

OPINION of COUNSEL
for
THE NORTH AYRSHIRE COUNCIL
(Montgomerie Park, Irvine)

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1. It is my opinion it is only arguable that the Deed of Conditions has validly imposed, as a real burden, an obligation on the residents of Montgomerie Park in relation to payment for the costs of maintenance of what the Deed of Conditions describes as “the Common Parts”. I express that opinion with some diffidence, because of the knowledge that Professor Rennie has given an opinion to the opposite effect and also because the terms of the Deed of Conditions are far from perfect with the effect, realistically, of making it more difficult to enforce. In practical terms, its many deficiencies will subconsciously prejudice a court against its enforcement. My reason for not being able to say that the real burden is effective rather than only arguably so is connected with the size and nature of the whole estate as set out below in the paragraph headed “Must relate in some way”.

This opinion does not apply in relation to Plot Owners of the three undeveloped Community Facility Areas. When these areas are transferred to developers I consider that nothing will be recoverable from them.

Had it not been for the changes brought about by the Title Conditions (Scotland) Act 2003, my opinion would certainly have been that the Deed of Conditions had not succeeded in imposing real burdens in relation to the Common Charges for the Development Site.

Since the answer is not free from doubt, since the Deed of Conditions permits the Council to depart from its existing scheme, since new obligations can therefore be imposed at least on the as yet undeveloped areas and since the Deed does unarguably contain defects, the Council might wish to consider whether or not to try again at least in relation to the remainder of the site, although this would be likely to leave the Council with no recovery against the existing Housing Plot Proprietors. I have therefore answered all questions in the Memorial, whether they assume a positive or a negative answer to the first question.

Real burdens – pre 2003 Act

Historically, an obligation to contribute to the maintenance of an area of land not adjacent to the burdened subject has had difficulty in qualifying as a real burden or condition. In



Corporation of Tailors of Aberdeen v Coultts (1840) 1 Rob.App. 296 an obligation to contribute to the then unascertained cost of railings and a wall around the central area of Bon Accord Square in Aberdeen was held in the Outer House (and upheld in the Inner House) not to be a real burden on property which faced on to the square. That was decided not because of the lack of physical proximity but because the burden was held to be of the nature of an obligation to pay an indefinite sum of money. Before the introduction of standard securities, it was not possible under Scots law to create a real burden in security of an indefinite sum of money, as *Tailors of Aberdeen* demonstrated (minority of the consulted judges at 323, supported - narrowly - by the House of Lords: Lord Brougham at 339-340).

Since the advent of standard securities, it has only been possible to create such an obligation by use of a standard security (Conveyancing and Feudal Reform (Scotland) Act 1970, s.9(3)). Neither the Deed of Conditions nor the subsequent conveyances are standard securities. It would therefore follow that, unlike the position where a disponee is taken bound to maintain the parts of an estate that are not to be developed for building, the obligation in the Deed of Conditions to contribute to the “Common Charges” for that purpose could not have been created as a real burden and would therefore not have been enforceable.

Another problem would have been caused by the limiting of the increase in each five-year period by reference to the Retail Prices Index (Deed of Conditions, schedule, clause 4.2). The attempt to create a real burden in *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 S.C. 788 was defeated on two grounds, one of which was the rule that the extent of the obligation had to be found within the terms of the real burden and without reference to anything else. There the reference required was to the terms of a statute. Here the reference is to the published RPI.

Similarly the sharing of the 10% of the Common Charges of the Development Site between the owners of the Community Facility Area is not set out in the Deed of Conditions. And there the reference is not to another document but depends on a decision to be taken by the Council.

Real burdens – post 2003 Act

These two problems which I have explained by reference to *Tailors of Aberdeen* and *Aberdeen Varieties Ltd* are, in my opinion, both met in relation to House Plots by the terms of s.5 of the 2003 Act, which applies to potential objections to real burdens “whenever created” and has innovated on the previous law. Section 5(1)(a) deals with “an amount payable in respect of an obligation to defray some cost... not specified in the constitutive deed”. Section 5(1)(b) relates to a proportion or a share payable in respect of such a cost where the proportion or share is

not specified but the constitutive deed sets out how the proportion or share is to be calculated. In both circumstances s.5(2) allows reference in the constitutive deed to another document if that is a “public document” – defined as an enactment or a public register or some record or roll to which the public has access.

The particular problem in *Aberdeen Varieties Ltd* is, in my opinion, overcome by the terms of ss.5(1)(a) and 5(2). The RPI is to be found in publications of the Office for National Statistics, which I consider would meet the requirement of being in a “public document”.

It is different in relation to Community Facility Owners. They are taken bound in the first sentence of clause 3 of the schedule together to pay 10% of the Common Charges of the Development Site. In relation to the split between them the clause continues: “The Council will determine the *pro rata* share of the Common Charge of the Development Site for each of the Community Facility Area (*sic*).” That has the result that each share is not *pro rata* to the number of Community Facility Areas but what determines the size of the share is neither contained in the Deed of Conditions nor in a document referred to there. That leaves as possibly satisfying the s.5(1)(b) requirement that how the share is to be arrived at is specified in the constitutive deed. It is my opinion that a share of the total 10% contribution is not so specified when it is left to another person, in this case the creditor in the obligation, to decide upon in an arbitrary manner. That has the effect that, even under the 2003 Act, I consider that there is no enforceable obligation in relation to Community Facility Owners.

In relation to the more general validity of the Deed of Conditions, s.5(1) has removed the ground of decision in *Tailors of Aberdeen v Coutts* in relation to the contribution to the then unascertained cost of the central part of the square. And the proportion or share an individual House Plot Proprietor is to pay, although not specified as a proportion, can be calculated, thus meeting the test in s.5(1)(b).

The Deed of Conditions seeks to impose on House Plot Proprietors an obligation together to pay 90% of the Common Charges of the Development Site, each equal share to be calculated “by reference to the total number of House Plots constructed or permitted to be constructed upon all of the Housing Development Areas” (schedule, para 4). The other 10% is the responsibility of the Community Facility Owners (para 3). For the first five years after registration of the Deed of Conditions, which took place on 2 July 2004, the amount payable for any one house plot is cost based but limited to £250, increased only by the increase in the RPI (paras 4.1 and 4.2). After the first five years, actual costs are to be used in the calculation, although again there is provision for increases over each five year period being limited to RPI



increases. These provisions cause practical difficulties that I will return to in Answer 5 but, in my opinion, satisfy the requirement of the ability to assess what, in monetary terms, the share amounts to.

I now to consider, in relation to House Plot Proprietors, the terms of the 2003 Act which establish positively what a real burden now is. Section 3 sets out the “characteristics” of a real burden. They include that a real burden “must relate in some way” to the burdened property. That relationship “may be direct or indirect” but “shall not merely be that the obligated person is the owner of the burdened property”. I take these in turn.

Must relate in some way

The burden imposed on the burdened property in this Deed of Conditions is to pay a share of the cost of the maintenance of the land within Montgomerie Park that is not to be developed for building purposes. It is described as the Common Parts. Although that land is not to become the common property of the individual owners, it is nonetheless part and parcel of the overall development scheme of the estate, described in the narrative of the Deed of Conditions as “part of an urban expansion development”, that such areas are managed. It can also be seen from the Deed of Conditions that the Common Parts are outwith the Housing Development Areas and the Community Facility Areas that will benefit from the upkeep to which the real burden relates (Deed of Conditions, clause 1.2). I also note that clause 4 of the Deed of Conditions proceeds on the basis of the Proprietors having at least a potential interest in the Common Parts (“all Proprietors having an interest in the Common Parts”).

In addition clause 6 bears to confer on the Proprietors and Plot Owners a *ius quaesitum tertio* for the enforcement of the provisions of the Deed of Conditions “in any question with any other Proprietor or Plot Owners insofar as he, she or they shall from time to time have an interest to enforce the same.” I do not consider that the provisions of clause 6 produce the effect of mutual enforceability. That is because individual owners do not have any interest to enforce the obligation to contribute to the maintenance. Owners receive no benefit from other owners’ contributions. The person who directly benefits is the Council or the LMB, the owner of the land to be maintained. And there is no indirect benefit in reducing each owner’s individual contribution. The individual owners are not bound jointly and severally to meet the whole costs but each is bound only to meet his *pro rata* share (Deed of Conditions, Schedule, para 4). I consider the possibility of the Council or the LMB seeking under para 4.10 to spread the burden of unrecovered shares on others not to be sufficient to lead to House Plot Proprietors having an interest to enforce the burden.



Although neither creating common property nor fitting precisely the historically understood concept of property subject to common interest, such as the walls of a tenement building, the wording of the Deed of Conditions does point strongly to an intended relationship between the benefited property and the burdened property which intention, combined with the individual properties all being within one development site, although to be developed in parts, may be sufficient to satisfy this relationship requirement of s.3.

It is therefore possible to argue that there is a relationship between the burdened property and the Common Parts coming from the obligation to maintain the setting of the whole estate. It is however of note that the estate stretches about one mile on its longer dimension, a fact that tends to diminish the relationship between an individual house plot and the Common Parts. In *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*, decided partly on the basis mentioned above that it was an attempt to create security for an indefinite sum, the distance between the two theatres (about half a mile) was mentioned in support of the proposition that the restriction on use was in any event not binding. However, the decision on the restriction of use argument was based upon the condition being an attempt to impose a restraint on trade which, being unlimited in time and also because it was not concerned with neighbourhood or amenity, could never be justified as reasonable.

Here, in contrast, it is a question of amenity and neighbourhood, although I accept that the distance involved would be a matter that the court could take into account in determining neighbourhood. At some stage, physical remoteness would prevent the burdened property from having an interest sufficient to be considered as related in some way to the benefited property to allow for enforcement against the burdened property. That matter would have to be considered as a mixed question of fact and law and may lead to real difficulty where, as in the present situation, the housing developments are towards one end of the Development Site and maintenance could be required at the other end of the site, far away from any of the existing houses. Further difficulty results from the fact that the estate is not homogenous. There are Community Facility Areas as well as Housing Development Areas. The difference between the characteristics of housing areas and Community Facility Areas will certainly at least weaken and may be fatal to the argument that burdened properties are related in some way to the benefited property.

"Direct or indirect" relationship

A direct relationship well describes an obligation to maintain or to join in maintaining something, typically the common property in a tenement block or a small housing

development. An indirect relationship is a description of the situation such as this where there is no direct obligation to maintain common property but instead an obligation to meet someone else's cost of maintaining what might otherwise have been common property. That characteristic is accordingly, in my opinion, applicable here.

"Not merely... that the obligated person is the owner of the burdened property"

The Deed of Conditions, on its second page, refers to the purpose of the "urban expansion development" at Montgomerie Park and mentions various Housing Development Areas and the Community Facility Areas within the Development Site. It also includes mention of open space locations, structure planting and landscaping areas. From this it is simple to infer that it is the lands required for those items that are to benefit from the Deed of Conditions and that the purpose is to provide benefit to and protect the amenity of the whole Development Site. Thus those areas benefit from the terms of the Deed of Conditions and the individual burdened properties are all properties within the same estate. That, in my opinion, clearly differentiates the individual properties and their owners from the category of "merely... the owner of the burdened property".

2. It is my opinion that, so long as the Council remains the owner of the Common Parts, it is permissible for the Council to charge on the Scottish Woodlands basis by describing such charges to the Council as "reasonably and properly incurred from time to time" but that such a method of charging would not be available to an LMB were it to acquire ownership.

This Answer only applies to the 90% share to be met by the House Plot Proprietors. As indicated in the previous answer, I do not consider that there is an obligation enforceable against the Community Facility Owners. It is therefore my opinion that neither an LMB nor the Council is entitled to any share of the 10% of the Common Charges for the Development Site which were intended to be recoverable from the Plot Owners of individual Community Facility Areas.

LMB charges

I deal first with the position of an LMB. The Common Charges of the Development Site are defined in clause 1.1 of the Deed of Conditions as "the whole expenses properly and reasonably incurred in respect of the repair, maintenance and renewal and any improvement of the Common Parts... and the cleaning thereof" (clause 1.1.1), "the remuneration of any managing agents and the reimbursement to them of any expenses properly incurred in performing the management duties in relation to the Development Site" (clause 1.1.2),

premiums for any insurance required for any aspect of the Common Parts (clause 1.1.3) and a catch-all “any other charges and expenses” provision (clause 1.1.4).

I leave aside clause 1.1.2, because it will not arise if an LMB is the owner. I leave aside also 1.1.4 because of its vagueness and therefore likely unenforceability. That leaves clause 1.1.1 and 1.1.3 expenditure, both of which involve costs incurred. Standard rates applicable to all such areas of land and derived from averaging costs elsewhere and adding management and administration charges are not “expenses... incurred from time to time” by the LMB. Para 2 of the schedule obliges Plot Owners to contribute on an annual basis their appropriate share of the Common Charges of the Development Site incurred by the LMB, a reference back to clause 1.1.1 expenses and 1.1.3 insurance premiums. Para 4.5 obliges each Proprietor (owner of a Housing Development Area or Community Facility Area) to collect the first year’s charges from a house Plot Proprietor, effectively payment in advance. That raises a further problem since “expenses properly and reasonably incurred” cannot normally be calculated before the end of the period in which they have been incurred. If that was what had been intended, provision would normally have been made for an initial provisional assessment, to be adjusted at the year end.

These considerations cause me to conclude that the system is unworkable for an LMB who insists on charging (a) in advance and (b) on the basis of standard rates rather than expense actually incurred.

Charges by Council

Clause 7.3 of the Deed of Conditions makes the schedule applicable to charges by the Council where it remains the owner. There is no obvious requirement that the Council should use its own workforce to carry out the work. Therefore, if the work is contracted out, the charges the Council reasonably incurs will be the charges made to it by the contractors. If all such contractors charge on the basis of advance payment of unit charges then, provided those charges are not obviously excessive, it is my opinion that they qualify as “expenses properly and reasonably incurred” by the Council and therefore would be recoverable as Common Charges of the Development Site.

3 and 4. I only consider the position where the Council remains the owner since I have concluded that Scottish Woodlands, if owners, would have no right to recover their charges.



It is my opinion that what would need to be provided by the Council to entitle it to recover from the House Plot Proprietors, if challenged, would be evidence of the charges made by the LMB as contractor to the Council.

A further difficulty is caused by the terms of the Licence granted by the Council to Scottish Woodlands Ltd, which I am instructed was executed nearly two years ago. Clauses 8 and 9 of the Licence bear to transfer certain matters to Scottish Woodlands, in clause 8 by authorising Scottish Woodlands to collect payments from "the occupiers of the Development" and in clause 9 by assigning certain rights to Scottish Woodlands.

However, clause 8 makes provision which runs counter to the terms of the Deed of Conditions in that the clause bears to confer upon Scottish Woodlands "full right and authority to collect from the occupiers of the Development an equitable share (calculated on a pro rata basis or otherwise) of the costs incurred by the Licensee in maintaining, repairing and where necessary renewing such part or parts of the Amenity Ground in respect of which this Licence subsists from time to time and any equipment thereon in accordance with Condition 4 hereof." That last part is a reference to the earlier provision of an agreed Specification for such work. I have not seen this Specification but am, for present purposes, prepared to accept that what it requires is consistent with the words in clause 1.1.1 of the Deed of Conditions "the repair, maintenance and renewal and any improvement of the Common Parts... and the cleaning thereof (but excluding the capital costs incurred by any Proprietors... in the original installation and construction of the Common Parts...)" However the Deed of Conditions already contains a detailed provision about recovery of equal *pro rata* shares from all House Plot Proprietors of 90% of the total costs. In that circumstance I conclude that the intended ability of Scottish Woodlands to recover shares, on an undefined basis, for work on potentially part only of the Common Parts to be misconceived and unenforceable.

Clause 9 of the Licence, which reads as an assignation, ends with words to which I can give no content. There is a reference to "the Developer's rights" as being part of what is assigned under Clause 7.3 of the Deed of Conditions. I have no idea what that expression is supposed to mean or even who the "Developer" is. That is the clause which applies the Schedule to the Deed of Conditions to the Council in the event that the Council retains the Common Parts. Maybe the reference to "Developer" is meant to be a reference to the Council, although described in the License as "the Licensor". In any event, there appears to be an assignation by the Council to Scottish Woodlands of the Council's right, discussed in my earlier answers, to recover contributions from the House Plot Proprietors. Once intimated to the House Plot Proprietors, that assignation would normally be effective and in that roundabout way would



entitle Scottish Woodlands to seek recovery of what would otherwise have been due to the Council by those House Plot Proprietors.

However, that ignores the position of the LMB as not only the creditor in the assigned obligation but also the person whose services the Council would have been entitled to charge for. In an assignation not only does the expression *assignatus utitur iure auctoris* apply to make available to the debtor in the obligation any defence against a claim which could have been advanced by the assignor but so also is any defence available against Scottish Woodlands who is the creditor in the assigned obligation. It is that which gives rise to my concern that the transaction would not permit Scottish Woodlands to recover from House Plot Proprietors what the Council had been entitled to recover but which Scottish Woodlands would not have, the point dealt with in Answer 2.

5. In my opinion the calculation must be on basis (c), the number of houses built plus the number with planning permission.

If there is a total of 200 houses built on the Robertson Homes and David Wilson Homes sites and also planning permission for another 100 homes on a further site, the divisor to use in the calculation is 300. Each House Plot Proprietor would therefore be liable for a one three-hundredth share of the 90% of the total charges attributable to the House Plot Proprietors. A consequence of this is that, in the example I use, only two-thirds of the expense incurred will be recoverable.

In my opinion para 4 of the schedule can be read in no other way.

I do appreciate that this result is at variance with the opening words of para 4 that "The House Plot Proprietors shall together pay 90% of the Common Charges of the Development Site". However the clause is obviously not perfectly drafted and, in my opinion, no greater share can be imposed on any one House Plot Proprietor than the *pro rata* share which appears to be particularly defined in the following words of the clause.

House Plot Proprietor is defined in clause 1.11 of the Deed of Conditions as the owner of an individual House Plot, defined in clause 1.10 as "an individual housing plot... with dwellinghouse... erected thereon..." In my opinion it follows that, at least until the dwellinghouse is built, there is no House Plot and therefore no House Plot Proprietor of that plot. However, houses for which planning permission exists are included in the number to be

used to find the *pro rata* share. Thus in the example I have given there can only be liability in respect of 200 one three-hundredth shares. The drafter has failed to notice that an individual housing plot is not a House Plot as defined in clause 1.10 until it has a house erected on it. Therefore, in the example given in para 4 of the schedule, involving the total number of one hundred House Plots, he has assumed that sites for which planning permission has been granted are House Plots. Therefore his example can be best described as misleading.

I note, in passing, (a) a slight mistake in para 4 of the schedule and (b) a further problem with the liability to pay.

The slight mistake is in the example set out in para 4 where the conclusion is that the owner of one House Plot out of 100 is liable for a one-hundredth share of the Common Charges of the Development Site. The maximum liability of the House Plot Proprietors is of course for 90% of the Common Charges of the Development Site (para 4). I consider that mistake is to be ignored in considering the application of para 4, although it does underline the fact that the clause has not been fully or carefully thought through.

The further difficulty I refer to is that although charges are obviously on an annual basis no specific provision is made for the situation, which is bound to occur, of the number of House Plots increasing during the year. Is a House Plot Proprietor of a new House Plot to be liable for the whole year's expenses (each year ending on 2 July: schedule, para 4.1 having provided that the first year ends on 2 July 2005)? And when does the *pro rata* share of the other House Plot Proprietors change? Is it when further grants of planning permission are made, further houses erected or only at the end of the year when that has happened?

6. In my opinion the Council is restricted, in all but the first year of each five year period, to recovery of the lower of (a) actual costs incurred in that year and (b) the charge made in the previous year increased by the RPI increase over the year. In the first year of each five year period there is no RPI cap and the figure is based on actual costs for that year.

In addition, for the first five years of the Deed of Conditions, there is a further cap of £250 for year one and that figure (or the lower actual cost figure) indexed by RPI for each of the following four years.

In particular, it is my opinion that there is no opportunity to charge House Plot Proprietors in the first year of subsequent five-year periods for the balance of actual cost over indexed



figures recovered for the preceding four years. I consider that the wording in the proviso in para 4.2 of the schedule clearly relates to the annual cost for each year one and not to any right to recover past costs not previously reimbursed because of the RPI cap. If that had been intended, it is my opinion that it would need to have been clearly expressed.

7. I can see no reason why defects in the Deed of Conditions precluding the Council from making recoveries should be a basis for considering the licence agreement with Scottish Woodlands to be void. Clause 14 of the Licence gives to both parties the right to terminate it on one month's notice at any time after the fifth anniversary of the last date of execution of the Licence "in the event that such future agreement relating to the long term maintenance of the Amenity Ground has not been entered into". That must be a reference to the Agreement mentioned in paragraph 3 of the narrative of the Licence under which the Council would transfer to Scottish Woodlands title to what is referred to in the Deed of Conditions as the Common Parts and is referred to in the Licence as the Amenity Ground. I am instructed that the Licence was executed in October 2008. Therefore notice may not be given for a further three years and more. It is possible that, faced with a situation where the long term aim of Scottish Woodlands is not to be met, an earlier termination of the Licence could be negotiated.

Until such a termination occurs, Scottish Woodlands would appear to be entitled to attempt to recover payments from the occupiers of the Development Site (Licence, clauses 8 and 9). In the event that that proves to be impossible as in my opinion it is (see Answer 2), Scottish Woodlands are likely to have a remedy against the Council, probably on the simple ground that Scottish Woodlands would not have entered into the Licence but for the Council having impliedly, if not expressly, represented that such payments would be recoverable.

It is further my opinion that this remedy would only continue until the termination of the Licence and that there would be no claim by Scottish Woodlands in respect of any loss after the termination, which would presumably take place on the appropriate notice after the fifth anniversary of the last date of execution.

8. The terms of any alternative would be for a practising conveyancer. What I can say is that the Council is permitted in terms of clause 6 of the Deed of Conditions to change its mind completely. It may "depart entirely" from its plans for Montgomerie Park and the clause also reserves to the Council the right to dispose of any part "for such purpose as it deems fit".



Thus one possibility would be to start again and limit the liability for common charges to, say, each site sold for development to a housing developer or a combination of neighbouring sites and the amenity or landscaped land associated with that site or sites. The risk of it being held that the burdened properties are not “related in some way” to the benefited property would be avoided.

Nor would I suggest providing a charging scheme such as that in the schedule to the Deed of Conditions, which is predicated on a transfer to an LMB, first of the ability to charge and then of ownership. I would suggest that any charging regime would be in favour of the proprietor of the subjects to be maintained. With the real burden created by the obligation to pay for the required works set up in a suitable way, that burden on the burdened properties would transmit in favour of the owner of the benefited property, whoever it might be.

I accept that a fresh start would not solve the problem of the maintenance of the land related to the sites already sold. For the future, only an owner can burden land with a real burden (2003 Act, s.4(2)(b)). A failure in recovery of payment from the already developed portions of Montgomerie Park may simply be a consequence of the Council seeking to retain control over the standard of maintenance of the Common Parts by the use of property law rather than planning policies.

9. I have not previously been asked for my opinion on this particular type of question. Nor have any other members of the bar spoken to me about a similar problem. The way to discover if such arrangements have caused concern is by contacting other local authorities who may have been placed in the similar position of planning a major extension of a settlement. My first reaction is that such authorities might instead have adopted the approach described by Prof Rennie in para 2.2 of his Supplementary Note.

10. Within Answer 1 I deal with the effect of the 2003 Act as compared with the previously applicable law. The problem of passing ownership of the Common Parts to the burdened properties before it is known how many owners there will be is the result, mainly, of the Land Registration (Scotland) Act 1979. This problem is illustrated by the decision in *PMP Properties Ltd v Keeper of the Registers* 2009 S.L.T. (Lands Tr.) 2 and discussed, although not resolved, in the section entitled “Common Areas” in Prof Reid and Prof Gretton’s publication “Conveyancing 2008” at pages 133 and following.



11. I have considered separately the proposition that the burdens imposed are community burdens. I do so particularly because this is discussed by Prof Rennie in his Opinion.

Burdens are community burdens if they are imposed under a common scheme on four or more units (s.25(1)(a)) and each of those units is both a benefited property and a burdened property (s.25(1)(b)).

The land which is to benefit from the real burden, the Common Parts, is not a burdened property. Para 4.9 of the schedule to the Deed of Conditions disapplies from the Common Parts (if they ever did apply, which I doubt) any provisions in the Deed of Conditions intended to regulate the ownership of and regulation of the Plots. If there had been the mutual enforceability referred to in Clause 6 of the Deed of Conditions then there would have been a community burden, which would have had certain consequences in relation to management decisions and the like. It is, however, my clear opinion that the element of mutual enforceability is absent and therefore community burdens have not been created.

Other provisions of the 2003 Act that I consider important are ss.49 and 50. Section 49 provides for the extinction, ten years after the appointed day (28 November 2004) of a real burden that does not nominate a benefited property. Although it is easy to appreciate from this Deed of Conditions what land is, in general, intended to be benefited, that land is not nominated there or in subsequent dispositions nor is it identified other than, effectively, by subtraction of all Housing Development Areas and Community Facility Areas from the entire the Development Site. Section 49 of the 2003 Act abolishes the previous rule of law that the identity of the benefited property could be implied. Section 50 provides a mechanism to avoid the effect of s.49 where there is a constitutive deed which would, under the previous law, have provided the necessary implied identification. That mechanism is the execution and registration against both benefited and burdened properties of a notice of preservation in suitable terms (s.50(2) and (3)). Registering such a notice is competent within ten years after the appointed day. I would recommend that steps be taken to operate s.50 if the decision is taken to attempt to enforce the burden against House Plot Proprietors.

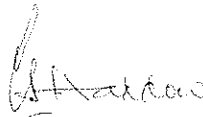
I note also the repeal of s.32 of the Conveyancing (Scotland) Act 1874 and s.17 of the Land Registration (Scotland) Act 1979 by s.128 of and schedule 15 to the 2003 Act. These were the provisions about registering deeds of conditions and when any obligations so registered became a real obligation as affecting the land. They have been replaced by the terms of s.4 of the 2003 Act but with transitional effect given in s.6 to already registered deeds of conditions

under which the obligations had not become real obligations affecting the land. This applies to the Deed of Conditions.

In terms of s.4 a real burden is now created by registering against the burdened property a deed which is granted by the owner and imports the terms of the prospective burden. In the absence of s.17 of the 1979 Act and with the effect of s.17 having been expressly not applied to the Deed of Conditions, s.4 would not apply in relation to any burden affecting land which had not been created a real obligation by the registration before the appointed date of a disposition incorporating the burden by reference. Hence the need for s.6. In relation to the Robertson Homes Ltd land the burdens would have become real obligations under the previous law on registration of the disposition in their favour on 18 August 2004, before the appointed date. It would be different in relation to the David Wilson Homes transaction, the disposition there not being registered until 6 July 2007, well after the appointed date. Section 6 is a transitional provision which applies, as here in relation to the David Wilson Homes site, where a deed of conditions has been registered before the appointed day of 28 November 2004 but it contained a provision expressly disapplying s.17 of the 1979 Act. Section 6 provides that the real burden is, in that circumstance, created on registration of a disposition importing the terms of the deed of conditions. Thus in relation to the David Wilson Homes title the real burdens would have been created on registration of that disposition on 6 July 2007, after the appointed date. Similarly, in subsequent developments within the Development Site, the burdens will become real burdens on registration of the disposition to the particular developer, assuming that it contains a suitable reference to the Deed of Conditions.

I have nothing further to add but would be prepared to answer any supplementary issues arising or to discuss matters at a consultation.

THE OPINION OF



Christopher Haddow QC

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21 May 2010