

Opinion
by
Professor Robert Rennie
for
North Ayrshire Council
relative to
Montgomerie Park, Irvine

1.0 Introduction

North Ayrshire Council were proprietors of a large area of land known as Montgomerie Park, Irvine. They still own parts of the Park but two sites have been sold and developed for housing purposes. There are, I understand, twelve sites available for development in the future. The total number of houses on the two sites already developed is approximately 200.

- 1.1 When the Council were the owners of the whole of Montgomerie Park they granted a deed of conditions dated 29th June and recorded in the Division of the General Register of Sasines applicable to the County of Ayr on 2nd July both 2004. The main purpose of the deed of conditions was to regulate the obligations of landscape maintenance over those parts of the Park area which were not actually to be developed for housing and were not therefor to be conveyed to any developer but to remain in the ownership of the Council.
- 1.2 I have seen a copy of the deed of conditions but I have not seen copies of any of the dispositions granted by the Council in favour of developers nor any of the individual dispositions for individual house plots granted by either developer. For the purposes of this Opinion however I assume:-

- (a) That none of the landscaped areas have been conveyed by the Council either exclusively to a developer or in common to proprietors of houses on the developments apart from the part conveyed to Cruden, and
 - (b) That none of the subsequent dispositions to the developers or to individual plot owners contain any attempts to convey common rights or any other burdens relating to maintenance of the landscaped areas other than those in the deed of conditions.
 - (c) That in all subsequent conveyances to developers and individual plot owners the deed of conditions is referred to for burdens.
- 1.3 There is a lengthy narrative clause in the deed of conditions. It indicates that there are thirteen plots or areas of land designed for private housing or residential development all shown outlined in blue and marked “site 1 to site 13” inclusive. The narrative also indicates that there are further areas designated for a shop/healthcare facility area, proposed sheltered housing area, primary school area, social housing area all as shown outlined in green on the plan. The narrative also indicates that the Council require to have the infrastructure and related services constructed to facilitate the general development including road layouts, open space locations, structure planning and landscaping, community areas and footpath links, surface water drainage arrangements, service media and others.
- 1.4 Section 17 of the *Land Registration (Scotland) Act 1979* is disapplied. That means that the burdens contained in the deed of conditions do not become real burdens on any part of the whole development site until the deed of conditions is specifically referred to in a subsequent conveyance.
- 1.5 The deed of conditions contains an extensive definition clause. Common charges are defined in the following terms:-

- “1.1.1. *the whole expenses properly and reasonably incurred from time to time in respect of the repair, maintenance and renewal and any improvement of the Common Parts (as hereinafter defined) and the cleaning thereof (but excluding the capital costs incurred by any Proprietors (as hereinafter defined) in the original installation and construction of the Common Parts or any part thereof of the Development Site (" the Management Operations");*
- 1.1.2. *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;*
- 1.1.3. *premiums for any insurance required for any aspect of the Common Parts;*
- 1.1.4. *any other charges and expenses, howsoever arising, in relation to the Development Site which in the opinion of the Council (acting reasonably) should properly be borne by all the Proprietors;”*

I noted that the common charges related only to Common Parts although sub-clause 1.1.4 on the face of it appears to allow the Council to stipulate for the payment of any other charges and expenses. I should say that in my opinion that clause is unenforceable as a real burden because it is simply far too vague. Sub-clause 1.1.2 refers to the remuneration of any managing agents and the reimbursement of expenses incurred in performing management duties relating to the Development Site. There was no definition however of “managing agents” and I do not think that an issue arises here in any event.

1.6 “Common Parts” is defined as follows:-

“The Community Play Areas, the Footpath Link (until adopted by the relevant statutory authority), Cycle Paths (until adopted by relevant statutory authority), the

Public Open Space, the Structure Planning and the SUDS Features (until adopted by the relevant statutory authority)."

There are other definitions of the Community Facility Area, the Community Play Areas, Cycle Paths, The Distributor Road, the Footpath Links the Landscaping Strips, the Public Open Space, the Structure Planting and the SUDS Arrangements and SUDS Features. However these definitions are restricted to words. There is no statement in the definitions section that they area actually shown on the plan attached although there are areas hatched on the plan which appear to be landscape/amenity/open space areas.

hatched
areas

- 1.7 Clause 2 of the deed of conditions contains the usual provision to the effect that the housing development areas are not to be used for any purpose other than housing or residential use with ancillary roads, footpaths, open spaces, amenity areas etc. Clause 3 contains the usual reciprocal servitude rights for roads and services.
- 1.8 Clause 4 contains a declaration that all boundary walls, fences and hedges around the perimeter of the development site which adjoin any of the Common Parts are to be common property of all proprietors "having an interest in the common parts" and as such these are to be mutually maintained by such Proprietors in equal shares. There is also a provision to the effect that all boundary walls, fences, etc. around the perimeter of a housing development area or community facility area which adjoin any of the common parts shall be the exclusive property of the proprietor of the relevant housing development area or community facility area and maintained exclusively by that party.
- 1.9 Clause 5 is a reservation to the Council of servitude rights over roads, pavements, etc. and wayleave rights for services.
- 1.10 Clause 6 is a reservation to the Council allowing it to make alterations or deviations to the plans of the development site. Subject to that power of alteration there is conferred on Proprietors and Plot Owners a *ius quaesitum tertio* for the enforcement of the

burdens in a question of any other Proprietor or Plot Owners but only in so far as such party might have an interest to enforce the same.

- 1.11 Clause 7 deals with the “conveyance of the common parts”. Sub-clause 7.1 provides that the Common Parts are to remain open and undeveloped except if otherwise decided by the Council. Sub-clause 7.2 is a reservation to the Council of a right to convey or dispose all or part of the common parts to any third party and also to require such third party to undertake and free and relieve all Proprietors of the maintenance obligations. Sub-clause 7.2 goes on to provide:-

“In the event that the Common Parts in whole or in part are conveyed to any third party so that such third party is liable for maintenance of all or part of the Common Parts (such third party being referred to as the Landscape Maintenance Body, hereinafter referred to as “LMB” the provisions to the schedule to this deed of conditions shall take effect.”

The sub-clause goes on to state:-

“Declaring for the avoidance of doubt that nothing herein contained shall prevent or restrict the Council from transferring responsibility for the management and maintenance of part or parts of the Common Parts to the LMB all in terms hereof prior to the eventual conveyance of the Common Parts in which event, from the date of such transfer of responsibility, all Proprietors and Plot Owners will be bound to contribute towards the common Charges [sic] of the Development Site which pertain to such part or parts of the Common Parts.”

Sub-clause 7.3 states:-

“In the event that the Council retain the Common Parts the provisions of the Schedule shall also take effect and the Proprietors and Plot Owners shall be obliged to pay such expenses as are due in terms of the said Schedule to the Council rather than the LMB, mutatis mutandis.”

1.12 Clause 8 is an arbitration clause and it also contains that the usual declaration of the reservations, burdens, etc. are real liens and burdens on the Development Site, the Housing Development Areas and the Community Facility Areas. It should be noted that they are not made real burdens in respect of the landscaped and other areas which are stated to be part of the Common Parts.

1.13 There is nothing in the main body of the deed of conditions (apart from what is in the schedule) to actually impose a burden on any of the Development Sites relative to the maintenance of the Common Parts. Sub-clause 7.2 appears to apply in two situations:-

(a) Where the Common Parts are conveyed to a third party who is liable for maintenance of the Common Parts, or

(b) Where the Council retain ownership of the Common Parts.

In neither of these cases are the so-called Common Parts held or intended to be held in common ownership among all the Proprietors and all the Plot Owners.

1.14 I am advised that it is the intention of the Council to pass over responsibility for the landscaped areas comprising all or part of the Common Parts to a landscape maintenance body namely Scottish Woodlands. The initial intention was that they, in the first instance, work under the licence from the Council as owners of the Common Parts until all the Developments Sites had been sold. At that point the landscaped areas would be conveyed to Scottish Woodlands. Paragraph 4.5 of the Schedule provides that each Developer is to collect the Initial Charge from the first owner of each plot and then remit this to the Council. This has not happened in relation to houses which have been sold. Instead invoices have been sent by the Council to individual residents for a share of the amount calculated by Scottish Woodlands as a reasonable estimate of the cost of carrying out the maintenance work. The Council have used the method of calculation adopted by Scottish Woodlands in respect of landscaping charges and this involves an element for future capital asset replacement and associated costs. Accordingly the invoices which have been sent out by the

Council contain a charge which is more than the actual cost incurred for landscaping, maintenance and repair. Paragraph 4.2 of the Schedule provides that the amount of the maintenance charge cannot be increased by more than the cost of the Retail Price Index for the first four years. In the fifth year it can be increased to reflect the actual expenditure.

- 1.15 The share of common charges is set out in paragraph 4 of the Schedule. House plot proprietors are to pay 90 per cent of the common charges for the whole development site and the *pro rata* share for each house plot is to be calculated by reference to the total number of house plots “constructed or permitted to be constructed”. Each house plot proprietor then bears annually a proportion equivalent to the numerical proportion or fraction which that house plot bears to the total number of house plots constructed or permitted to be constructed. There is an obvious difficulty here given the fact that only two of the housing sites have actually been developed. If we assume a scenario where maintenance is being carried out to all of the landscaped etc. areas and Common Parts in a situation where only two sites have been developed the charge could be high. However this is catered for in sub-clauses 4.1 and 4.2. The charge for the first twelve months will not exceed £250 and thereafter there can only be an increased based on the rate of inflation for the first four years. However sub-clause 4.2 provides that that limit will not apply in respect of the increase at the end of the fifth year and every fifth year following in perpetuity. Presumably what this means is that the charge for year 5 will be the actual cost. Presumably thereafter that is the base cost and for the next four years there is an increase restricted to the Retail Price Index. In the next fifth year it is actual cost which then becomes the base cost for the next period. There is no provision in the Schedule or in the body of the deed of conditions itself which states that the common charges can be based on a future estimate of what is likely to be required in any year.

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- 1.16 Various questions have now arisen in relation to the interpretation of the maintenance obligations in the deed of conditions.

2.0 Opinion

Before answering the individual questions it is, I think, necessary to say something in general about the relationship between the various parties.

2.1 The Relationship between LMB and the Individual House Plot Proprietors

For the LMB to be able to enforce the management charge against individual proprietors there would obviously have to be some sort of obligation on these proprietors to pay the LMB. Obligations arise in a variety of ways but generally speaking in the context of land law and conveyancing they arise either by personal contract or by virtue of a real burden which runs with two discrete areas of land one being the dominant or benefited property and the other being the servient or burdened property. It is to state the obvious to say that no individual proprietor has entered any contract with the LMB at least not in relation to the deed of condition. Put simply the proprietors are not parties to any licence agreement and the LMB are not parties to the deed of conditions. So far as the law of real burdens is concerned while the Council would have rights to enforce real burdens by virtue of the deed of conditions while they own parts of the original site they would cease to have any title, far less interest, to enforce once they lose ownership. Accordingly if all the remaining ground encompassing the Development Sites and landscaping and amenity land etc. were to be conveyed to the LMB the Council could not enforce any burdens in the deed of conditions. That of course is not to say that the burdens would be unenforceable. The deed of conditions does create a common scheme¹ and individual proprietors could enforce the burdens in the deed of conditions against each other in so far as they are real burdens validly created. Indeed in the deed of conditions a third party right in favour of proprietors is created. The deed of

¹ *For the purposes of SS52 and 53 of the Title Conditions (Scotland) Act 2003*

conditions also purports to create a third party right in favour of the LMB to enforce the previous obligations in relation to payment of the share of the management costs. Here the reference is to a contractual *ius quaesitum tertio*. In a contractual sense this is a right in a third party to enforce a contract between two other parties. As a matter of the law of contract therefore this third party right would require to relate to another contract between the Council and the LMB. However there is no contract as such, nor was there. The deed of conditions is not a contract between the Council and the LMB so it was not clear to me just how a contractual *ius quaesitum tertio* could be created. In any event the LMB is not identified.

- 2.2 If however the areas of open space are actually conveyed by the Council to the LMB then the LMB becomes owner of part of the original site covered by the deed of conditions. In this case the deed of conditions would apply only when referred to ². Accordingly the LMB should become a proprietor subject to the common scheme. However there is a problem here and that is that the deed of conditions expressly states in the Schedule ³ that any provisions in the deed of conditions intended to regulate the ownership and regulation of the plots are disapplied from application to the Common Parts. It seems to me therefore that on a conveyance to the LMB unless there was some sort of complicated amendment to the deed of conditions to which all plot owners would have to consent the LMB would not be a proprietor of property subject to the common scheme and accordingly would not have third party rights of enforcement ⁴. The same of course could apply to the Council because Section 17 of the 1979 Act was disapplied and accordingly the landscaped and amenity areas are not burdened.

² Section 17 of the Land Registration (Scotland) Act 1979 is disapplied

³ Para 4.9

⁴ Either under Section 52 or Section 53 of the Title Conditions (Scotland) Act 2003 both of which require there to be a common scheme

2.3 There is, I fear, another problem which has arisen as a result of the recent case of *PMP Plus Limited v Keeper of the Registers of Scotland*⁵. This case involves land registration and common rights as opposed to burdens but it may still have a bearing on the matter. In the PMP Plus case there was a development in which the Deed of Conditions indicated that certain areas were to be held in common by the owners of individual units. However the difficulty arose because the description of the common areas related to those parts of the development which on completion had not been exclusively alienated to purchasers of dwellinghouses. There was then a general list by way of example and including footpaths, lay-bys, service roads, play areas and other areas of open space. When individual house titles were registered the Keeper included a reference to these common rights in general terms in the property section of each title sheet. Before the development was finished the residual developer Persimmon considered selling a site to PMP Plus Limited so that they could erect a medical centre. An approach was made to the Keeper in 2001 and the point was put squarely to the Keeper namely would this area be regarded as common. The Keeper responded that the rights of common property would not crystallise to a defined area in common until completion of the development and until that point Persimmon were free to alienate areas as provided for in the Deed of Conditions. This of course ran somewhat counter to the fact that common rights had been included in the title sheets of the individual houses. The matter eventually ended up at the Lands Tribunal because the Keeper decided he would have to exclude indemnity. The Keeper had originally argued that the common rights would not “crystallise” until the estates was complete because until that point the areas would not be identifiable. However the Keeper abandoned that argument and simply argued that it was not possible to identify the common areas. As Professors Reid and Gretton point out⁶ there may be

⁵ 2009 SLT (Lands Tr) 2

⁶ *Conveyancing* 2008 133-149

unforeseen consequences in relation to maintenance burdens so far as amenity areas are concerned as a result of this decision. A real burden must relate in some way to the burdened property. In this case the burdened properties are the individual houses. The maintenance obligation however relates to landscaped and amenity areas which are not in the ownership of any of the proprietors of houses and if it is conveyed by the Council to the LMB then the houses will still have no property interest in these areas. There did not appear to be in the deed of conditions any statement relating to access to these amenity areas although I have not seen any of the individual split off dispositions to individual proprietors. As Professors Reid and Gretton state, at the very best therefore, proprietors of individual houses might simply have a right to look over the landscaped areas. These professors question whether that is enough connection for the purposes of Section 3 of the *Title Conditions (Scotland) Act 2003*. In other words is there sufficient connection between the burdened property (the houses) and the benefited property (the landscaped and amenity areas) in the ownership of the LMB or the Council. This problem of course is not peculiar to the LMB situation and may have an effect on maintenance burdens in deeds of conditions in general terms where the definition of amenity areas is vague.

2.4 The Questions

I answer the questions in the Memorial as follows:-

1. **Does the deed of conditions succeed in imposing an obligation on the residents (the plot holders) of Montgomerie Park to pay a share of common charges?**

The rights which are to be conveyed with each housing development area or community facility area or part thereof are listed in clause 3 of the deed of conditions. These rights do not include any rights in the landscaped or amenity areas. In any event it is not competent to actually create common rights in a deed of conditions although I know that it has become customary to list the property which is to be common property in such deeds. A deed of

conditions is a statutory creation ⁷. The statutory provision states clearly that the only function is to set out burdens and conditions. It does appear however to be accepted at the Land Register that if a split off writ such as a disposition of an individual plot conveys the common rights as described in the deed of conditions then they are conveyed although the property section in the title sheet and Land Certificate simply states that the common rights listed in the deed of conditions are included. In this case however there is no possibility of any common right being created in any split off writ because the whole point of the deed of conditions is to allow the landscaped and amenity areas to be conveyed to third parties who do not own plots. The burdened properties are the house plots themselves. There are problems here with the law relating to real burdens. There must be a question over whether the maintenance burdens relate in some way to the burdened properties in circumstances where these burdened properties do not have any property rights of any sort over the landscaped/amenity areas. There is the added problem of identifying ultimately a benefited property in circumstances where the burdens do not apply to the landscaped areas. There appears also to me to be a further problem and that relates to the unfinished nature of the development and the extent of landscaping which would have to be carried out to all of the landscaped areas. If in year 5 there are still only two or possibly three housing development sites will the existing 200 or so proprietors be faced with enormous bills for the maintenance of all of the landscaped and amenity areas. If one of the developed areas is at one end of the park what possible connection would there be between a house in that area and a landscaped area at the farthest other end of the park for the purposes of Section 3. This is a

⁷ *In terms of Section 52 of the Conveyancing (Scotland) Act 1874 as amended by Section 17 of the Land Registration (Scotland) Act 1979*

difficult question but I am of the view that standing the fact that the landscaped/amenity areas are not common and all that the proprietors might have is a right to view them ⁸ then the burdens are in effect.

2. **Can the Council demand payment for common charges which have not yet been incurred, given that the wording in the deed is "charges reasonably and properly incurred from time to time"? (Clause 1.1). That is, can we utilise the Scottish Woodland method set out in 11 above, or are we restricted to charging for work which has already been carried out.**

There is no provision in the deed of conditions for some sort of float to be paid as against further expenditure. I do not think the Scottish Woodlands method can be used.

3. **What evidence if any would the Council have to provide to satisfy the criterion of "charges reasonably and properly incurred"? Given the method set out in 11 above, is it necessary to provide any evidence whatsoever of charges reasonably and properly incurred, or is it sufficient to state that this is a recognised method of invoicing for landscaping charges in the estate management industry?**

Assuming that the burdens were enforceable I think any plot owner would be entitled to enquire as to what had been "properly and reasonably incurred". It would not, in my view, be enough simply to say that the Scottish Woodland's method is a recognised method.

4. **Alternatively, is it reasonable for the residents to demand sight of all invoices, contracts etc. for the costs relating to common charges?**

I think it would be reasonable to have copies of the invoices available for inspection at some local central point.

5. **In calculating the charge due by the residents, in view of the wording in paragraph 4 of the Schedule, is the Council entitled to calculate this in terms of (a) the total number of houses to be built on the whole of the development site in due course, (b) on the number of houses which have actually been built, or (c) on the number of houses actually built as well as those with planning permission but not yet constructed?**

I think the calculation would be on the basis of the actual houses plus the number of houses for which planning permission has been granted whether

⁸ *In terms of a strict property right*

constructed or not. This of course presents an arithmetical difficulty especially in relation to collection in respect of plots which do not exist. The obligation in clause 4 is imposed on "the house plot proprietors". The house plot proprietors are defined as the owners of an individual house plot. I suppose that means the developers in the case there is permission for a plot on a development area which has been sold but the plot itself has not been sold. Given that 90 per cent of the common charges is to fall on house plot proprietors however there is likely to be a considerable shortfall in the allocation of the 90 per cent.

6. **If the Council is restricted to charging in arrears, what if any is the effect of the 5-year uplift set out in paragraph 4.2 of the schedule? In particular, does this mean that the effect of paragraph 4.2 would restrict the Council's ability to charge any amounts actually incurred in subsequent years? Would this provision for uplift permit the Council to charge in the fifth year all the balance of charges which it had been unable to charge in years 1 to 4?**

In my opinion the fifth year uplift means that it is a share of the actual cost. Thereafter as I have indicated that becomes the base figure and the Retail Price Index restriction applies until the next fifth year when the actual cost in that year becomes the base. However I do not think that that means that in every fifth year there is rolled up a deficit in actual charging from the previous years. It is only the actual cost in the fifth and subsequent fifth years that can be apportioned.

The Opinion of

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2nd February 2009

Supplementary Note

by

Professor Robert Rennie

North Ayrshire Council

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1.0 Introduction

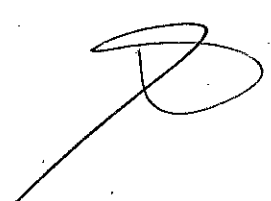
I refer to:-

- (a) My Opinion dated 2nd February 2010.
- (b) Further letter of instruction dated 3rd February 2010.

- 1.1 I am asked how matters might be taken forward with the existing residents.

2.0 Further Opinion

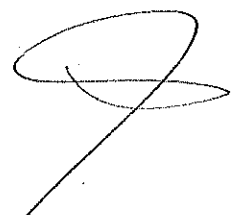
The position at the moment is that ownership of all the amenity areas remains with the Council. Moreover there is nothing in the deed of conditions which actually places any obligation directly on individual proprietors to maintain these areas. Presumably the existing proprietors are not happy that maintenance of the landscaped areas is contracted out to someone instructed by the Council on the basis that they have little or no control over matters. Of course the alternative is to convey the landscaped areas to a maintenance company as was envisaged but that raises the technical problems which I outlined in my original Opinion. It would also have to be said that there have been problems with maintenance companies of this type and they are not particularly popular with residents.

A handwritten signature in black ink, consisting of a stylized 'P' followed by a horizontal line and a loop.

- 2.1 The obvious difficulty of the Council is that if they remain owners but do nothing about maintenance they will be criticised. If they do contract out the maintenance to a maintenance company then they may also be criticised if the residents do not regard the maintenance as satisfactory or far too expensive for the service provided. It is in many ways the classic lose/lose situation.
- 2.2 It has been my experience that one way of resolving matters of this type is to offer a positive solution. The Council could therefore offer to convey to the existing house owners either a *pro indiviso* share in all the landscaped areas or a *pro indiviso* share in the landscaped areas closest to the existing site. Before doing that the Council could execute a deed of conditions applicable only to the landscaped areas or that portion of the landscaped area to be conveyed in common in which the maintenance obligation was placed firmly on the proprietors.
- 2.3 Any conveyance of the landscaped areas should specifically convey a precise fractional share in so far as this is possible taking into account the likely number of houses which will eventually be built. If it was agreed to treat the landscaped areas in totality then one would have to make a calculation based on existing planning permissions or projections as to the number of houses which would eventually be erected. The difficulty with a general conveyance of:-

"A right in common with us and our successors as proprietors of the remaining parts of the said landscaped areas shown hatched etc."

is that the first conveyance to a house owner could technically convey a one half *pro indiviso* share leaving the Council with the remaining one half and the second, if in the same terms, convey a one quarter share to the next proprietor. This of course is not what is intended hence the need for actual fractions. Accordingly if the likely number of houses is 500 then each proprietor should be granted a one 500th share *pro indiviso*.



- 2.4 If on the other hand it is decided to split up the landscaped areas and only convey in common the most proximate landscaped area to a particular site then the calculation would be based on the number of houses in or likely to be in that site.
- 2.5 Obviously at the moment a conveyance to existing owners of *pro indiviso* shares would leave the Council with the bulk of the *pro indiviso* shares. If a deed of conditions were granted by the Council then the Council's remaining *pro indiviso* shares would also be burdened. This however is not a contravention of Section 4(6) of the *Title Conditions (Scotland) Act 2003* which provides that a right of ownership held *pro indiviso* shall not constitute a burdened property because the new deed of conditions will have created the burdens over the whole land before any split. This would effectively mean of course that the Council would also have to bear a share of the maintenance costs until every site was developed.
- 2.6 It may be that when residents are faced with the reality of owning in common the landscaped areas they are not so keen on organising the maintenance themselves. In these circumstances there is nothing to stop the residents contracting out the maintenance either to the local authority or indeed to a maintenance company.

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15th February 2010