Review of Select Property Cases 2008-09

By

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Part A – SERVITUDES/BOUNDARIES

Servitude of ventilation ductwork; whether grant; Ventilation ductwork; whether part and pertinent; whether separate tenement

Compugraphics International Ltd v. Nikolic : Court of Session: Lord Bracadale : 8 April 2009

In 1971 a company leased an industrial unit in Glenrothes. They used it to produce semiconductor devices which process required clean air conditioned air at constant temperature and humidity. The air conditioning required ductwork which was put on outside of the southern wall of the unit and the extended above the ground over a path and verge which ran adjoining the southern wall. The ductwork was fixed into the ground with posts set in concrete. In 1983 the company bought the unit. The feu disposition to the company conveyed to them the area of ground with the unit as shown on a plan. The plan showed that the conveyed area did not extend southwards from the southern wall and did not cover the path and verge with the ductwork above it. However the feu disposition also reserved for the granter a right of access as a fire escape over the path and

verge under exception of the air conditioning system erected on it. The land to the south of the wall was sold and disponed to another owner and eventually came into the hands of the defender. Immediately to the south of the path and verge the owner of the southern land put up a fence separating it from the ducting. Nevertheless the company conceded that they did not own the solum of the path and verge.

When the new owner acquired the southern land, he objected to presence of the ducting, claiming that it was an encroachment and that he wasn't bound by any consent of his predecessors. The company claimed that :
(a) the 1983 disposition did not have a bounding description, had an implied parts and pertinents clause, was habile (wide enough) to cover the ductwork, and that by virtue of it as confirmed by 10 years' prescriptive possession, they owned the ductwork as a separate tenement, separate from the solum;
(b) alternatively they had through 20 years' prescriptive possession acquired a servitude right of air conditioning ductwork.

Lord Bracadale decided –

(1) there was an implied clause of part and pertinent in the 1983 feu disposition;

(2) pipework above the ground could be a separate tenement the ownership of which could be separated from the solum;

(3) the pipework was capable of being conveyed as a separate tenement and had been conveyed as a part and pertinent in the 1983 feu disposition;

(4) the company had an indefeasible title to the ductwork by prescriptive possession;

(5) if he was wrong on ownership, Scots law was capable of having a servitude right of airduct being a combination of the servitudes of overhang and support;

(6) such a servitude had been created by prescriptive possession.

This case appears to be part of a small trend in the discovery of new types of servitude. However it also appears to develop the law relating to (a) parts and pertinents (holding such clauses can be implied); and (b) separate tenements.

Servitude of signage; whether it exists

Romano v. Standard Commercial Property Securities Ltd : Lord Carloway : 18 July 2008, 2008 S.L.T. 859

The upper part of Buchanan Street, Glasgow has two tenement buildings on its west side, just down from the concert hall. Originally owned as one, they were sold and conveyed to a number of owners, but under provision that external and load bearing walls be common property of the owners of the tenements. There was also a real burden limiting the display of any business sign or lettering except on the glass of the windows. One of the sold units was a ground floor and part-basement property. In 1962 the owner conveyed the ground floor and reserved a “servitude right” in favour of the basement property to attach to the ground floor property a shop front including fascia to be no higher than the bottom sill of the windows of the ground floor. For some 14 years an Italian restaurant operated from the basement and used fascia on the outside of the ground floor. The fascia was then apparently taken down. From 1989 the ground floor and basement were tenanted by the same person and used together with the front being painted (the picture is in the Scotcourts judgment). There was no objection from any co-owner. A CPO procedure began and the issue arose whether the owners of the basement had a right of signage on the ground floor front, that being a matter affecting the value of both properties.

The owner of the basement claimed the servitude as acquired by positive prescription, either on the basis of an a non domino grant in 1962, and separately.

Lord Carloway decided -

(1) the servitude claimed was neither of a type known to Scots law nor akin to an existing category;

(2) assuming that it was known to Scots law, the owner of the basement was unable to show any possession in terms of the a non domino grant;

(3) leaving aside the grant there had not been signage in any one place outwith the basement property for a continuous period of 20 years, and declarator of servitude refused.

Case illustrates the need for any new servitude to be analogous to an existing servitude.

Servitude of access; whether excessively burdensome and void; Warrandice: whether breached.

Holms v. Ashford Estates Ltd : Extra Division : 26 March 2009 : 2009 S.L.T. 389

Developers sold a flat with a car parking space in a larger car park and a servitude right of access to the space from the road over a lane and the "common" car park. In their disposition to the owner the developers imposed a real burden on the flat and its space reserving to themselves a power to grant rights of access and servitudes over "any part of" the car park. They then sold a second flat to H with another car parking space in the same car park with a servitude right of access to the space from the road over a lane and the "common" car park.

H's car parking space was too narrow for a "typical or conventional" car to be parked on it without encroachment onto the first flat's space. Furthermore, if the first flat's space was occupied, it was physically impossible to drive a "typical or conventional" car onto the pursuers' space.

H sued the developers for breach of the developers' grant of absolute warrandice. Absolute warrandice is an undertaking by a disponer that the disponeee will not be evicted from all or part of the property disponed by a person with a better title, or constructively (or partially) evicted from full use of the

property for example by the holder of an adverse servitude right. H argued that they had been evicted by (1) the mere fact that they could not park a typical or conventional car on their space without encroachment, and (2) their servitude enabling access over the first flat's space being void since it deprived her of any practical use of her space and was thus incompatible with her ownership of the space.

The Extra Division decided that :

(1) warrandice did not cover defects in quality or fitness for any purpose, and there was no eviction merely because H could not park a typical or conventional car in the space without encroachment – difficulties or impossibility in parking did not mean that H had a defective title

(2) H's servitude did not deprive the first flat owner of the use of her space for all purposes and was not obviously void, so H were not deprived of access to their space and had not been evicted for that reason either.

The court also raised the point whether the developers could have validly granted a servitude to H over the first flat's space merely because they had purported to impose a real burden over the first flat's space reserving a right to do so. The developers claimed that a real burden reserving a right to grant a servitude could be reserved, and the pursuers conceded that the position was at the highest unclear, so the point went no further.

This is a pity given the frequency with which developers make such reservations of rights, and the general rule that only a servient owner can grant a servitude over the servient tenement. It may be that the pursuers' counsel was aware of the possibility of a right of access being implied as a *res merae facultatis* to an otherwise landlocked space (*Bowers v. Kennedy* 2000 S.L.T. 1006*).*

The case illustrates the extent of burden that can be imposed by a servitude before it is void through the „ouster of owner" principle.

Private road; Whether capable of adoption; Roads (Scotland) Act 1984; Whether "public right of passage"

Hamilton v. Dumfries and Galloway Council : Court of Session : Extra Division : 24 February 2009 : 2009 S.L.T. 337

In 1983 a stopping up order was made for the stopping up of an adopted, public road which was to be intersected and blocked off by a by-pass of a Dumfriesshire village. The order authorised the stopping up of certain lengths of that road once the bypass was open. In 1989 the bypass opened. The council deleted the public road from their list of adopted roads. From 1993 to 1999 a housing development was built which took access over the blocked up unadopted road. In 2001 H obtained ownership of the unadopted road. The frontagers of the road applied to the council for adoption of the road as a public road. H opposed any adoption by the council on the grounds that it would be an ultra vires act in that the road was not a "road" in terms of the Roads (Scotland) Act 1984 since the public didn't have a "public right of passage" over it which was an essential for it to be a "road" under the Act.

The issue was whether the expression "public right of passage" required the public to have a legally enforceable right over the roadway before it could be deemed to be a road under the 1984 Act and so susceptible to adoption.

The Extra Division decided -

(1) that in terms of the Roads (Scotland) Act 1984, a "public right of passage" meant a public right of way;

(2) the mere taking of a road off the list of adopted roads does not extinguish a "public right of passage" – a stopping up order or negative prescription is necessary;

(3) it is enough for an order to provide for the stopping up to extinguish the public right of passage – physical action on the ground is not necessary;

(4) the roadway in question was not subject to a public right of passage and so was not a road that could be lawfully adopted.

Part B – REGISTRATION OF TITLE

Title to purported common property in flat development; Disposition of property alleged to be covered by title to common property; Keeper excluding indemnity; Whether disposition a non domino; Whether disponee in bad faith in knowing of alleged prior personal right; Whether Keeper entitled to exclude indemnity

PMP Plus Ltd v. Keeper of Registers : Lands Tribunal for Scotland: 20 Nov. 2008 & 19 March 2009

L owned development site by the Clyde in Glasgow. In 1990 L registered a deed of conditions covering the site. Deed of conditions provided for real burdens on parts of the site which in the future they would not alienate exclusively to purchasers. The deed of conditions had a plan showing the boundaries of the site and also a layout of the proposed development. From 1990 L began to dispone flats to purchasers. The dispositions, provided that what was being disponed was the flat,

> "together with a one two hundred and ninety-first share (1/291) [or an equal *pro indiviso* share] in common with all the proprietors of all other dwellinghouses . . . erected or to be erected on the [site] in and to those parts of the Development [at the site] which on completion thereof shall not have been exclusively alienated to purchasers of dwellinghouses. . ."

The title sheets, without exclusion of indemnity, reflected this wording. By 2006 most of the flats and houses had been sold. The layout of the proposed development in the deed of conditions had not been fully followed. L's successors P, sold part of the site to a private medical company for use as a medical centre. In 2006 the Keeper registered the disposition to the medical company but only under exclusion of indemnity. This was because the disposition to the medical company was an *a non domino* disposition because P

or L had already disponed part or all of the ground for the centre as common property in the dispositions to the various flat owners.

There was also a suggestion, later dropped, that the Keeper was entitled to exclude indemnity because even if the 2006 disposition to the medical company was not *a non domino* it was voidable by the flat/house owners who held alleged prior rights under missives or disposition to have *pro indiviso* shares in the ground conveyed to them, of which the medical company was aware.

The medical company appealed to the Lands Tribunal for Scotland against the Keeper's decision. The Keeper opposed the appeal but no opposition was insisted on by any flat/house owner.

The Lands Tribunal for Scotland (3 members) decided –

(1) that an appeal to it was not restricted to points of law but could cover all matters of fact and law – it was not akin to a judicial review, and any cases suggesting the contrary were wrong;

(2) the Keeper is not obliged to defend his decision in an appeal;

(3) it is not competent to dispone an area of ground or *pro indiviso* right in an area of ground the boundaries of which not ascertainable at the time of the disposition but are only ascertainable in relation to an uncertain future event;

(4) as the *pro indiviso* rights in the dispositiions to the flats were not in an area of ground the boundaries of which were ascertainable at the time of the dispositions, their disposition was incompetent;

(5) as the dispositions of the *pro indiviso* rights were incompetent, the disponees of the alleged *pro indiviso* rights cannot have acquired any real right through registration and the entry of such rights in their title sheets;

(6) the *pro indiviso* share entries in the flat/house owners' title sheets were void or ineffective (through uncertainty ?) but did not require rectification under s. 9 in order for this to be the case and therefore the disposition to the medical company was not *a non domino*;

(7) In terms of section 4 (2) of the 1979 Act the Keeper was obliged to refuse to register an application in so far as it related to land not sufficiently described to enable him to identify it by reference to the OS map; and in terms of s. 6 (1)

a title sheet of an interest in land had to include a description of the interest based on an OS map;

(8) that if the "offside goals" rule in Rodger (Builders) Ltd v. Fawdry applied, to render a title voidable, and the Keeper was at the time of registration unaware of the claim, he was not entitled to exclude indemnity. In that situation the remedy for the holder of the prior personal right would be to seek rectification of the title sheet under s. 9. Indemnity might even be lost under s. 13.

This case is rightly decided. Although not expressly stated to be such it is a case of voidness for uncertainty of a clause in a title sheet. Lack of accuracy of description is well recognised as a reason for missives being void for uncertainty, and the same applies to dispositions and title sheets. It is a warning for those advising both sellers and purchasers of houses or flats in a development to ensure that *pro indiviso* rights are fixed at the outset, or for there to be a separate settlement in respect of such rights after the acquisition on the flat/house itself with part of the purchase price being retained until such subsequent settlement.

PART C – COMMERCIAL LEASES

Lease; Specified use unlawful under Planning legislation; Whether lease frustrated; Whether lease illegal

Robert Purvis Plant Hire Ltd v. Brewster : Lord Hodge : 27 February 2009

Tenants entered into 5 year lease of 1. 75 ha of a site intending to use it for storage and recycling of road construction materials. Lease provided that the uses would be for storage or other use agreed to by the landlord. It contained a prohibition on the tenant doing anything in contravention of the planning acts. It also included a provision excluding any warranty by the landlord that any part of the premises was authorised under the planning acts for any specific purpose.

Tenants took entry and 2 weeks into their road material recycling process received complaints which led to a successful planning enforcement notice being

served on them. It transpired that the recycling work was unlawful under the planning acts and that the storage was most probably also without planning permission.

The tenants claimed that the enforcement notice was an event which frustrated the lease thereby bringing it to an end or alternatively that the lease was illegal from the outset as it was for use which was illegal.

Lord Hodge decided –

(1) for frustration the performance must be rendered impossible by an event which took place after the entering into of the contract;

(2) what rendered the contemplated use impossible was the unlawfulness of that use under the planning acts which was something which existed at the outset of the contract, the enforcment notice being a mere manifestation of that ongoing situation, so the lease was not frustrated;

(3) for frustration, the event must be one which was not foreseen by the parties at the time of the contract;

(4) here the parties had foreseen the possible illegality under the planning acts in their condition excluding the warranty of the landlords for such an eventuality, the tenants had taken the risk of illegality and the lease was not frustrated for that reason also;

(5) given that the lease contemplated other uses with the consent of the landlord which might not be illegal, it could not be said that the lease was illegal in that it could only be performed illegally ab initio, and action to declare lease at an end dismissed.

This case is a warning for those advising tenants to carry out due diligence in relation to the presence of planning permission for the activities which they intend to carry out.

PART D – STANDARD SECURITIES

Standard security; Lender aware of borrowers' prior grant of option to sell ; whether lender in bad faith; whether standard security reducible by purchaser under option

Gibson v. Royal Bank of Scotland : Lord Emslie : 03 February 2009 : 2009 S.L.T. 444

M entered into an agreement with Gs whereby Gs would have the option to buy a property from him within 2 years. Offer said to form part of the option agreement provided that neither party would be bound unless the acceptance satisfied the "requirements" of s. 3 of the Requirements of Writing (Scotland) Act 1995 (which provide for signatures to be witnessed). Acceptance did not satisfy s. 3. Within 1 month of the agreement Gs exercised the option to take effect after 11 months from the exercise. 10 months into this 11 months M granted a standard security to the bank. It was registered days before the settlement date under the agreement. It was alleged that the bank was aware of the option agreement and Gs' rights thereunder.

Gs sought reduction of the grant of the standard security on the grounds that the bank, as the grantees were aware of the option agreement, should have made themselves aware that the presence of the obligation to give a marketable title, that this would have shown that M was in breach and that the bank were therefore in bad faith in taking a standard security which devalued the right to be granted to Gs.

The bank argued (1) that the option agreement was not binding as the acceptance was not witnessed; (2) that the general rule was that a third party was not bound by the personal obligations of a seller and was entitled to rely on the register of sasines/land register, the only exception being where the third party was aware of a prior personal right which was capable of being made into a real right in competition with his own real right – and that this exception did not apply here. Accordingly the action should be dismissed at debate without the need for evidence.

Lord Emslie decided -

(1) on the 1995 Act point, section 3 did not impose "requirements"; a party desiring to stipulate for particular formalities must do so clearly and in a fair manner and the matter should be decided only after hearing evidence;
(2) the standard security granted to the bank was competing with Gs' prior personal right to have a marketable disposition delivered to them, just as if a disposition had been granted to the bank;
(3) it could not be said that G's prior personal right was incapable of being made real;
(4) there was no good reason why breach of the fundamental requirments of fairness and good faith in contractual dealings should not bar the bank from being barred from taking the benefit of the standard security if they were or should have been aware of Gs' prior personal right, and proof before answer allowed.

This is a case which raises issues of basic principle and Lord Emslie's decision is unlikely to be the final word on the matter particularly as there are conflicting views and authorities.

PART E – RIGHTS TO ROAM

A right to roam (and its corresponding burden to allow roaming) exists only if it is "exercised responsibly" (section 2). The issue of responsible exercise by horse arose in **Tuley v. Highland Council** (Extra Division, 21 April 2009 reversing 2007 S.L.T. (Sh.Ct.) 97). The facts were that the landowner owned woodland with various paths running through it. The owner encouraged access by pedestrians. He became concerned about the use of a particular path by horses. In particular the use by horses damaged the path and made it and its banks become muddy. It was agreed that horse traffic on the path would damage the drainage of the path and eventually cause soil erosion. The owner put padlocked gates on either side of the path with pedestrian gates which had the effect of preventing access by anyone on a horse. The Council served a remediation work

notice on the owners under s. 14 (2) of the 2003 Act requiring them to enlarge the pedestrian gates to make them passable for horses. The owners appealed against the notice and sought its recall.

The question was whether there had been contravention of section 14 (1) of the Act which prohibits an owner from taking action the main purpose of which is to prevent or deter any person from exercising his right to roam.

A right to roam can be on a horse. A right to roam exists only if it is exercised "responsibly". "Responsible exercise" is defined in s. 2 (3) as "the exercise of [the rights] in a way which is lawful and reasonable and takes proper account of the interests of others and of the features of the land in respect of which the rights are exercised". Section 2 (2) then gives a presumption, some exclusions and some factors to be taken into account !! in determining responsible exercise.

The owner contended that since it was a sine qua non of a right to roam that it be exercised responsibly and as passage on horseback over the path could not be exercised responsibly (because of damage to the path), there was no right to roam which was being obstructed by the narrow gate.

The Extra Division decided that –

- the correct interpretation of the agreed evidence was that horse traffic regardless of quantity would damage the drainage of the path and ultimately cause soil erosion and therefore it could be said that any horse traffic was not a "responsible" use and therefore not the exercise of the access right – the erection of the gates was therefore not a breach of section 14 (1);
- for there to be a breach of section 14 (1) the mere carrying out of any action which prevented a person from exercising his access right was not enough: for there to be a breach the obstructive conduct had to be for the main purpose, as the landowner saw it, of preventing the responsible right

of access (thus the planting of a hedge for agricultural purposes which happened to prevent the public from crossing the land covered by the hedge would not be a breach of s. 14 (1)

- appeal allowed and enforcement notice recalled.

The court noted that the landowner should not have to wait until it can be established that even one rider on entry will cause severe damage to the path. It is a pity that the case did not contain more legal analysis of the key section 2 or contain comments on the Code.