hornet's nest.

The sheriff principal's decision is to be welcomed in that it clarifies that "material" does not mean "substantial" in the sense of large. The sheriff principal finds that whether something is "materially detrimental" will depend on the facts of the individual case. This seems to be irrefutable, if a little difficult for legal advisers in advising their clients.

However the result is odd. The findings in fact of the sheriff were not in dispute. The sheriff evaluated them in the light of his interpretation of "material" as "substantial". That interpretation was faulty and so the evaluation which was built on it was also faulty. Thus it should have been for the sheriff principal to re-assess the facts to see whether they represented material detriment. Instead the sheriff principal seems to have ducked the issue and simply followed the sheriff's defective evaluation. Thus he accepted the sheriff's evaluation that the incidents were "trivial". In effectively abrogating his duty to assess whether the findings in fact amounted to material detriment, the sheriff principal has, it is submitted, erred in law himself.

It will be interesting to see if this case will be appealed further. It is difficult to see how any reasonable court could conclude that in the context of a private stabling development in a rural residential area to which persons move for peace and quiet, a breach of a real burden prohibiting business use which results in over 30 incidents in one year does not involve material detriment to the other owners of residential units in the stabling.

The case does suggest that real burdens restricting use may be of little value and can be breached with something approaching impunity. This will be of concern to residents of steadings, the numbers of which have increased substantially in recent years, many of whom will have the same "protection" as B, S, and W in the **Barker** case.

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